

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 31

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CASE NO. 31-CA-167294

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**NORTHROP GRUMMAN SYSTEMS CORPORATION,**

Respondent,

and

**PORFIRIA VASQUEZ, an Individual,**

Charging Party.

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**NORTHROP GRUMMAN SYSTEMS CORPORATION'S  
EXCEPTIONS TO THE DECISION OF THE  
ADMINISTRATIVE LAW JUDGE AND SUPPORTING BRIEF**

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## EXCEPTIONS

Pursuant to Section 102.46 of the NLRB's Rules and Regulations, Respondent Northrop Grumman Systems Corporation ("Northrop" or "the Company") files these exceptions to the Decision issued by Administrative Law Judge Eleanor J. Laws ("ALJ Laws") on November 2, 2016, *Northrop Grumman Sys. Corp. & Porfiria Vasquez*, 31-CA-167294, 2016 WL 6519003 (Nov. 2, 2016) (the "Decision"). Specifically, Northrop excepts to: (1) the decision of ALJ Laws not to stay this matter pending guidance from the United States Supreme Court on the issue at the heart of these proceedings (*see* Decision, p. 4:36-39); and (2) ALJ Laws' incorrect conclusion that Northrop's maintenance of its Employee Mediation/Binding Arbitration Program ("DRP") violates the Act even though the DRP (i) expressly excludes claims under the NLRB's jurisdiction, (ii) preserves the right to pursue class or collective actions in jurisdictions where a waiver of such procedures is prohibited by law, and (iii) does not limit or restrict employees from sharing counsel, coordinating claims, pooling information, money or other resources, providing testimony to support each other's claims, developing common strategies, choreographing discovery requests or responses, sharing documents, or otherwise acting concertedly by aiding or assisting each other (*see* Decision, pp. 4:14-6:11, n.6, 9:6-9).

## INTRODUCTION

As a preliminary matter, because Ms. Vasquez and Northrop resolved their underlying dispute in private mediation and, further, because Ms. Vasquez has since submitted a request to Region 31 of the NLRB to approve the withdrawal of her unfair labor practice charge giving rise to these proceedings, the Board should dismiss the General Counsel's Complaint as now moot and vacate ALJ Laws' November 2, 2016 Decision on that ground, alone.

Even if the Board does not rule this matter moot and vacate the Decision, ALJ Laws erred by declining to stay these proceedings, and Northrop respectfully requests and contends

that the Board should now stay this matter. An irreconcilable split exists among the Circuit Courts, and it is widely anticipated that the United States Supreme Court will grant certiorari on at least one of five separate writs (including two writs filed by the NLRB itself) now pending on the predicate of the General Counsel's Complaint in this matter; namely, that arbitration agreements waiving class or collective claims violate the Act. Indeed, on the same day that these Exceptions were filed with the Board (January 6, 2017), the Justices were scheduled to consider four of the five pending writs at a conference and already may have granted certiorari on the class and collective action waiver issue at the heart of this matter. As a result, staying these proceedings will avoid the further expenditure of Board resources and obviate any potentially unnecessary briefing to the Fifth Circuit Court of Appeals.

In the event these proceedings are not ruled moot or stayed, the Board should reverse ALJ Laws' decision because she did not appropriately consider the distinguishable provisions of Northrop's DRP and, instead, incorrectly applied the Board's flawed logic in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) ("*D.R. Horton I*") and in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) ("*Murphy Oil I*"). Northrop's DRP, by its terms, preserves the Section 7 rights of Northrop employees and plainly states that it does not "apply to or cover claims . . . [that are] [c]overed under the National Labor Relations Act and within the exclusive jurisdiction of the National Labor Relations Board" or "[a]s to which an agreement to arbitrate such claims is prohibited by law." [Joint Motion and Stipulation of Facts ("Joint Motion") ¶ 5(f); Joint Exhibit 2, SOF p. 54 and Joint Exhibit 3, SOF p. 66] The DRP further assures employees that it does not "limit [their] right to file a charge or complaint with a governmental agency." [Joint Exhibit 2, SOF p. 55 and Joint Exhibit 3, SOF p. 67] Notwithstanding its lawfully tailored class action waiver (which applies only in jurisdictions where it is legally permissible) [Joint Exhibit 2, SOF p. 62, and Joint Exhibit 3, SOF p. 74], the DRP facilitates the efficient adjudication of

substantive employment claims – at Northrop’s expense – and permits employees to exercise their Section 7 rights in connection with those claims.

As proof of how Northrop’s DRP works in practice, the Charging Party in this matter actively pursued her substantive employment claims in an arbitral forum and identified both current and former Northrop employees as witnesses she intended to use to support her claims. [Joint Motion ¶¶ 5(n) and (o); Joint Exhibits 9 and 10] Notably, the Charging Party never asserted any class or collective claims against Northrop. Because ALJ Laws did not recognize those distinctions and the unique qualities of Northrop’s DRP, the Board should reverse her flawed conclusion that Northrop’s maintenance of the DRP violates the Act.

#### **STATEMENT OF THE CASE**

On January 7, 2016, Charging Party Porfiria Vasquez filed the underlying unfair labor practice charge alleging that Northrop violated the NLRA by maintaining and enforcing its DRP (the “Charge”). [Joint Ex. 1(a)] On June 27, 2016, the Regional Director of Region 31 issued a Complaint alleging that Northrop’s DRP violated the Act. [Joint Ex. 1(d)] Northrop filed its Answer on July 11, 2016, which denied the Complaint’s allegations. [Joint Ex. 1(f)]

On August 31, 2016, the parties filed a Joint Motion and Stipulation of Facts with the Division of Judges. On October 21, 2016, the parties filed their briefs with ALJ Laws. Just eight business days later, on November 2, 2016, ALJ Laws issued the Decision purporting to apply the Board’s decisions in *D.R. Horton I* and *Murphy Oil I*, and concluding that Northrop’s maintenance (but not enforcement) of the DRP violates the Act.

On December 21, 2016, in light of the resolution of the underlying litigation, Ms. Vasquez submitted a request to Region 31 of the NLRB to withdraw her underlying unfair labor practice charge. On the same day, Region 31 refused to approve Ms. Vasquez’s request to withdraw her charge.

## STATEMENT OF FACTS

### **I. THE PARTIES AND BACKGROUND**

Northrop is an aerospace and defense contractor with operations throughout the United States, including operations within the jurisdiction of the Fifth Circuit Court of Appeals. [Joint Motion ¶ 5(b)] Charging Party Porfiria Vasquez was employed by Northrop from 2004 until October 2015. [Joint Motion ¶ 5(g)]

On or about August 15, 2015, Ms. Vasquez filed a Complaint against Northrop in the United States District Court for the Central District of California, Case No. 2:15-CV-05926-AB-AFM (the “Federal Court Action”). [Joint Motion ¶ 5(i); Joint Exhibit 4] On or about October 6, 2015, Ms. Vasquez filed a First Amended Complaint in the Federal Court Action. [Joint Motion ¶ 5(j); Joint Exhibit 5] Neither the Complaint, nor the Amended Complaint named additional current or former employees of Northrop as plaintiffs. [Joint Exhibits 4 and 5]

On December 17, 2015, Northrop filed a Motion to Compel Binding Arbitration (“Motion”) in the Federal Court Action, which Ms. Vasquez opposed. [Joint Motion ¶¶ 5(k) and (l); Joint Exhibits 6 and 7] On March 4, 2016, the District Court granted Northrop’s Motion. [Joint Motion ¶ 5(m); Joint Exhibit 8] Ms. Vasquez continued to pursue her individual claims in an arbitration, which was scheduled to begin in April 2017. However, this past month, the parties resolved Ms. Vasquez’s claims via confidential private mediation.<sup>1</sup> Notably, Ms. Vasquez identified both current and former Northrop employees as witnesses she intended to call to support her claims in the arbitration. [Joint Motion ¶¶ 5(n) and (o); Joint Exhibits 9 and 10] While Ms. Vasquez acknowledged that compliance with the DRP was a condition of

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<sup>1</sup> Because Ms. Vasquez and Northrop resolved their underlying dispute in private mediation and, further, because Ms. Vasquez has since asked Region 31 of the NLRB to approve the withdrawal of her unfair labor practice charge giving rise to these proceedings, the Board should dismiss the General Counsel’s Complaint as now moot and vacate ALJ Laws’ November 2, 2016 decision.

employment, she did not suffer any adverse employment action as a result of her failure to comply with the DRP. In fact, Northrop has not disciplined or terminated any current or former employees for filing a class, collective, or joint action or complaint. [Joint Motion ¶ 5(p)]

## **II. NORTHROP'S DRP**

Northrop has utilized the DRP since September 2006. [Joint Exhibits 2 and 3] The DRP expressly ensures employees that they have the right to enforce and pursue all claims arising from their employment. Moreover, current (or former) employees can pursue their claims without incurring the costs associated with filing a complaint in state or federal court. Instead, Northrop pays the arbitration costs under the DRP. [Joint Exhibit 2, SOF p. 60 and Joint Exhibit 3, SOF p. 72] Thus, Northrop's DRP is a less expensive and more expeditious means for employees to pursue employment-related claims than filing civil actions in state or federal court that can take many months (and often years) to conclude.

Potential claims that can be fully pursued under the DRP include claims for:

- Wages and other compensation due;
- Breach of any contract or covenant, express or implied;
- Personal injury, defamation, or other tort claims;
- Unlawful discrimination or harassment, including, but not limited to, discrimination or harassment based on race, sex, religion, national origin, age, disability, or any other status as protected and defined by applicable law;
- Unlawful retaliation;
- Benefits; and
- Violations of applicable federal, state, or local law, statute, ordinance, or regulation.

[Joint Exhibit 2, SOF p. 55 and Joint Exhibit 3, SOF p. 67]

In terms of limitations on the claims that are covered, the DRP states in part:

**Claims Covered:** This Program does not apply to or cover claims . . . [a]s to which an agreement to arbitrate such claims is prohibited by law; [or that are] [c]overed under the National Labor Relations Act and within the exclusive jurisdiction of the National Labor Relations Board. . . .

