No. ___________

IN THE

Supreme Court of the United States

ALTON J. SANDERS,

Petitioner,

NATIONAL LABOR RELATIONS BOARD,

Real Party in Interest.

v.

24 HOUR FITNESS USA, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a provision in an employment arbitration agreement that prohibits employees from seeking adjudication of any work-related claim on a class, collective, joint, or representative basis in any forum is invalid and unenforceable under Sections 2 and 3 of the Norris-LaGuardia Act, 29 U.S.C. §§ 102, 103, and Sections 7 and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§ 157, 158(a)(1), because it "interfere[s]" with the employees' statutory right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection."

2. Whether such a provision, if otherwise unlawful, is rendered lawful by permitting employees a time-limited pre-dispute opportunity to opt out of the default employment arbitration agreement.

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Alton J. Sanders respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's June 27, 2016 Summary Order is not published in the Federal Reporter, but is available at 2016 WL 3668038 (App. 1a). The December 24, 2015 decision and order of the National Labor Relations Board, as well as the November 6, 2012 decision of the Administrative Law Judge, are available at 363 NLRB No. 84 (App. 5a).

JURISDICTION

The Fifth Circuit's order granting summary disposition was entered on June 27, 2016. On September 20, 2016, Justice Thomas entered an order extending the time for Petitioner Sanders to file a petition for writ of certiorari to and including October 26, 2016. On October 19, 2016, Justice Thomas entered an order further extending the time for Petitioner Sanders to file a petition for writ of certiorari to and including November 23, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Norris-LaGuardia Act ("NLGA"), the National Labor Relations Act ("NLRA"), and the Federal Arbitration Act ("FAA").

Section 2 of the NLGA provides:

> In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:
>
> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly help-

less to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

29 U.S.C. § 102.

Section 3 of the NLGA provides:

Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102 of this title, 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.

29 U.S.C. § 103.

Section 15 of the NLGA provides:

All acts and parts of acts in conflict with the provisions of this chapter are repealed.

29 U.S.C. § 115.

Section 7 of the NLRA provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157.

Section 8(a)(1) of the NLRA provides:

> It shall be an unfair labor practice for an employer—
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . . .

29 U.S.C. § 158(a)(1).

Section 2 of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such

> grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

INTRODUCTION

This is one of several cases currently before the Court that raise the identical issue: whether an employer can prevent its workers from exercising their federal labor law right to join together to seek adjudication of workplace disputes by inserting a clause in an employment arbitration agreement that prohibits those employees from pursuing concerted legal action in any forum. *See NLRB v. Murphy Oil*, No. 16-307 (petition filed Sept. 9, 2016 by Solicitor General on behalf of NLRB); *Epic Sys. Corp. v. Lewis*, No. 16-285 (petition filed Sept. 2, 2016 by employer); *Ernst & Young U.S. LLP v. Morris*, No. 16-300 (petition filed Sept. 8, 2016 by employer); *Patterson v. Raymours Furniture Co., Inc.*, No. 16-388 (petition filed Sept. 22, 2016 by employee).

If such a prohibition were set forth in an individual stand-alone employment agreement, it would surely be unlawful and unenforceable because it would deprive covered employees of the core statutory right guaranteed by the 1932 NLGA and 1935 NLRA—the right to be free from employer interference, restraint, and coercion when seeking to engage in concerted activity for mutual aid and protection. The question in these cases is whether the same prohibition, if inserted instead in an employment arbitration agreement, becomes lawful and enforceable as a result of the 1925 FAA's general policy favoring enforcement of private arbitration agreements according to their terms. In addition to this predicate question, this case presents the further question of, if such a prohibition is otherwise unlawful, may it be redeemed by permitting employees a time-limited pre-dispute opportunity to opt out of the employment arbitration agreement.

An irreconcilable conflict exists among the federal and state appellate courts to have considered the predicate question of whether such a prohibition is permissible under the federal labor statutes and the FAA. *Compare Morris v. Ernst & Young LLP*, 834 F.3d 975 (9th Cir. 2016), *and Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *with Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016), *Murphy Oil v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013), *Sutherland v. Ernst & Young*, 726 F.3d 290 (2d Cir. 2013), *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013), *Tallman v. Eighth Judicial District Court*, 359 P.3d 113 (Nev. 2015), *and Iskanian v. CLS Transp. L.A., LLC*, 59 Cal.4th 348 (2014), *cert denied*, 135 S.Ct. 1155 (2015). That conflict will only deepen if certiorari review is delayed, because the same issue is now fully briefed and pending before at least five more circuit courts of appeal. *See The Rose Group v. NLRB*, 3d Cir. Nos. 15-4092 and 16-1212; *AT&T Mobility Servs., LLC v. NLRB*, 4th Cir. Nos. 16-1099 and 16-1159; *NLRB v. Alternative Entm't, Inc.*, 6th Cir. No. 16-1385; *Everglades Coll., Inc. v. NLRB*, 11th Cir. Nos. 16-10341 and 16-10625; *Price-Simms, Inc. v. NLRB*, D.C. Cir. Nos. 15-1457 and 16-1010. That conflict can only be resolved by this Court.