**Class Action Claims:** To the extent it is permissible to do so in the jurisdiction where the arbitration is held and (if applicable) the jurisdiction where the parties' obligation to arbitrate claims under this Program is enforced, both you and the Company waive the right to bring any covered claim under this Program as a class action. In jurisdictions where this is permissible, the arbitrator will not have authority or jurisdiction to consolidate claims of different employees into one proceeding, nor shall the arbitrator have the authority or jurisdiction to hear the arbitration as a class action.

[Joint Exhibit 2, SOF pp. 54 and 62, and Joint Exhibit 3, SOF pp. 66 and 74] The DRP also expressly states that it does not prevent employees from bringing claims before government agencies. [Joint Exhibit 2, SOF p. 55 and Joint Exhibit 3, SOF p. 67]

### **QUESTION PRESENTED**

Whether Northrop's maintenance of the DRP violates the Act even though the DRP expressly preserves employee Section 7 rights and Northrop never interfered with the Charging Party's exercise of those rights.

### **ARGUMENT**

#### **I. THE BOARD SHOULD STAY THIS MATTER PENDING SUPREME COURT GUIDANCE ON THE CLASS AND COLLECTIVE ACTION WAIVER ISSUE UNDERLYING THE GENERAL COUNSEL'S COMPLAINT.**

ALJ Laws wrongly declined to stay this matter pending Supreme Court review of the theory of liability pursued by the CGC. *See* Decision pp. 8-9. At the time of the Decision, an irreconcilable split had already arisen among the Circuit Courts, including one (of the now two cases) in which the NLRB, itself, petitioned for certiorari on the class action waiver issue. ALJ Laws' decision to proceed did not sufficiently consider the judicial and party economy of even an interim delay until the expected certiorari decision.

The Fifth Circuit has twice rejected the CGC's theory of liability and ALJ Laws' rationale.<sup>2</sup> See *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) ("*D.R. Horton I*") (denying enforcement in relevant part of *D.R. Horton I*); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015) ("*Murphy Oil I*") (refusing to enforce in relevant part the Board's decision in *Murphy Oil I*). On June 2, 2016, the Eighth Circuit also refused to enforce the Board's determination that a class or collective action waiver of employment-related disputes violates the Act. See *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772, 776 (8th Cir. 2016); see also *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1054-55 (8th Cir. 2013). In September 2016, the Second Circuit affirmed the District Court's rejection of the argument that a mandatory arbitration provision violated an employee's substantive rights under the Act. See *Patterson v. Raymours Furniture Co., Inc.*, No. 15-2820, 2016 WL 4598542, at \*2 (2d Cir. Sept. 14, 2016); see also *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290, 297, n.8 (2d Cir. 2013). On the other hand, both the Seventh and Ninth Circuits erroneously have adopted the Board's position that arbitration agreements violate the Act if they prevent employees from bringing class

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<sup>2</sup> As noted above, Northrop conducts business within the jurisdiction of the Fifth Circuit Court of Appeals. In the event the Board refuses to stay this matter pending Supreme Court guidance and finds against Northrop, Northrop plans to appeal the Board's decision to the Fifth Circuit, which has overturned Board decisions on the class and collective action waiver issue presented here. Given the certainty of that outcome, the Board should not rely on its theory of nonacquiescence and decide this matter until after the Supreme Court has spoken. To proceed without Supreme Court guidance would demonstrate the same "agency aggrandizement" criticized by the D.C. Circuit in *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16, 18 (D.C. Cir. 2016) (noting that "the Board's longstanding 'nonacquiescence' towards the law of any circuit diverging from the Board's preferred national labor policy takes obduracy to a new level," and that "what the Board proffers as a sophisticated tool towards national uniformity can just as easily be an instrument of oppression, allowing the government to tell its citizens: 'We don't care what the law says, if you want to beat us, you will have to fight us.'"). As the Board is surely aware, the D.C. Circuit awarded Heartland Plymouth attorneys' fees in that case for the Board's bad faith conduct. See *id.* at 28 (noting that the Board's bad faith was evidenced by the fact that it knew Heartland would appeal to the D.C. Circuit, whose precedent would lead to the D.C. Circuit overturning the Board's decision). The Board can avoid a potentially similar result by staying this matter until after the Supreme Court has had an opportunity to opine on the issue.

or collective claims. *See Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016).

On September 2, 2016, Epic Systems filed a Petition for Writ of Certiorari with the United States Supreme Court. *See* Petition of Appellant for Writ of Certiorari, *Lewis v. Epic Sys. Corp.*, No. 16-285 (7th Cir. Sept. 2, 2016). On September 8, 2016, Ernst & Young filed a Petition for Writ of Certiorari with the United States Supreme Court. *See* Petition of Appellees for Writ of Certiorari, *Morris v. Ernst & Young, LLP*, No. 16-300 (9th Cir. Sept. 8, 2016). The next day, on September 9, 2016, the NLRB sought Supreme Court review of the Fifth Circuit's decision in *Murphy Oil II*. *See* Petition of Cross-Petitioner for Writ of Certiorari, *Murphy Oil USA, Inc. v. NLRB*, No. 16-307 (5th Cir. Sept. 9, 2016). Approximately two weeks later, on September 22, 2016, the plaintiff in *Patterson v. Raymours Furniture Co., Inc.* sought Supreme Court review of the Second Circuit's decision in that matter. *See* Petition of Appellee for Writ of Certiorari, *Patterson v. Raymours Furniture Co., Inc.*, No. 16-388 (2d Cir. Sept. 22, 2016).

On November 23, 2016, the NLRB petitioned the Supreme Court again – this time to review the Fifth Circuit's summary disposition order in *24 Hour Fitness USA, Inc. v. NLRB*, No. 16-60005, 2016 WL 3668038, at \*1 (5th Cir. June 27, 2016), holding that a class action waiver did not violate the Act as alleged. Notably, in *24 Hour Fitness*, the Board sought a stay before the Fifth Circuit and then requested the Supreme Court to “hold the petition in [*24 Hour Fitness* in abeyance] pending its disposition of *Murphy Oil* and the other petitions presenting variants of the same question presented (i.e., *Patterson v. Raymours Furniture Co.*, No. 16-388; *Morris v. Ernst & Young, LLP*, No. 16-300; and *Epic Sys. Corp. v. Lewis*, No. 16-285) and then dispose of [*24 Hour Fitness*] accordingly.” *See* Petition of Respondent for Writ of Certiorari, *24 Hour Fitness USA, Inc. v. NLRB*, No. 16-689, at 5, 7 (5th Cir. Nov. 23, 2016).

Given the irreconcilable split among the Circuit Courts and the fact that there are now five writs of certiorari currently pending review on the very issue at the heart of this case (two of which were filed by the NLRB), it is widely anticipated that the Supreme Court will grant certiorari in the very near future. In fact, according to the Supreme Court's public docket, the Justices met on today's date – January 6, 2017 – to discuss the pending writs in *Epic Sys. Corp. v. Lewis*, No. 16-285, *Morris v. Ernst & Young, LLP*, No. 16-300, *Murphy Oil II*, No. 16-307, and *Patterson v. Raymours Furniture Co.*, No. 16-388. Thus, the Board should expect the Supreme Court to grant certiorari in one (or more) of the five matters pending review within the coming days. For those reasons and in the interests of preserving both the Board's and Northrop's time and resources, the Board should stay these proceedings.

## **II. NORTHROP'S DRP IS UNIQUE AND DOES NOT VIOLATE THE NLRA.**

In the event the Board does not stay these proceedings and addresses the merits of ALJ Laws' decision, it should recognize that Northrop's DRP presents an issue of first impression and contains express language comports with the requirements of the Act. Specifically, the DRP expressly excludes from its coverage any claims within the exclusive jurisdiction of the National Labor Relations Board. It also excludes any claims as to which an agreement to arbitrate is prohibited by law. [Joint Motion ¶ 5(e) and (f); Joint Exhibit 2, SOF pp. 54; Joint Exhibit 3 SOF pp. 66] The DRP further clarifies that it does not in any way "limit [an employee's] right to file a charge or complaint with a governmental agency"<sup>3</sup> [Joint Exhibit 2, SOF p. 55 and Joint Exhibit 3, SOF p. 67] and even makes clear that the class and collective

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<sup>3</sup> The CGC acknowledged that it did not pursue (and, thus, has waived) any claim that Northrop's employees reasonably would construe the DRP as interfering with their right to file a charge with the NLRB or another state or federal administrative agency. *See* CGC Brief to ALJ Laws p. 4, n.4; Joint Exhibit 1(a).

action waiver does not apply in jurisdictions that prohibit such waivers. [Joint Exhibit 2, SOF p. 62 and Joint Exhibit 3, SOF p. 74.] Stated differently, the DRP preserves the rights of Northrop employees to bring class or collective claims in arbitral forums where the jurisdiction at issue prohibits such waivers. To the extent that forum is the entire United States then (at least as applied to non-supervisory employees with Section 7 rights), Northrop's DRP can be read in harmony with the NLRA. Notably, ALJ Laws did not address that unique possibility in any substantive way. Instead, her sole response was to declare – without any factual support in the record – that a layperson could not understand the carve-out for jurisdictions prohibiting class and collective action waivers.<sup>4</sup> See Decision pp. 5-6.

ALJ Laws also erred by not recognizing the important differences between the language in Northrop's DRP and the language in the arbitration agreements at issue in *D.R. Horton I* and its progeny. For example, the language at issue in *D.R. Horton I* provided that “all disputes and claims” must be decided “exclusively by final and binding arbitration.” *D.R. Horton I, supra*. It also stated that the arbitrator “may hear only Employee's individual claims”, “will not have the authority to consolidate the claims of other employees”, and “does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.” *Id.* Northrop's DRP contains no such language. To the contrary, the DRP includes express carve-outs that distinguish it from the other class and collective action waiver language previously analyzed by the Board. Accordingly, ALJ Laws

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<sup>4</sup> The CGC presented no evidence to support that conclusion. Moreover, it is inevitable that any consideration of a class action by a layman would necessarily involve a trained lawyer, as courts uniformly require attorney representation for a plaintiff to avail herself of the class action procedure. See *Blue v. Def. Logistics Agency*, 181 F. App'x 272, 275 (3d Cir. 2006) (“as a *pro se* plaintiff, she cannot adequately represent the interests of other class members”); *Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975) (“[T]he competence of a laymen representing himself” does not permit him to “risk the rights of others.”)

erred because she relied on *D.R. Horton I* as determinative in this case without comparing and sufficiently analyzing the specific language used by Northrop in its DRP.

The challenged language in *Murphy Oil I* also is distinguishable. In *Murphy Oil I*, employees were required to “waive their right to commence or be a party to any group, class or collective action claim in arbitration or any other forum.” *Murphy Oil I, supra*. That language went on to state: “The parties agree that any claim by or against Individual or the Company shall be heard without consolidation of such claim with any other person or entity’s claim.” *Id.* Unlike those outright prohibitions, Northrop’s DRP preserves the right of employees to file actions in state or federal court where agreements to arbitrate such claims are impermissible and also affords Northrop employees the ability to file class or collective actions in jurisdictions where class and collective action waivers are prohibited. Again, ALJ Laws did not identify that significant distinction in her summary rejection of Northrop’s DRP.

The Board’s most recent case on this issue, *24 Hour Fitness USA, Inc.*, 363 NLRB No. 84 (2015), analyzed language that also is distinguishable from Northrop’s DRP. In that case, the arbitration policy provided that: “there will be no right or authority for any dispute to be brought, heard or arbitrated as a class action (including without limitation opt out class actions or opt in collective class actions), or in a representative or private attorney general capacity on behalf of a class of persons of the general public.” *24 Hour Fitness*, 363 NLRB No 84. Northrop’s DRP simply does not contain similar exclusions, meaning that neither *24 Hour Fitness*, *D.R. Horton I*, nor *Murphy Oil I* is dispositive of Northrop’s DRP. ALJ Laws’ automatic reliance on *D.R. Horton I* did not afford the necessary examination of these pertinent details in her decision.

ALJ Laws further erred by not evaluating the differences between the language in Northrop’s DRP and the language at issue in the two matters pending before the United States Supreme Court that did not advance through the traditional Board channels: *Morris v. Ernst &*

*Young, LLP*, 834 F.3d 975, and *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147. In *Morris v. Ernst & Young*, the operative clause required employees to pursue legal claims “exclusively through arbitration” and “only as individuals” and in “separate proceedings.” 834 F.3d at 979. The effect of such language was to prevent employees from pursuing class or collective claims in any forum. *See id.* Similarly, in *Lewis v. Epic Systems Corporation*, the challenged clause required employees to pursue claims only through “individual arbitration” and mandated that they “waive[] the right to participate in or receive money or any other relief from any class, collective, or representative proceeding.” 823 F.3d at 1150. The carve-outs seen in Northrop’s DRP do not appear in the language at issue in *Ernst & Young* or *Epic Systems*.

ALJ Laws’ reliance on *D.R. Horton I* and *Murphy Oil I* as binding precedent on Northrop’s unique and plainly distinguishable DRP language (which has never been reviewed or addressed by the Board) is an independently sufficient basis to reverse her conclusion that Northrop’s maintenance of the DRP violates the Act.

### **III. THE BOARD SHOULD REVISIT ITS PRIOR ANALYSIS AND OVERTURN *D.R. HORTON I* AND ITS PROGENY.**

Although ALJ Laws correctly concluded that Northrop’s enforcement of the DRP did not violate the Act as it related to Charging Party Porfiria Vasquez, ALJ Laws’ deference to *D.R. Horton I* and *Murphy Oil I* led her to wrongly conclude that Northrop’s maintenance of the DRP violates the Act. Indeed, ALJ Laws’ reliance on *D.R. Horton I* and *Murphy Oil I* was the sole basis for her summary rejection of Northrop’s detailed arguments demonstrating that those decisions conflict with the Federal Arbitration Act, the Rules Enabling Act, the Federal Rules of Civil Procedure, the Fair Labor Standards Act, Supreme Court precedent, public and judicial policy favoring arbitration, and the “numerous other arguments” made by Northrop in its brief to

the ALJ. *See* Decision pp. 5, 6, and n.6. However, as detailed below, *D.R. Horton I* and *Murphy Oil I* were wrongly decided and Northrop’s maintenance of the DRP does not violate the Act.

**A. The Act Does Not Grant Employees The Right To Utilize Class Or Collective Action Procedures.**

The Board’s authority under the NLRA is limited, and its interpretation of the Act must rationally follow and be consistent therewith. *See NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 576 (1994) (noting that the Board’s interpretation was irrational and inconsistent with the Act); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539 (1992) (rejecting the Board’s interpretation of the NLRA); *NLRB v. Fin. Inst. Emps. of Am., Local 1182*, 475 U.S. 192, 202-04 (1986) (same); *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317-18 (1965) (same). The NLRA does not mention class or collective action procedures, much less guarantee employees a right of access to such procedures. Nonetheless, in *D.R. Horton I*, the Board invented such a right and rolled back the Federal Arbitration Act (“FAA”) to make room for it. By doing so, the Board stepped outside the role Congress created for it and established a new federal right that is exclusively the province of Congress. *See Fin. Inst. Emps. of Am.*, 475 U.S. at 202 (a Board decision must be rational and consistent with the NLRA and not an “unauthorized assumption . . . of major policy decisions properly made by Congress”).<sup>5</sup>

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<sup>5</sup> The Board reached this conclusion notwithstanding the repeated contrary interpretations by its own agents. Specifically, the Regional Director in *D.R. Horton I* initially dismissed the underlying charge partially because “application of the class action mechanism is primarily a procedural device and the effect on Section 7 rights of prohibiting its use is not significant.” RD’s partial refusal to issue complaint on Michael Cuda’s unfair labor practice charge, dated Aug. 28, 2008, Resp’t Ex. 3 in *D.R. Horton, Inc.’s Record Excerpts, D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) (No. 12-60031). The ALJ in *D.R. Horton I* also correctly observed there was not “any Board decision holding that an arbitration clause cannot lawfully prevent class action lawsuits or joinder of arbitration claims” and the Acting General Counsel argued to the Board that “an employer has the right to limit arbitration to individual claims – as long as it is clear that there will be no retaliation for concertedly challenging the agreement.” *D.R. Horton I, supra*, at 23; Acting General Counsel’s Reply Brief to Respondent’s Answering Brief at 1-2,

In *D.R. Horton I*, the Board reasoned that “the NLRA protects employees’ ability to join together to pursue workplace grievances, including through litigation.” *D.R. Horton I, supra*, at 2. The Board fundamentally erred, however, by not distinguishing between employee rights to: (1) concertedly assert legal rights in an attempt to improve their terms and conditions of employment; and (2) obtain a class or collective adjudication of their employment claims. While the NLRA protects the former, it does not protect the latter. The NLRA entitles employees to act together to improve their terms and conditions, it does not entitle them to a particular forum or procedure in which to do so, much less to secure any specific terms and conditions.

Court procedures for joinder, of which a class action is a species, are wholly unrelated to the Section 7 concern with equalizing bargaining power. The Federal Rules of Civil Procedure are intended to effectuate the prompt and efficient resolution of legal disputes. *See* Fed. R. Civ. P. 1. “A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits.” *Shady Grove Orthopedic Assocs. P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion). “And like traditional joinder, [the class action procedure] leaves the parties’ legal rights and duties intact and the rules of decision unchanged.” *Id.*

Significantly, the Board in *D.R. Horton I* correctly recognized that Section 7 cannot grant employees a “right to class certification,” and that an employer can lawfully oppose certification of a class without violating the Act because its employees already acted in concert to exercise their Section 7 rights to “seek” class certification. *D.R. Horton I, supra*, at 12 (noting that Section 7 guarantees employees only the limited right “to take the collective action inherent in

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dated April 25, 2011, *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) (No. 12-CA-025764); *see also* GC Memorandum 10-06 at 7 (stating that employees may waive all rights to file class arbitration and litigation, if they can concertedly challenge the enforceability of the agreement containing the waiver without retaliation).

seeking class certification, whether or not they are ultimately successful under Rule 23” and “to act concertedly by invoking Rule 23, Section 216(b), or other legal procedures”) (emphasis added). The Board in *D.R. Horton I* could not, however, explain how the purported right to “seek” class certification and “invoke” class procedures furthers the purpose of the NLRA or is essential to the purpose of collective bargaining in the workplace. That is likely because the creation of this new Section 7 “right” is not based on language found anywhere in the Act.

Notably, the Board in *D.R. Horton I* did not consider the fact that class action procedures are rarely suitable for employment disputes. In reality, class certification is routinely denied with respect to employment-related claims because such claims are inherently based on individualized facts. For example, in *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1272 (11th Cir. 2009), the Eleventh Circuit reversed an order granting class certification and noted that the plaintiff could “not utilize identical evidence on behalf of every member of the class to prove offer, acceptance, consideration, or the essential terms.” The court explained:

Instead, these mandatory elements of each class member’s claim depend on such individualized facts and circumstances as when a given employee was hired, what the employee was told (and agreed to) with respect to compensation rules and procedures at the time of hiring, the employee’s subjective understanding of how he would be compensated and the circumstances under which his compensation might be subject to charge backs, and when and how any pertinent part of the employee’s compensation agreement or understanding thereof may have changed during the course of that employee’s tenure at T-Mobile.

*Id.* Outside of collective bargaining agreements (which, by definition, apply to a group of employees represented by the same labor organization or union), courts regularly find contract claims by employees to be incompatible with class and collective action procedures.<sup>6</sup>

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<sup>6</sup> See also *Cutler v. Wal-Mart Stores, Inc.*, 927 A.2d 1, 10 (Md. Ct. Spec. App. 2007) (affirming denial of class certification in missed-breaks case, in part, because “absent a contract applicable

The Board in *D.R. Horton I* also did not adequately explain the difference between the inability to utilize class action procedures due to an unsuccessful motion for class certification and a successful motion to enforce a class action waiver. In both instances, the employee(s) already will have taken “the collective action inherent in seeking class certification” and already will have acted in concert by “invoking” class certification procedures. Thus, a class action waiver does not abridge a purported right to act in concert to “seek” class certification or “invoke” class procedures any more than a successful opposition to class certification.