There is also disagreement as to whether, if otherwise unlawful, such a prohibition may be saved by permitting employees a time-limited pre-dispute opportunity to opt out of the arbitration agreement. The Ninth Circuit has held that, if employees are "fully informed" and able to make a decision whether to opt out "free of any express or implied threats of termination or retaliation," an employment arbitration agreement by which employees waive their right to pursue employment-related claims on a collective basis in any forum, judicial or arbitral, is permissible. *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1075, 1077 (9th Cir. 2014). By contrast, the NLRB has applied long-standing principles to hold such an opt-out regime unlawful because it places a burden on employees to act affirmatively to retain rights guaranteed by the federal labor statutes. *On Assignment Staffing Servs., Inc.*, 362 NLRB No. 189 (2015), *rev'd* 2016 WL 3685206 (5th Cir. Jun. 6, 2016). Because the Fifth Circuit in this case found the matter subject to summary disposition in light of its earlier decisions in *D.R. Horton*, 737 F.3d 344, and *Murphy Oil*, 808 F.3d 1013, which found a prohibition on concerted legal activity lawful under the FAA, it did not reach the secondary question of the effect of the opt-out provision.

For more than 80 years, the National Labor Relations Board has held that an employer violates federal labor law by seeking to enforce any individual employment contract or workplace policy that prohibits its employees from acting in concert to vindicate workplace rights. The right "to engage in . . . concerted activities for the purpose of . . . mutual aid and protection" has long been the core substantive right protected by the NLGA and NLRA; and federal courts have repeatedly agreed with the Board that the right extends to concerted efforts to seek adjudication of claims challenging the lawfulness of an employer's workplace policies and practice. *See, e.g.*, *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978); *Brady v. Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011); *Mohave Elec. Co-op., Inc. v. NLRB*, 206 F.3d 1183, 1188-89 (D.C. Cir. 2000).

The Board first applied these statutory principles to invalidate an employer's use of a mandatory arbitration agreement to prohibit concerted adjudication activity in *D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274 (2012), *rev'd in part*, 737 F.3d 344 (5th Cir. 2013), and it expanded upon that analysis two years later in *Murphy Oil*, 361 NLRB No. 72, 2014 WL 5465454 (2014), *rev'd in part*, 808 F.3d 1013 (5th Cir. 2015). Since then, the Board has reached the same result, under similar if not identical circumstances, in well over 70 cases, many now pending in the federal courts of appeals.

Although the appellate courts that initially reviewed the Board's rulings on this issue denied enforcement to those rulings, principally on the ground that the Board's reasoning was not entitled to deference and that the pro-arbitration policies of the FAA trumped the federal labor statutes,[1] more recent decisions, by the only two circuit courts to "engage[] substantively with the relevant arguments," *Morris*, 2016 WL 4433080 at *10 n.16 (quoting *Lewis*, 823 F.3d at 1159), agreed with the NLRB and concluded that be-

[1] *See D.R. Horton*, 737 F.3d 344; *Owen*, 702 F.3d 1050; *Sutherland*, 726 F.3d 290.

cause of the FAA's "savings clause," 9 U.S.C. § 2, there is no conflict between the FAA and the long-established federal labor policies guaranteeing employees the right to act in concert to vindicate workplace rights. *See Morris*, 2016 WL 4433080 at *7-8; *Lewis*, 823 F.3d at 1157.[2]

Petitioner now asks this Court to resolve the square conflict among state and federal appellate courts and to hold that the Board was correct as a matter of law and acted well within its statutory authority in concluding that an employment contract that prohibits workers from pursuing legal claims on a concerted action basis in all forums is void and unenforceable as a matter of federal labor law, even if included in an employment arbitration agreement. Petitioner further asks this Court either to hold that presenting employees a time-limited, pre-dispute opportunity to opt out of such an employment arbitration agreement

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[2] Similarly, after considering the Seventh Circuit's and Ninth Circuit's analysis, a panel of the Second Circuit wrote: "If we were writing on a clean slate, we might well be persuaded, for the reasons forcefully stated in Chief Judge Wood's and Chief Judge Thomas's opinions in *Lewis* and *Morris*, to join the Seventh and Ninth Circuits and hold that the [employer's arbitration agreement's] waiver of collective action is unenforceable. But we are bound by our Court's decision in *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013)"—which had followed the Fifth and Eighth Circuits in a brief footnote, and which the panel in the later case found controlling absent rehearing en banc. *Patterson v. Raymours Furniture Co., Inc.*, __ F. App'x __, 2016 WL 4598542 (2d Cir. Sept. 2, 2016); *see also SF Markets v. NLRB*, Case No. 16-60186 (5th Cir. Order of July 26, 2016) (Dennis, J., concurring) ("Given the inter-circuit conflict generated by the well-reasoned opinion in *Lewis*, I urge our court to reconsider this issue en banc.").

does not save the agreement because it requires employees to act affirmatively to secure rights the law already provides, or to remand to the Fifth Circuit for that court to consider the secondary question.

Petitioner further asks this Court to designate *NLRB v. Murphy Oil*, No. 16-307, as the lead case—because it is the Board's analysis that is ultimately at issue and because the Solicitor General is best situated to address the interplay among the three federal statutes at issue. Finally, petitioner asks the Court to consider these issues in the context of not only the NLRA and FAA, which were the focus of the Seventh and Ninth Circuit's decisions, but the NLGA as well, which the Board has consistently cited as support for its construction of the NLRA in *D.R. Horton*, *Murphy Oil* and all subsequent cases, including here. App. 52a.[3]

STATEMENT OF THE CASE

A. Facts

Since 2005, Respondent 24 Hour Fitness USA, Inc. ("24 Hour Fitness") has, by default, imposed upon all employees an Arbitration of Disputes Policy ("Arbitration Policy") requiring arbitration of workplace disputes and prohibiting class, collective, joint and representative actions.[4] In its original form, this pro-

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[3] *See*, *e.g.*, *D.R. Horton*, 357 NLRB No. 184 at *7-8, 16; *Murphy Oil*, 361 NLRB No. 72 at *13-14; *On Assignment Staffing*, 362 NLRB No. 189, 2015 WL 5113231 at *1, 10, 12 (2015), *rev'd by* 2016 WL 3685206 (5th Cir. June 6, 2016).

[4] The Company's Arbitration Policy also prohibits employees from disclosing to their co-workers or others than an arbitration is pending. Jt. Ex. 2(a) (". . . Except as may be required

hibition, which appeared in a lengthy employee handbook, provided:

> . . . However, there will be no right or authority for any dispute to be brought, heard or arbitrated *as a class action*, *private attorney general*, *or in a representative capacity* on behalf of any person.

Jt. Ex. 2(a) (emphasis added).[5] Shortly after adopting this prohibition, 24 Hour Fitness revised it to be more explicit:

> . . . However, 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 actions)*, *or in a representative or private attorney general capacity on behalf of a class of persons or the general public* . . . .

Jt. Ex. 2(b) (emphasis added). Although the employee handbook has been revised at least twice (in 2007 and 2010), this portion of the Arbitration Policy remained unchanged through February 2011, when Sanders filed his charge with the National Labor Relations Board.[6]

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by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties."); Jt. Ex. 3(b) (same).

[5] Citations are to the record created before the Administrative Law Judge. Because the Fifth Circuit summarily disposed of the Petition for Review no record was filed with that court.

[6] *See* Jt. Stip. 6 & Jt. Ex. 6; *see also* Jt. Ex. 3(b), 3(c) (revised handbooks, apparently from 2007), Jt. Ex. 3(d) (2010 revised handbook).