**B. Multiple Federal Statutes Support The Enforceability Of Class And Collective Action Waivers Like That Seen In Northrop’s DRP.**

The Board’s decisions in *D.R. Horton I* and *Murphy Oil I* also conflict with federal statutes that are outside the Board’s jurisdiction and expertise. As a result, the Board should overrule its earlier decisions on class and collective action waivers or, at a minimum, refuse to apply those decisions to Northrop’s DRP.

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to the entire class of Wal-Mart employees, the existence, formation, and terms of any implied employment contract would vary among employees” and “the alleged breaches of these implied contracts by supervisors and managers at individual Wal-Mart stores also give rise to individual, not common, factual and legal issues”); *Wal-Mart v. Lopez*, 93 S.W.3d 548, 557 (Tex. App. 2002) (reversing trial court’s certification of class action as abuse of discretion in missed-breaks case because, among other things, “[a]ny determination concerning a ‘meeting of the minds’ [on a breach of oral contract claim] necessarily requires an individual inquiry into what each class member, as well as the Wal-Mart employee who allegedly made the offer, said and did”); *Cohn v. Massachusetts Mut. Life Ins. Co.*, 189 F.R.D. 209, 215 (D. Conn. 1999) (no predominance where the resolution of plaintiffs’ breach of contract claims was dependent upon the representations made to each plaintiff individually); *Brooks v. S. Bell Tel. & Tel. Co.*, 133 F.R.D. 54, 57 (S.D. Fla. 1990) (finding that commonality was not met where “[i]t [was] not only conceivable, but probable, that [the] court [would] be required to hear evidence regarding the existence, terms, modifications and limitations of each alleged contract of the over 5,000 prospective class members”).

**1. The Federal Arbitration Act Requires The Enforcement Of Arbitration Agreements With Class And Collective Action Waivers.**

The FAA requires that agreements to arbitrate be enforced to the same extent as any other type of contract and not singled out for more rigorous scrutiny because of a hostility or aversion toward arbitration. Specifically, the FAA provides that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,” such as “fraud, duress, or unconscionability.” 9 U.S.C. § 2; *see also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011). It is well established that the FAA reflects an “emphatic federal policy in favor of arbitral dispute resolution.” *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011). The purpose of the FAA “is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings.” *Concepcion*, 131 S. Ct. at 1748. The FAA does not require class or collective claims to be permitted in order for an agreement to arbitrate to be valid and enforceable.

Under the FAA, parties are generally free, as a matter of contract law, to agree to the procedures governing their arbitrations. *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (noting that parties to an arbitration agreement may “specify by contract the rules under which that arbitration will be conducted”); *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) (“Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes”).

Moreover, complaints about the “inequality in bargaining power” between an employer and employee are insufficient to void an arbitration agreement. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991). Similarly, the Supreme Court repeatedly has rejected challenges to the “adequacy of arbitration procedures,” concluding that such attacks are “out of

step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.” *Id.* at 30. A party to an arbitration agreement “trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.” *Id.* at 31 (citation omitted). As a result, an arbitration agreement is enforceable even if it permits less discovery than would be available in federal courts, and even if a resulting arbitration cannot “go forward as a class action or class relief [cannot] be granted by the arbitrator.” *Id.* at 31-33 (citation omitted); *see also Vilches v. The Travelers Cos., Inc.*, 413 F. App’x 487, 494 & n.4 (3d Cir. 2011); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *Horenstein v. Mortg. Mkt., Inc.*, 9 F. App’x 618, 619 (9th Cir. 2001). Simply put, state and federal courts “must enforce the [FAA] with respect to all arbitration agreements covered by that statute.” *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012) (per curiam). “That is the case even when federal statutory claims are at issue, unless the FAA’s mandate has been ‘overridden by a contrary congressional command.’” *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (citation omitted). There is no provision in the NLRA that trumps the clear mandate in the FAA that the Northrop DRP’s specific arbitration procedures be enforced as any other contract.

**2. The Rules Enabling Act Dictates That Class And Collective Actions Are Only Procedural In Nature, And Therefore Can Be Waived.**

*D.R. Horton I* and *Murphy Oil I* also are at odds with the Rules Enabling Act (“REA”), in which Congress delegated authority to the Supreme Court to promulgate the Federal Rules of Civil Procedure. *See* 28 U.S.C. § 2072(b). The REA expressly provides that the Federal Rules “shall not abridge, enlarge or modify any substantive right.” *Id.* Accordingly, the Supreme Court has made clear that Federal Rule of Civil Procedure 20 (permissive joinder) and Federal Rule of

Civil Procedure 23 (class actions) regulate only procedure and do not impact substantive rights. In *Shady Grove*, a plurality of the Supreme Court explained that a rule of procedure is valid under the REA only if it “really regulat[es] procedure – the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.” 559 U.S. at 407. The plurality opinion reasoned:

Applying that criterion, we think it obvious that rules allowing multiple claims (and claims by or against multiple parties) to be litigated together are also valid [under the REA]. *See, e.g.*, Fed. Rules Civ. Proc. 18 (joinder of claims), 20 (joinder of parties), 42(a) (consolidation of actions). Such rules neither change plaintiffs’ separate entitlements to relief nor abridge defendants’ rights; they alter only how the claims are processed. For the same reason, Rule 23 – at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants in a class action – falls within § 2072(b)’s authorization. A class action, no less than traditional joinder (of which it is a species), **merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties’ legal rights and duties intact and the rules of decision unchanged.**

*Id.* at 408 (emphasis added).

Contrary to the REA and *Shady Grove*, the Board in *D.R. Horton I* incorrectly held that employees possess a substantive right under the NLRA to class action procedures. *See D.R. Horton I, supra*, at 12 (“Any contention that the Section 7 right to bring a class or collective action is merely ‘procedural’ must fail”). In the absence of class action procedures in the text of the NLRA or in any subsequent amendments to it, Federal Rule of Civil Procedure 23 provides the only basis in federal law for such a right. Thus, the Board’s treatment of Rule 23 as expanding employee substantive rights under the NLRA directly conflicts with the REA and is contrary to the longstanding principle that the Federal Rules of Civil Procedure are valid only

insofar as they “regulat[e] procedure.” See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (“[N]o reading of the Rule can ignore the [REA’s] mandate . . . .”)<sup>7</sup>

### 3. Class Action Procedures Are Waivable Under The Federal Rules Of Civil Procedure.

*D.R. Horton I* and *Murphy Oil I* also are at odds with Federal Rule of Civil Procedure 23 specifically, and the Federal Rules generally. Time and again, the courts have held that litigants do not have a substantive right to class action procedures under the Federal Rules, and they have further held that access to such procedures is waivable. See e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997); *Deposit Guar. Nat’l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 332 (1980) (“[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims”); *Frazar v. Gilbert*, 300 F.3d 530, 545 (5th Cir. 2002) (“A class action is merely a procedural device; it does not create new substantive rights”), *rev’d on other grounds, Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004).<sup>8</sup>

Additionally, the Board’s treatment of litigation procedures as non-negotiable entitlements is inconsistent with longstanding practices under the Federal Rules. Those Rules (and their state counterparts) generally permit, and sometimes mandate, that litigants negotiate regarding the procedures governing the adjudication of disputes. See Fed. R. Civ. P. 16(b) & (c) and 26(f) (allowing parties to agree on procedures governing case); Fed. R. Civ. P. 29 (allowing parties to stipulate to changes in discovery procedures); Fed. R. Civ. P. 37(a)(1) (requiring

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<sup>7</sup> Moreover, to the extent the Board concluded that employees possess a substantive right under the Act to class action and joinder procedures created under state law, the Board’s interpretation impermissibly treated state law as modifying and enlarging substantive rights under a federal statute. See *Shady Grove*, 559 U.S. at 409 (“[O]f course New York has no power to alter substantive rights and duties created by other sovereigns”).

<sup>8</sup> State class action procedures are treated similarly. See *Blaz v. Belfer*, 368 F.3d 501, 504 (5th Cir. 2004) (no “substantive right to pursue a class action, in either Texas state or federal court”).

parties to attempt to agree on resolution to discovery disputes before seeking court action). Parties in litigation frequently negotiate, and courts routinely enforce, agreements regarding class procedures, including agreed upon scheduling orders setting deadlines for motions for certification or permissive joinder, agreements extending the time in which employees may move for certification, stipulations as to the scope of any certified class, agreements by the parties as to the time period during which opt-ins in FLSA collective actions may file their consents to join a case or during which putative members of classes may file their notices to opt out, and stipulations and settlement agreements dismissing class allegations on agreed terms. Under the novel rule adopted by the Board in *D.R. Horton I*, such routine agreements would be invalid because they narrow or waive purported non-negotiable rights under the Act.

The Board in *D.R. Horton I* and in *Murphy Oil I* committed further error by ruling that the NLRA gives employees not only a substantive right to invoke class action procedures, but also a right to have motions for certification decided on their merits according to the requirements of Federal Rule of Civil Procedure 23. *See D.R. Horton I, supra*, at 10 & n.24; *see also Murphy Oil I, supra*, at 6. Any such right would limit a court's ability to dispose of cases prior to certification and arguably insulate putative class representatives from Rule 12(b) motions and from a wide variety of procedural and substantive defenses unrelated to the requirements of Rule 23. For instance, some local rules require that motions for class certification be filed within 90 days of a class action complaint. *See, e.g.*, N.D. Ohio L.R. 23.1(c); C.D. Cal. L.R. 23-3; S.D. Ga. L.R. 23.2. However, courts may deny such motions if they are untimely. *See Walton v. Eaton Corp.*, 563 F.2d 66, 75 n.11 (3d Cir. 1977) (noting that the district court did not abuse its discretion in denying motion for certification as untimely); *Batson v. Powell*, 912 F. Supp. 565, 570-71 (D.D.C. 1996) (denying motion for certification as untimely).

In *Murphy Oil I*, the Board explained that its concern is “with employer-imposed restraints that would preclude employees from seeking to use [group litigation] mechanisms.” *Murphy Oil I, supra*, at 22. By this logic, an employer that makes an offer of judgment for the purpose of mooting the claims of a plaintiff in a putative class or collective action before he or she moves for class/collective action certification – would thereby create an “employer-imposed restraint” on “group litigation mechanisms” and thereby commit an unfair labor practice. That logic flies in the face of clear Supreme Court precedent to the contrary. *See Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2013) (holding that a single employee’s putative collective action under the FLSA was moot as a result of the employer’s offer of judgment).

**4. The NLRA Does Not Create A Substantive Right To Collective Or Class Actions Under The Fair Labor Standards Act.**

The Board’s decisions in *D.R. Horton I* and in *Murphy Oil I* interpret the FLSA’s collective action procedure in a manner contrary to the FLSA’s legislative history and the consensus of the Circuit Courts of Appeals. No substantive right to collective or class action exists under the FLSA that can be imported into the NLRA. Congress adopted the Portal-to-Portal Act in 1947 to curtail the proliferation of collective actions under the FLSA by requiring employees to provide their individual consent to be a party-plaintiff. *See Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989) (Congress enacted Section 216(b) to limit private FLSA actions to employees who assert claims in their own right and to free employers of the burden of representative actions). By concluding that employers and employees are not permitted to agree to arbitrate FLSA claims only on an individualized basis, the Board acted contrary to Congressional intent. Consistent with that intent, the federal courts have ruled consistently that Section 216(b) does not create a substantive right that cannot be waived in favor of individual

arbitration.<sup>9</sup> There is no basis for finding that an arbitration agreement waiving class procedures interferes with an employee’s purported right to engage in concerted activity any more than does the FLSA’s own individual opt-in requirement.

The Board in *D.R. Horton I* also ignored the fact that the procedures governing collective actions under the FLSA (and, by incorporation, the Age Discrimination in Employment Act) were created by the courts under their inherent authority to manage cases – authority the Board does not possess and which Congress itself did not create when the FLSA was enacted or later amended. See *Hoffmann-La Roche Inc.*, 493 U.S. at 165. Indeed, the various *ad hoc* procedures for “certifying” a Section 216 collective action have been developed by federal courts applying their discretionary authority.<sup>10</sup> The Board’s conclusion in *D.R. Horton I* that employees have a substantive right under the NLRA to invoke these *ad hoc* procedures therefore has no basis in the FLSA. There is simply no predicate right to class or collective actions in the FLSA that the NLRB can borrow for the NLRA.

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<sup>9</sup> See *Long John Silver’s Rests., Inc. v. Cole*, 514 F.3d 345, 350–51 (4th Cir. 2008); *Caley*, 428 F.3d at 1378; *Carter*, 362 F.3d at 298 (holding that an arbitration agreement was not unenforceable under the FAA where it required employees to arbitrate their FLSA claims individually because “the inability to proceed collectively” did not “deprive[] them of substantive rights available under the FLSA”); *Adkins*, 303 F.3d at 503; *Horenstein*, 9 F. App’x at 619; *Copello v. Boehringer Ingelheim Pharm. Inc.*, 812 F. Supp. 2d 886, 894 (N.D. Ill. 2011) (“[W]hile FLSA prohibits substantive wage and hour rights from being contractually waived, it does not prohibit contractually waiving the procedural right to join a collective action”); *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 164-65 (S.D.N.Y. 2008) (holding that the opt-in procedures of FLSA are procedural, not substantive); *Sjoblom v. Charter Commc’ns, LLC*, No. 07-CV-0451, 2007 WL 4560541, at \*5-6 (W.D. Wis. Dec. 19, 2007) (concluding that the opt-in provisions of § 216(b) are not clearly substantive); *Westerfield v. Washington Mut. Bank*, No. 06-CV-2817, 2007 WL 2162989, at \*1 (E.D.N.Y. July 26, 2007) (“Section 216(b) by its terms governs procedural rights”).

<sup>10</sup> See *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1212-16 (5th Cir. 1995) (describing various methods used by district courts to determine whether employees are similarly situated in a collective action under the ADEA, which incorporates Section 216(b)), *overruled on other grounds by Roussel v. Brinker Int’l. Inc.*, 441 F. App’x 222 (5th Cir. 2011).

**C. The Norris-LaGuardia Act Does Not Trump The Federal Arbitration Act.**

In *D.R. Horton I*, the Board ventured well outside its jurisdiction and expertise to hold, incorrectly: (1) that the Norris-LaGuardia Act (“NLGA”) voids employment arbitration agreements with class or collective action waivers; and (2) that the NLGA partially repealed the FAA so that agreements containing class or collective action waivers are not protected by the FAA. *See D.R. Horton I, supra*, at 7-8, 16.<sup>11</sup>

Enacted in 1932, the NLGA divested federal courts of jurisdiction to issue restraining orders and injunctions “in a case involving or growing out of a labor dispute,” except in narrow circumstances permitted by the NLGA. *See* 29 U.S.C. § 101. The NLGA also made “yellow-dog” contracts (contracts in which an employee agrees “not to join, become, or remain a member” of a labor organization and agrees his employment would terminate if he did) unenforceable in federal courts. *See id.* § 103. The NLGA also provided that any agreement “in conflict with the public policy declared [therein], is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court.” *Id.*

When the NLGA was adopted in 1932, the Federal Rules, the FLSA, and the modern class action device had not even come into existence. Thus, it is absurd to suggest that the NLGA manifested a Congressional intent to create a non-waivable right to hypothetical procedures.<sup>12</sup>

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<sup>11</sup> The Board’s novel interpretation of the NLGA should be abandoned for two principal reasons. First, the Board is not entitled to deference in interpreting the NLGA. *See Murphy Oil I, supra*, at 8. Second, the Board in *D.R. Horton I* did not cite any authority supporting the position that the NLGA repealed the FAA.

<sup>12</sup> The Board’s analogy in *D.R. Horton I* to “yellow-dog” contracts also misses the mark. Unlike an employee who signs a yellow-dog contract, an employee who signs an arbitration agreement and then files a class action lawsuit in violation of the arbitration agreement does not lose his job

Even assuming some conflict might exist between the NLGA and the FAA (which there is not), it would be up to the courts, not the Board, to resolve that conflict, since neither statute is within the Board's jurisdiction to interpret or enforce. *See Owen*, 702 F.3d at 1053 (on employer's motion to compel arbitration under the FAA, addressing employee's challenge to enforceability of individual arbitration agreement based in part on NLGA). Moreover, if a conflict existed between the NLGA and the FAA, courts would "reconcile" the decades-old NLGA with the Supreme Court's more recent jurisprudence under the FAA. *See Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 251 (1970). Indeed, the Supreme Court has made clear that the NLGA must accommodate the substantial changes in the law since it was enacted. *See id.* at 250 (concluding that the NLGA "must be accommodated to the subsequently enacted" Labor Management Relations Act "and the purposes of arbitration"). Thus, even if the NLGA could be construed as applying to individual employment arbitration agreements, that construction would have to give way in light of the FAA and subsequent developments – especially because an arbitration agreement with a class action waiver is clearly not "the type of situation to which the Norris-LaGuardia Act was responsive." *Id.* at 251-52.

Finally, the Board in *D.R. Horton I* used the wrong dates in evaluating whether the NLGA and/or the NLRA should be viewed as partially repealing the FAA. *D.R. Horton I* assumed the FAA was enacted in 1925 and predated both the NLGA and the NLRA. *D.R. Horton I, supra*, at 8. Therefore, if the FAA conflicted with either of those statutes, the Board in *D.R. Horton I* reasoned the FAA must have been repealed, either by the NLGA's express provision repealing statutes in conflict with it or impliedly by the NLRA. *See id.* at 16 & n.26. The Board in *D.R. Horton I* did not account for the dates when the NLRA and the FAA were re-

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for filing the lawsuit. Rather, an employer simply moves to compel arbitration under the FAA without any effect on the individual's employment.

enacted – points which are essential to the analysis. See *Chicago & N. W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582 n.18 (1971) (looking to re-enactment date of the Railway Labor Act to determine that it post-dated the NLGA and concluding “[i]n the event of irreconcilable conflict” between the two statutes, the former would prevail). The NLGA was enacted in 1932, the NLRA was re-enacted on June 23, 1947, and the FAA was re-enacted on July 30, 1947. See 47 Stat. 70; 61 Stat. 136; 61 Stat. 670. Thus, of these three statutes, the FAA (as the latest of the three) would prevail if there were an “irreconcilable conflict” among them.<sup>13</sup>

**D. Binding Supreme Court Precedent, And Decisions From Other Federal Courts, Support The Legality Of Class And Collective Action Waivers.**

The Board’s conclusion in *D.R. Horton I* that its ban on class and collective action waivers is permissible under the FAA and that its ban does not treat arbitration agreements “less favorably than other private contracts” conflicts with governing Supreme Court precedent. In *Concepcion*, the Supreme Court expressly rejected a similar attempt to circumvent the FAA in the case of a nearly identical California rule prohibiting class action waivers. See *Concepcion*, 131 S. Ct. at 1746-48. *Concepcion* recognized that courts could exhibit hostility to arbitration agreements by announcing facially neutral rules ostensibly applicable to all contracts. See *id.* at 1747. For instance, a court might find unconscionable all agreements that do not provide for “judicially monitored discovery.” *Id.* “In practice, of course, the rule would have a

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<sup>13</sup> The Board in *Murphy Oil I* stated that the FAA’s reenactment in 1947 should not be viewed as altering the scope of the NLGA or NLRA. The Board reasoned that “[i]t seems inconceivable that legislation effectively restricting the scope of the [NLGA] and the NLRA could be enacted without debate or even notice.” *Murphy Oil I, supra*, at 15. However, *D.R. Horton I* and *Murphy Oil I* nevertheless assume the NLGA’s enactment in 1932 and the NLRA’s in 1935 restricted the scope of the 1925-enacted FAA with respect to the enforceability of arbitration agreements “without debate or even notice.” Rather than speculating as to which statute silently and impliedly repealed or amended the other, it is far more plausible to read the NLGA and NLRA as not in conflict with the FAA because neither of those statutes concerns the enforceability of individual employment arbitration agreements.

disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well.” *Id.* To avoid this result, the Supreme Court concluded that an arbitration agreement cannot be invalidated under the FAA based on a “preference for procedures that are incompatible with arbitration and ‘would wholly eviscerate arbitration agreements.’” *Id.* at 1748 (citation omitted).