In 2007, 24 Hour Fitness began to offer employees a time-limited opportunity to opt out of the default Arbitration Policy. The opportunity to opt out and the procedure for doing so were not described in the employee handbook, but rather in an Employee Handbook Receipt Acknowledgement form. That form provided:

> I have received the January 2005 handbook and I understand that in consideration for my employment it is my responsibility to read and comply with the policies contained in this handbook and any revisions made to it. In particular, I agree that if there is a dispute arising out of or related to my employment as described in the "Arbitration of Disputes" policy, I will submit it exclusively to binding and final arbitration according to its terms, unless I elect to opt out of the "Arbitration of Disputes" policy as set forth below.
>
> *I understand that I may opt out of the "Arbitration of Disputes" policy by signing the Arbitration of Disputes Opt-Out Form ("Opt-Out Form") and returning it through interoffice mail to the CAC/HR File Room no later than 30 calendar days after the date I received this handbook*, as determined by the Company's records. I understand that I can obtain the Opt-Out Form by calling the employee Hotline at 1.866.288.3283. I understand that if I do not opt out, disputes arising out of or related to my employment will be resolved under the "Arbitration of Disputes" policy. I understand that my decision to opt out or not opt out will not be used as a basis for the Company taking any retaliatory action against me.

Jt. Ex. 5 (emphasis added).

At the same time, 24 Hour Fitness began adding a reference to this new opt-out procedure in its Employment Application form: "I understand that as an expeditious and economical way to settle employment disputes without need to go through court, 24 Hour Fitness agrees to submit such disputes to final and binding arbitration . . . [applicants] may opt out of the arbitration procedure within a specified period of time, as the procedure provides." Resp. Ex. 1. Nothing in the Employment Application form explains that by failing to opt out of arbitration, the employees will be forever forfeiting any and all right to pursue class, collective, joint or representative rights in court *or* in arbitration or to be permitted to discuss with co-workers the pendency or results of any arbitration. *Id.*

At some point in 2009 or 2010, 24 Hour Fitness also began offering some employees an electronic version of its Arbitration Policy. *See* Jt. Ex. 2(d). That electronic version includes the same prohibitory language as the hard copy version. The electronic version also adds three paragraphs at the end to describe the company's opt-out procedures, which state:

> I agree that if there is a dispute arising out of or related to my employment as described in the Arbitration of Disputes Policy, I will submit it exclusively to binding and final arbitration according to its terms, unless I elect to opt out of the Arbitration of Disputes Policy as set forth below.
>
> I understand that I may opt out of the Arbitration of Disputes Policy by signing the Arbitration of Disputes Opt-Out Form ("Opt-Out Form") and returning it through interoffice mail to the CAC/HR File Room no later than 30 calendar days after the date I click

> on the button below. I understand that I can obtain the Opt-Out Form by calling the Employee Hotline at 1.866.288.3283. I understand that if I do not opt out, disputes arising out of or related to my employment will be resolved under the Arbitration of Disputes Policy. I understand that my decision to opt out or not opt out will not be used as a basis for 24 Hour Fitness taking any retaliatory action against me.
>
> I UNDERSTAND THAT BY ENTERING MY INITIALS AND CLICKING THE "CLICK TO ACCEPT" BUTTON, I AM AGREEING TO THE ARBITRATION OF DISPUTES POLICY (WHICH INCLUDES MY ABILITY TO OPT-OUT OF THE POLICY WITHIN THE PERIOD OF TIME NOTED ABOVE). I ALSO AGREE THAT THIS ELECTRONIC COMMUNICATION SATISFIES ANY LEGAL REQUIREMENT THAT SUCH COMMUNICATION BE IN WRITING.

Jt. Ex. 2(d).[7]

Given the complexity of the Company's opt-out procedures and the absence of any explicit linkage of the time-limited opportunity to opt out and preservation of the right to pursue class, collective, joint and representative actions for workplace disputes, it is no surprise that very few employees were able to opt-out

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[7] An alternate version of the electronic form includes an identical class action prohibition and disclosure ban and the same statement about all disputes being arbitrable, but omits the third (capitalized) paragraph. Jt. Ex. 2(e). This alternate version also provides different instructions for obtaining opt-out forms and directs employees to submit the forms to the company's Legal Department rather than to the CAC/HR File Room. *Id.* The record does not indicate which new hires received this alternate version.

of the Arbitration Policy. Before the ALJ, 24 Hour Fitness was able to identify only 35 employees who timely and successfully completed this opt-out process in the five years it had been available (although the Company contended that up to 70 individuals may have actually opted out). Jt. Stip. 24. Between January 1, 2007 and the time of the hearing before the ALJ, 24 Hour Fitness hired approximately 70,000 individuals. Jt. Stip. 24. Adding to this an estimate of the number of new hires prior to 2007 yields a total of 85,366 employees hired since 2005—of which only 35 (0.04%) to 70 (0.08%) successfully opted out. *This means that between 99.92% and 99.96% of 24 Hour Fitness employees were deemed to have forfeited their Section 7 and NLGA rights through inaction.*

B. Proceedings Below

On February 15, 2011, Sanders filed an unfair labor practice charge with Region 20 of the National Labor Relations Board, alleging that 24 Hour Fitness's Arbitration Policy violated the NLRA.[8] On April 30, 2012, the Regional Director for Region 20 issued a formal complaint alleging that the Company violated Section 8(a)(1) by maintaining and enforcing a provision in the Arbitration Policy that requires employees to forego any rights they have to the resolution of employment-related disputes by collective or class action. App. 24a.