Accordingly, a rule used to void an arbitration agreement is not saved under the FAA simply because it would apply to “any contract.” The proper test is whether a facially neutral rule prefers procedures that are incompatible with arbitration and thus “stand[s] as an obstacle to the accomplishment of the FAA’s objectives.” *Id.* Applying this test, the Supreme Court in *Concepcion* held a rule mandating the availability of class procedures is incompatible with arbitration. *See id.* at 1750–52. In reaching this conclusion, the Supreme Court recognized that arbitration is intended to be less formal than court proceedings to allow for the speedy and inexpensive resolution of disputes. The Supreme Court further noted that this informality makes arbitration poorly suited to conducting class litigation with its heightened complexity, due process issues, and stakes. *See id.* at 1751–52. Specifically, the Supreme Court held:

The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

*Id.* at 1748.

The Board in *D.R. Horton I* attempted to distinguish *Concepcion* by arguing its decision did not require class or collective arbitration. *See D.R. Horton I, supra*, at 16. Rather, the Board claimed it required only the availability of class or collective action procedures in some forum, thus forcing employers to either (i) permit class or collective arbitration, or (ii) waive the arbitral forum to the extent an employee seeks to invoke class or collective procedures in court. *See id.*

But that is a distinction without a difference. Like the California law addressed above, the *D.R. Horton I* Board “condition[s] the enforceability of certain arbitration agreements” on the availability of class or collective procedures. *Concepcion*, 131 S. Ct. at 1744. The Board’s reliance on the option of avoiding class arbitration only by agreeing to forgo arbitration does not reduce the degree to which its ban on class and collective action waivers “interferes with fundamental attributes of arbitration” and “creates a scheme inconsistent with the FAA.” *Id.* at 1748. To the contrary, requiring a party to abandon the arbitral forum altogether as the only way to avoid class or collective arbitration is an even greater obstacle to the FAA’s policies than mandating class or collective arbitration alone.

The Board in *D.R. Horton I* also incorrectly concluded an individual employment arbitration agreement should not be enforced because doing so would require employees to forgo a substantive statutory right in violation of *Gilmer v. Interstate/Johnson Lane Corp.* See *D.R. Horton I*, *supra*, at 13. However, in considering whether arbitration would violate an employee’s substantive statutory rights, the Board reviewed the wrong statute (the NLRA rather than the FLSA), did not ask the correct question (whether the employee could vindicate his or her FLSA rights effectively in arbitration), and arrived at the wrong answer (the arbitration agreement was unenforceable even if the employee could vindicate his or her FLSA rights in arbitration).

In *Gilmer*, the Supreme Court found that “[b]y 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. *Gilmer* also explained that the burden is on the party opposing enforcement of an arbitration agreement to “show that Congress intended to preclude a waiver of a judicial forum” through the statutory text, legislative history, or because an inherent conflict between arbitration and statute’s purpose exists. *Id.* The Court concluded that claims under statutes like the ADEA advancing important public policies

may be arbitrated as long as the “prospective litigant effectively may vindicate [the] statutory cause of action in the arbitral forum . . . .” *Id.* at 28.

The Supreme Court also has rejected a variety of challenges to arbitration procedures based on their differences from judicial procedures. Rather, the Supreme Court has held that statutory claims may be arbitrated (even though the arbitral procedures may be different from judicial procedures) because those differences do not prevent a party from enforcing and obtaining relief on statutory claims. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89-90 (2000); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

Instead of following *Gilmer* and other Supreme Court precedent on point, the Board in *D.R. Horton I* failed to recognize as dispositive the question of whether an employee could vindicate his statutory rights under the FLSA effectively pursuant to the arbitration agreement’s procedures. *See D.R. Horton I, supra*, at 12 & n.23. Instead, the Board erroneously reasoned that “the right allegedly violated by the [mandatory arbitration agreement] is not the right to be paid the minimum wage or overtime under the FLSA, but the right to engage in collective action under the NLRA.” *Id.* at 12. This turned *Gilmer* on its head and ignored the fundamental teaching of *Gilmer* and its predecessor decisions. *See Gilmer*, 500 U.S. at 30-32; *see 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009) (“At bottom, objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum to resolve statutory antidiscrimination claims”). In further conflict with *Gilmer*, the Board in *D.R. Horton I* held that an arbitration agreement was unenforceable even if the employee could vindicate his FLSA rights effectively under it. *See D.R. Horton I, supra*, at 11-12 & n.23.

The Board in *D.R. Horton I* also did not follow *Gilmer*'s test for determining whether Congress intended to preclude the waiver of a judicial forum and its procedures for a statutory claim. As noted above, *Gilmer* requires a court to answer this question based on the relevant statutory text, the statute's legislative history, or an "inherent conflict" between arbitration and the statute's underlying purposes. *Gilmer*, 500 U.S. at 26. The Supreme Court has applied this test repeatedly. See *McMahon*, 482 U.S. at 227; *Mitsubishi Motors*, 473 U.S. at 628. It reaffirmed its commitment to this inquiry in *CompuCredit Corp.*, where it analyzed the text of the Credit Repair Organizations Act ("CROA") to determine whether Congress intended to override the FAA to preclude the arbitration of CROA claims. See *CompuCredit Corp.*, 132 S. Ct. at 669. The *CompuCredit* Court also reiterated that if a statute "is silent on whether claims under [it] can proceed in an arbitral forum, the FAA requires the arbitration agreement to be enforced according to its terms." *Id.* at 673.

The Board, however, never explored Congress' intent regarding the preclusion of arbitration for FLSA claims. If it had done so, it would have been compelled to find that FLSA claims are subject to arbitration. See, e.g., *Carter*, 362 F.3d at 297 (holding "there is nothing in the FLSA's text or legislative history" to "even implicitly" suggest that Congress intended to preclude arbitration of FLSA claims).

The Board in *D.R. Horton I* also did not look for any indication in the NLRA's text or history of a congressional intent to override the FAA and require access to class procedures. In fact, the Board got the inquiry backwards and concluded that "nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable." *D.R. Horton I, supra*, at 14. If the Board had asked the correct question, however, it would have found that there is no language in the NLRA (or in the NLGA) demonstrating that Congress intended the employee concerted action rights therein to override the mandate of the

FAA. Indeed, the non-existence of the modern class procedures until decades after the NLRA was enacted establishes that Congress had no intention of the NLRA granting access to those procedures. Such “silence” in the NLRA means “the FAA requires the [DRP] to be enforced according to its terms.” *CompuCredit Corp.*, 132 S. Ct. at 673.

In the end, the Board in *D.R. Horton I* declared there was “an inherent conflict” between the NLRA and the arbitration agreement’s waiver of class and collective action procedures despite a lack of any authority for, and the novelty of, this conclusion. *See D.R. Horton I, supra*, at 13. Indeed, the Supreme Court and other federal courts repeatedly have found no “inherent conflict” between arbitration and other statutes. *See, e.g., Gilmer*, 500 U.S. at 27-29 (no inherent conflict between arbitration and the ADEA); *Rodriguez*, 490 U.S. at 485-86 (“resort to the arbitration process does not inherently undermine any of the substantive rights afforded to petitioners under the Securities Act”); *McMahon*, 482 U.S. at 242 (no inherent conflict between arbitration and RICO’s private treble damages provision); *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 680-81 (5th Cir. 2006) (no inherent conflict between arbitration and USERRA); *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 477-78 (5th Cir. 2002) (no inherent conflict between arbitration and the Magnuson–Moss Warranty Act).

Numerous other courts – including at least three Circuit Courts of Appeal – also have explicitly declined to follow the Board’s holding in *D.R. Horton I* and enforced mandatory employment arbitration agreements containing class action waivers. *See D.R. Horton II*, 737 F.3d at 362 (“The NLRA should not be understood to contain a congressional command overriding application of the FAA.”); *Murphy Oil II*, 808 F.3d at 1016 (“[A]n employer does not engage in unfair labor practices by maintaining and enforcing an arbitration agreement prohibiting employee class or collective actions and requiring employment-related claims to be resolved through individual arbitration”); *Cellular Sales*, 824 F.3d at 772; *Owen*, 702 F.3d at

1055 (rejecting plaintiff’s “invitation to follow the NLRB’s rationale in *D.R. Horton*” and enforcing arbitration agreement containing class action waiver); *Patterson*, 2016 WL 4598542; *Sutherland*, 726 F.3d at 297 n.8 (declining to follow the Board’s decision in *D.R. Horton*); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336 (11th Cir. 2014) (enforcing class action waiver in arbitration agreement and favorably citing *D.R. Horton II*), *cert. denied*, 134 S. Ct. 2886 (2014); *Murphy Oil I, supra*, at 36 n.5 (Johnson, dissenting) (citing to dozens of federal and state courts rejecting *D.R. Horton I*); *but see Ernst & Young*, 834 F.3d 975 and *Epic Sys.*, 823 F.3d 1147.

Moreover, the cases relied upon by the Board in *D.R. Horton I* do not support its conclusion. For example, in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978), the Supreme Court noted that some lower courts had applied the “mutual aid or protection” clause to protect employees from retaliation for “resort[ing] to administrative and judicial forums” in seeking to improve their working conditions. Nonetheless, the Supreme Court expressly reserved the question of “what may constitute ‘concerted’ activities in this context.” *Id.* at 566 n.15.

Similarly, the Board’s reliance on its decision in *Salt River Valley Water Users Association*, 99 NLRB 849 (1952) is misplaced. *Salt River Valley* only makes clear that an employee’s Section 7 right to “resort to judicial forums” is correctly understood as a right to assert legal rights collectively. That is not the same thing as a right to invoke judicial or arbitral procedures for a collective adjudication of individual claims.

In *Salt River Valley*, a number of employees believed they were due back pay under the FLSA and grew dissatisfied when their union did not pursue the issue. *See* 99 NLRB at 863-64. The employees enlisted “the support of others in a movement to recover back pay and overtime wages.” *Id.* at 863. To that end, one of the complaining employees circulated a petition among his co-workers through which they designated him their agent “to take any and all actions

necessary to recover for [them] said monies, whether by way of suit or negotiation, settlement and/or compromise” and authorized him to employ an attorney to represent them. *Id.* at 864. Both the union and the employer learned of the petition, opposed it, and, shortly thereafter, the “agent’s” employment was terminated. Significantly, the employees’ protected concerted activities in *Salt River Valley* occurred outside of any adjudicatory process or proceeding and did not utilize or depend on any class litigation procedures.

The other decisions relied upon by the Board in *D.R. Horton I* similarly lack any support for the proposition that employees have a Section 7 right to seek a collective adjudication of their claims. Those cases demonstrate only the rudimentary principle that employers may not retaliate against employees for acting in concert to assert legal rights relating to the terms and conditions of their employment. *See D.R. Horton I, supra*, at 2-3 & n.3.<sup>14</sup> In fact, the best the Board could do was cite decisions pre-dating the Supreme Court’s decision in *J.I. Case* in which various individual employment agreements were held unlawful under the NLRA because employers used them to violate certain specific, well-defined rights granted employees in Section 7 (e.g.

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<sup>14</sup> *See Mohave Elec. Co-op, Inc. v. NLRB*, 206 F.3d 1183 (D.C. Cir. 2000) (employer violated NLRA by discharging employee for filing petition jointly with co-worker); *Brad Snodgrass, Inc.*, 338 NLRB 917 (2003) (employer violated NLRA by laying off employees in retaliation for union’s filing grievances on their behalf); *Le Madri Rest.*, 331 NLRB 269 (2000) (employer violated NLRA by discharging two employees who were named plaintiffs in a lawsuit against employer); *United Parcel Serv., Inc.*, 252 NLRB 1015 (1980) (employer violated NLRA by discharging employee for initiating class action lawsuit, circulating petition among employees, and collecting money for retainer, among other activities); *Clara Barton Terrace Convalescent Ctr.*, 225 NLRB 1028 (1976) (employer violated NLRA by suspending employee without pay for submitting letter to management complaining on behalf of other employees about job assignments); *Trinity Trucking & Materials Corp.*, 221 NLRB 364 (1975) (alleging employer violated NLRA by discharging three employees who had filed suit against employer); *El Dorado Club*, 220 NLRB 886 (1975) (employer violated NLRA by discharging employee in retaliation for testifying at fellow employee’s arbitration hearing); *Spandsco Oil & Royalty Co.*, 42 NLRB 942 (1942) (employer violated NLRA by discharging three union members for filing a lawsuit); *see also Brady v. Nat’l Football League*, 644 F.3d 661 (8th Cir. 2011) (noting in *dicta* that filing lawsuit concerning terms and conditions of employment was protected activity).

bargaining, union membership) – as opposed to the general “right to engage in protected concerted action.” *D.R. Horton I, supra*, at 4-5 & n.7.<sup>15</sup> The Supreme Court, however, did not void the individual agreements, but only held that their existence did not excuse the employer from bargaining collectively because each individual employment agreement would be superseded by the terms of any collective bargaining agreement. *See J.I. Case Co. v. NLRB*, 321 U.S. 332, 336-38 (1944). Accordingly, these decisions show only that there was a brief period before the Supreme Court’s landmark decision in *J.I. Case* during which courts invalidated individual agreements that employers used in willful attempts to avoid collective bargaining and interfere with well-defined and specific Section 7 rights. The difference between the cases cited in *D.R. Horton I* that involved union animus and an employer’s routine use of judicially sanctioned arbitration agreements with a class action waiver is stark and establishes the Board’s lack of legitimate supporting authority. *See Concepcion*, 131 S. Ct. at 1748; *Circuit City Stores v. Adams*, 532 U.S. 105, 122-23 (2001) (“there are real benefits to the enforcement of arbitration provisions” in employment litigation).

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<sup>15</sup> *See, e.g., W. Cartridge Co. v. NLRB*, 134 F.2d 240, 244 (7th Cir. 1943) (individual agreements served “to forestall union activity” and “create a permanent barrier to union organization”); *NLRB v. Adel Clay Prods. Co.*, 134 F.2d 342, 345 (8th Cir. 1943) (individual contracts served “as a means of defeating unionization and discouraging collective bargaining”); *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942) (under individual employment agreements, “the employee not only waived his right to collective bargaining but his right to strike or otherwise protest on the failure to obtain redress through arbitration”); *NLRB v. Jahn & Ollier Engraving Co.*, 123 F.2d 589, 593 (7th Cir. 1941) (individual contracts were unlawful where they waived employees’ right to bargain collectively for a period of two years and were “adopted to eliminate the Union as the collective bargaining agency” of employees) (citation omitted); *NLRB v. Superior Tanning Co.*, 117 F.2d 881, 888-91 (7th Cir. 1941) (individual contracts were part of employer’s plan to discourage unionization); *NLRB v. Vincennes Steel Corp.*, 117 F.2d 169, 173 (7th Cir. 1941) (individual employment agreements were promulgated to circumvent union and required each employee to refrain from requesting a raise in wages, which “deprive[d] the employee of the right to designate an agent to bargain with reference thereto”).

**E. Compelling Public And Judicial Policy Favors Arbitration Agreements, Including Those Containing Class And Collective Action Waivers.**

The Board in *D.R. Horton I* erroneously found “[e]mployees are both more likely to assert their legal rights and also more likely to do so effectively if they can do so collectively.” *D.R. Horton I, supra*, at 3. The Board reasoned that unnamed class members can be protected by the named plaintiff and that such procedures are a potential “weapon” for employees to exert group pressure on employers.<sup>16</sup> See *D.R. Horton I, supra*, at 2 & n.3. The Act and Board law make clear, however, that an employer may legitimately blunt economic weapons utilized by employees.<sup>17</sup> The Board’s decision in *D.R. Horton I* also ignores that class action litigation procedures serve to allow courts to balance the interests of judicial efficiency with the demands of due process in adjudicating claims common to multiple litigants – not to increase employee bargaining power. Compare 1 McLaughlin on Class Actions §1:1 (8th ed.) (explaining class actions are “a mechanism for a single, binding adjudication of multiple claimants’ rights, while assuring due process to absent class members and repose to defendants”) with *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 835, 104 S.Ct. 1505, 1513 (1984) (“[I]n enacting § 7 of the

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<sup>16</sup> *D.R. Horton I* did not identify any evidence to support this proposition and only cited to a single decision that addressed potential retaliation against employees who intended to participate in a strike (not a class action) against their employer and was later denied enforcement by the Second Circuit in *NLRB v. Special Touch Home Care Servs.*, 708 F.3d 447 (2d Cir. 2013). See *Special Touch Home Care Servs.*, 357 NLRB No. 2 (2011).

<sup>17</sup> See *Am. Ship Bldg. Co.*, 380 U.S. at 318 (“Sections 8(a)(1) and (3) do not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party’s bargaining power”); *NLRB v. Brown*, 380 U.S. 278, 283 (1965) (“[T]here are many economic weapons which an employer may use that . . . interfere in some measure with concerted employee activities . . . and yet the use of such economic weapons does not constitute conduct that is within the prohibition of either § 8(a)(1) or § 8(a)(3)”); *NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 497-98 (1960) (“[W]hen the Board moves in this area . . . it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands. . . . [T]his amounts to the Board’s entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced”).

NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment”). Just as the NLRA permits employers to blunt the effectiveness of a work stoppage or strike, it also permits an employer to implement an arbitration agreement that blunts employee efforts to impose higher litigation costs on the employer to extract higher settlements.

Furthermore, the modern class action procedures in the Federal Rules allowing for absent, unnamed class members and “opt out” procedures, did not even exist in federal courts until 1966 (almost three decades after the enactment of the NLRA). *See Amchem Prods., Inc.*, 521 U.S. at 615; *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 545-547 (1974). Even now, members of FLSA, ADEA, and Equal Pay Act collective actions, which are not subject to Rule 23, still must file an individual consent with the court to join any putative collective action – thereby eliminating any anonymity. Thus, *D.R. Horton I’s* assumption that “named employee plaintiffs” could protect unnamed class members is misplaced.

The Board in *D.R. Horton I* also did not recognize that most employment claims amenable to class treatment involve statutory employment rights (e.g. Title VII, ADEA, ADA, FLSA), not obligations dependent on employee Section 7 rights or individual or collective bargaining power. *See Holling Press, Inc.*, 343 NLRB 301, 303 n.15 (2004) (employee could seek protection under the anti-retaliation provisions of anti-discrimination statute even though her conduct was not protected under the NLRA). These statutes almost universally contain anti-retaliation and fee-shifting provisions that protect individual claimants and incentivize them to pursue claims. *See, e.g.*, 42 U.S.C. § 2000e-3(a); 42 U.S.C. § 12203; 29 U.S.C. § 215(a)(3); *see also* 42 U.S.C. § 2000e-5(k); 42 U.S.C. § 12205; 29 U.S.C. § 216(b). As a result, employees

pursue individual claims with great frequency.<sup>18</sup> Moreover, the EEOC, the DOL, and other federal and state agencies remain empowered to pursue class or collective actions on behalf of employees in appropriate cases and are insulated from arbitration agreements waiving class relief. *See Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 776 (7th Cir. 2013) (“A promising alternative to class action treatment” is “to complain to the Department of Labor, which . . . can obtain in a suit under the [FLSA] the same monetary relief for the class members that they could obtain in a class action suit were one feasible”). Accordingly, class action waivers do not affect the substantive rights of employees to receive a full and fair adjudication of their employment claims.<sup>19</sup> *See* 28 U.S.C. § 453 (requiring each judge of the United States to swear he or she “will administer justice without respect to persons, and do equal right to the poor and to the rich”).