On November 6, 2012, an Administrative Law Judge

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[8] Sanders' charge was triggered, in part, by 24 Hour Fitness' motion to compel arbitration in *Fulcher v. 24 Hour Fitness*, No. RG 10524911 (Alameda Cnty. Sup. Ct., Cal.), a race- and sex-based discrimination class action in which Sanders was a putative class member. See App. 38a.

issued a decision finding that "[24 Hour Fitness's] arbitration policy with its class action ban and its nondisclosure provision amounts to the type of private employment agreement that is unlawful and unenforceable under the NLRA because it severely restricts protected concerted employee activity." App. 58a. The ALJ also explained that the limited opportunity to opt out of the Arbitration Policy did not render it lawful because "[t]he requirement that employees must affirmatively act to preserve rights already protected by Section 7 rights through the opt-out process is . . . an unlawful burden on the right of employees to engage in collective litigation that may arise in the future." *Id.* at 54a.

On December 24, 2015, the NLRB issued a Decision and Order affirming, in large part, the ALJ's findings and conclusions of law. App. 5a. In particular, applying its prior decisions in *D.R. Horton* and *Murphy Oil*, the Board found that the prohibition on class, collective, joint and representative actions violated Section 8(a)(1) of the NLRA. *Id.* at 6a-7a. The Board also found that the opportunity to opt out of the Arbitration Policy did not save the policy because it "still imposes an unlawful mandatory condition of employment that falls squarely within the rule of *D.R. Horton . . . .*" *Id.* at 8a (citing *On Assignment Staffing*, 362 NLRB No. 189).

24 Hour Fitness sought review of the NLRB's decision, choosing to file its Petition for Review in the Fifth Circuit, and Sanders moved to intervene before the Court of Appeals. The Fifth Circuit granted Sanders leave to intervene. App. 3a. Before its opening brief was due, 24 Hour Fitness filed a motion for summary disposition, arguing that the outcome of its Petition for

Review was controlled by the Fifth Circuit's prior decisions in *D.R. Horton*, 737 F.3d 344, and *Murphy Oil*, 808 F.3d 1013. Over oppositions from Sanders and the NLRB, on June 27, 2016, the Fifth Circuit issued a one-sentence per curiam order granting 24 Hour Fitness's motion for summary disposition. App. 1a.

REASONS THE PETITION SHOULD BE GRANTED

A. There Is a Clear and Irreconcilable Conflict Among the Appellate Courts

Although the Board has been entirely consistent in its analysis of the *D.R. Horton* issue over the past four years (and in decades of prior Board decisions invalidating employer contracts and policies that interfered with Section 7-protected group legal activity), federal and state appellate courts have recently been anything but consistent in their treatment of the issue presented. To be sure, none of those courts seem to have questioned the Board's threshold ruling that Sections 7 and 8(a)(1) of the NLRA and Sections 2 and 3 of the NLGA preclude employers from interfering with employee efforts to pursue workplace legal claims on a concerted action basis. Yet there is a clear and irreconcilable split of authority concerning whether an employer can insulate an otherwise unlawful prohibition against concerted legal activity from invalidation by inserting that prohibition into employment arbitration agreement covered by the FAA.

The Board first explained in *D.R. Horton*, 357 NLRB No. 184, 2012 WL 36274 (2012), why an employer commits an unfair labor practice by including a prohibition against concerted adjudication activity in its employment arbitration agreements. The Board began by analyzing the statutory history of the right to engage in concerted activity free from employer interference and the centrality of that right to federal labor policy, *id.* at *2-*10—an analysis that requires judicial deference. *See NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984). The Board then turned to the FAA and concluded that no conflict existed between the two sets of statutes because the FAA § 2 savings clause does not permit enforcement of arbitration provisions that violate public policy and federal law, 2012 WL 36274 at *14, and because an arbitration agreement may not require parties to waive substantive federal statutory rights, *id.* at *12-*13. The Board further explained that even if there were a conflict between the two statutory regimes, the FAA would have to yield to the later-enacted federal labor statutes. *Id.* at *16.