To the extent there is such a thing as “concerted legal activity,” the Board also wrongly equated it with use of class or collective action procedures. *See D.R. Horton I, supra*, at 12. There are many ways in which employees can act in concert in asserting legal claims without resort to class or collective adjudication procedures. They can work together in asserting their legal rights by pooling their finances, taking consistent positions on settlement demands and negotiating strategies, and share information. Employees also can solicit other employees to assert the same alleged legal rights, act in concert to initiate multiple individual arbitrations alleging the same legal claims, coordinate the litigation of those claims by hiring the same

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<sup>18</sup> In 2015, a large percentage of the 9,041 private FLSA lawsuits filed in federal court were individual lawsuits and 89,385 individual charges alleging employment discrimination were filed with the EEOC. *See* Judicial Bus. of the U.S. Courts, Table C-2 at p. 3, available at: <https://www.uscourts.gov/statistics/table/c-2/statistical-tables-federal-judiciary/2015/12/31>; <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

<sup>19</sup> Because the Supreme Court has held that unions may waive Section 7 rights (including the right to strike and to a judicial forum), the illogical rationale of *D.R. Horton I* is that a union can waive an individual’s rights, but that same individual cannot do so.

lawyer or law firm, jointly investigate claims, testify in each other's matters, and develop common legal theories and strategies. Thus, arbitration agreements with class and collective action waivers do not interfere with employee Section 7 rights to provide each other "mutual aid and protection." See Kenneth T. Lopatka, *A Critical Perspective on the Interplay Between Our Federal Labor and Arbitration Laws*, 63 S.C. L. Rev. 43, 92 (Autumn 2011) ("[A]n agreement to arbitrate rather than litigate, and to arbitrate only on an individual basis, does not mean that employees cannot act in concert with their coworkers when they pursue individual grievances. Rather, it limits only the scope of discovery, the hearing, the remedy, and the employee population bound by an adverse decision on the merits").

The Board in *D.R. Horton I* also wrongly ignored the significant interests favoring the arbitration of employment disputes and the harm that its decision might cause.<sup>20</sup> Specifically, the Board failed to acknowledge that individualized arbitration offers benefits to both the employer and the employee by providing a relatively low-cost and expedited method of adjudicating disputes. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010) ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes"). Furthermore, the Supreme Court has recognized that class arbitration is antithetical to the advantages parties expect when they agree to arbitrate and impairs the use of arbitration to achieve efficiency,

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<sup>20</sup> The Board wrongly suggested that the size of a class in employment disputes would be relatively small, unlike class actions involving commercial claims, and that its decision implicates "[o]nly a small percentage of arbitration agreements." See *D.R. Horton I*, *supra*, at 16. The reality, however, is that class-wide employment litigation can involve thousands (and sometimes tens or hundreds of thousands) of putative participants and that *D.R. Horton I* impacts a large percentage of the United States workforce, including every employee under the Act that is not subject to a collective bargaining agreement.

confidentiality, and informality. *See Concepcion*, 131 S. Ct. at 1751 (“[C]lass arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment”). The Supreme Court also has expressly recognized the benefits of arbitration in employment disputes:

We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. 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. . . . The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law; as we noted in *Gilmer*, “[b]y 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.”

*Adams*, 532 U.S. at 123.

The Board in *D.R. Horton I* further incorrectly reasoned that the FAA’s savings clause permitted it to declare an arbitration agreement waiving class or collective action procedures unenforceable as contrary to public policy. In reaching this errant conclusion, the Board treated the common law’s “public policy” balancing test as giving it the right to weigh the public policies underlying the NLRA and the NLGA against the FAA’s mandate and clear policy in favor of arbitration. *See D.R. Horton I, supra*, at 14-16.

There is no precedent for applying this balancing test under the FAA and “[t]here is not a single decision, since [the Supreme] Court washed its hands of general common-lawmaking authority, in which [it has] refused to enforce on ‘public policy’ grounds an agreement that did not violate, or provide for the violation of, some positive law.” *E. Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 68 (2000) (Scalia, J., concurring). Because the FAA

reflects an “emphatic federal policy in favor of arbitral dispute resolution,” *KPMG LLP*, 132 S. Ct. at 25, an administrative agency cannot deviate from the congressional commands in the FAA based on the agency’s own assessment of public policy<sup>21</sup> and absent an equally clear Congressional directive in another statute to the contrary. *See CompuCredit*, 132 S. Ct. at 672 (when Congress restricts the use of arbitration, it does so clearly).

**IV. THE BOARD SHOULD ACQUIESCE TO THE DECISIONS OF THE SECOND, FIFTH, AND EIGHTH CIRCUIT COURTS OF APPEALS HOLDING THAT CLASS AND COLLECTIVE ACTION WAIVERS DO NOT VIOLATE THE ACT.**

Given the numerous legal errors in *D.R. Horton I* and its progeny, the Board should take this opportunity to overturn those decisions with the same sanguinity with which it has overturned longstanding decisions in the past several years. *See, e.g., Babcock & Wilcox Constr. Co.*, 361 NLRB No. 132 (2014) (finding that the existing standard does not adequately balance the protection of employees’ rights under the NLRA and the national policy of encouraging arbitration of disputes arising over the application or interpretation of a collective-bargaining agreement); *Lamons Gasket Co.*, 357 NLRB No. 72 (2011) (holding that the approach taken in a prior decision was flawed and returning to the previous rule); *Oakwood Care Ctr.*, 343 NLRB 659 (2004) (concluding that a prior Board case was wrongly decided, and returning to previous precedent); *Levitz Furniture Co. of the Pac.*, 333 NLRB No. 105 (2001) (overturning precedent based on legal and policy reasons).

As the Supreme Court has noted:

The use by an administrative agency of the evolutionary approach is particularly fitting. To hold that the Board’s earlier decisions froze the development . . . of the national labor law would misconceive the nature of administrative decisionmaking. “Cumulative

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<sup>21</sup> In *D.R. Horton I*, the Board improperly relied on its own determination of “public interests” rather than deferring to Congressional purpose. *See D.R. Horton I, supra*, at 14-16. Tellingly, the Board in *Murphy Oil I* did not attempt to defend this aspect of *D.R. Horton I*.

experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process."

*NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (quoting *NLRB v. Seven-Up Co.*, 344 U.S. 344, 349 (1953)).

By overturning its prior decisions rejecting class and collective action waivers as violations of the Act, the Board can put an end to its costly and counterproductive nonacquiescence to the views expressed by the Second, Fifth and Eighth Circuits, and nearly every other federal and state court that has addressed this issue.<sup>22</sup> Acquiescence also will eliminate the threat to national labor policy uniformity, the burdens that the Board's persistent nonacquiescence has placed on private parties, courts, and the government, and the further risk of undermining the public's respect for Board orders. *See Murphy Oil II*, 808 F.3d at 1021 (warning that "[t]he Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders"). Even supporters of the Board's nonacquiescence policy recognize that there must be reasonable limits on such policies in the face of overwhelming judicial opposition to an agency's position. As two commentators have noted:

[E]ven in the absence of Supreme Court review, at some point the law in a particular circuit and across circuits will no longer be in flux. [T]he means are available under [Administrative Procedure

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<sup>22</sup> *See Murphy Oil I, supra*, at 36 n.5 (Johnson, dissenting) (citing dozens of Federal and state courts rejecting *D.R. Horton I*). While *Epic Sys.*, 823 F.3d 1147 and *Ernst & Young, LLP*, 834 F.3d 975 admittedly have followed the Board's position in *D.R. Horton I* and *Murphy Oil I*, those decisions, in turn, have generated substantial disagreement among other courts. *See, e.g., Bekele v. Lyft, Inc.*, No. CV 15-11650-FDS, 2016 WL 4203412, at \*20 (D. Mass. Aug. 9, 2016) (rejecting *Lewis* and observing "it should be noted that the Seventh Circuit's holding in *Lewis* would lead to consequences that are both odd and surely unintended"); *Bruster v. Uber Techs. Inc.*, No. 15-CV-2653, 2016 WL 4086786, at \*3 (N.D. Ohio Aug. 2, 2016) (declining to follow *Lewis*).

Act]-style rationality review, possibly the [Equal Access to Justice Act] and, in egregious cases, the courts' own injunctive powers to prevent nonacquiescence that is not adequately justified.

Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L. J. 679, 727 (1989). Moreover, one Board Member has noted the following:

[R]ather than promote uniformity, the Board's policy of nonacquiescence has fostered a bifurcated system in which litigants willing to pursue their case to the appellate level are able to avoid Board orders. Thus, the Board's policy has had the unintended effect of needlessly protracting litigation, establishing a two-tier system of labor law in the same judicial jurisdiction, encouraging disrespect for Board orders, and antagonizing the courts. The two-tier system places an undue burden on those litigants who lack the resources to pursue matters to the circuit court level. Even worse, it compels them to expend resources in litigating cases in which it is clear that the appropriate circuit will not enforce the Board's order. I believe it inappropriate for the Board to continue this practice.

*Arvin Indus.*, 285 NLRB 753, 762 (1987) (Chairman Dotson, dissenting). Simply put, the Board should refine its position on class and collective action waivers to restore a uniform national labor policy – especially because (as noted earlier) its nonacquiescence is based on an interpretation of statutes and case law outside its jurisdiction and beyond its expertise. *See also Heartland Plymouth*, 838 F.3d at 18 (“[T]he Board should reconsider its single-minded pursuit of its policy goals without regard for the supervisory role of the Third Branch”) (quoting *Glenmark Assocs. Inc. v. NLRB*, 147 F.3d 333, 339 n.8 (4th Cir. 1998)).

### CONCLUSION

For the above reasons, the Board should declare this matter moot and vacate ALJ Laws' Decision. Alternatively, the Board should stay this matter until the Supreme Court has had the opportunity to opine on the theory advanced by the CGC, and relied upon by ALJ Laws in finding that Northrop's maintenance of the DRP violates the Act. In the absence of vacating the Decision or staying this matter, the Board should reverse ALJ Laws' decision on the grounds that

*D.R. Horton I* and *Murphy Oil I* are not dispositive of the lawfulness of Northrop's DRP because the DRP contains unique language not previously addressed by the Board, or alternatively, because those decisions were incorrectly decided.

Dated January 6, 2017.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned certifies that on January 6, 2017 a copy of the foregoing NORTHROP GRUMMAN SYSTEMS CORPORATION'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND SUPPORTING BRIEF was electronically filed with:

Executive Secretary  
National Labor Relations Board  
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