Two years later, in *Murphy Oil*, 361 NLRB No. 72, 2014 WL 5465454 (2014), the Board deepened and expanded this statutory analysis, including by addressing at greater length the NLGA origins of the underlying rights. Subsequent to *Murphy Oil*, the Board has applied this same analysis in scores of cases, consistently holding that employers may not insulate an otherwise unlawful prohibition against concerted legal activity from invalidation by embedding it in a pre-dispute arbitration agreement. These Board rulings do not prevent employers from requiring arbitration of workplace claims; rather, consistent with the NLGA and NLRA, they require employers to provide either an arbitral or a judicial forum when their employees seek to pursue workplace claims on a concerted action basis.

The Fifth and Eighth Circuits rejected the Board's *D.R. Horton* reasoning, refusing to grant deference to the Board's construction of the NLRA and concluding that the right to concerted legal activity guaranteed by the federal labor statutes must yield in the face of the FAA's policy favoring enforcement of private arbitration agreements. In *Owen*, 702 F.3d 1050, the Eighth Circuit concluded that Congress had demonstrated an intent to elevate federal arbitration policy over federal labor policy by including the FAA in its recodification of the U.S. Code in 1947 (even though that re-codification was non-substantive, H.R. Rep. No. 80-251 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1511 (1947 recodification made "no attempt" to amend existing law); H.R. Rep. No. 80-225 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1515 (same)), 702 F.3d at 1053; and it further concluded that an employee's ability to file administrative claims with the Department of Labor or other agencies to challenge certain workplace violations was sufficient to protect the employees' statutory right to engage in concerted legal activity. *Id.* at 1053-54; *see also Cellular Sales*, 824 F.3d at 776 (following *Owen*). The Eighth Circuit's decisions did not address the relevance or effect of the FAA's savings clause.

The Fifth Circuit also rejected the Board's reasoning, in a series of cases starting with *D.R. Horton* itself. Relying on this Court's state law preemption decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), a divided panel (Graves, J. dissenting) concluded that to allow the Board to invalidate an employee's contractual waiver of the right to engage in concerted adjudication activity would "'[i]nterfere with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.' Requiring a class mechanism is an actual impediment to arbitration and violates the FAA." *D.R. Horton*, 737 F.3d at 359-60 (quoting *Concepcion*, 563 U.S. at 344). The Fifth Circuit further concluded that because the federal labor statutes contained no "contrary congressional command," the right to concerted legal activity must yield to the policy favoring arbitration. *Id.* at 360-62; *see also Murphy Oil*, 808 F.3d 1013 (following *D.R. Horton*).[9]

By contrast, the circuit courts that have more recently analyzed the merits of the Board's analysis have held that the Board's construction of its own statute, the NLRA, is entitled to deference and that the FAA's savings clause eliminates any potential statutory conflict. In *Lewis*, 823 F.3d 1147, the Seventh Circuit (in an opinion authored by Chief Judge Wood) examined the history of the right to concerted activity, *id.* at 1151-53, and concluded that "[c]ontracts 'stipulat[ing] . . . the renunciation by the employees of rights guaranteed by the [NLRA]' are unlawful and may be declared to be unenforceable by the Board." *Id.* at 1152 (quoting *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 365 (1940)) (alterations in origi-

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[9] The Nevada Supreme Court followed suit in *Tallman v. Eighth Judicial District Court*, 359 P.3d 113 (Nev. 2015), as did the California Supreme Court in *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal.4th 348 (2014), over a forceful dissent that explained why there is no conflict between the federal labor statutes and the FAA and why individual employment contracts prohibiting concerted legal activity violate the NLGA and its underlying purposes, *id.* at 397-406 (Werdegar, J., concurring and dissenting).

nal). The unanimous panel (in a decision that was circulated to every active judge before issuance, *id* at 1157 n.†) further held that no conflict existed between the NLRA and the FAA: "Here, the NLRA and FAA work hand in glove" because the latter's savings clause prevents enforcement of contract terms that violate federal statutory rights, *id.* at 1157, and because the NLRA is expressly "*pro*-arbitration." *Id.* at 1158 (emphasis in original). Explaining why this Court's recent arbitration decisions do not require a different result, the panel further noted that none of those decisions address the statutory rights at issue under *D.R. Horton* or suggest that all arbitration contracts are necessarily enforceable by their terms. *Id.* Rather, as this Court has repeatedly recognized, Congress' goal in enacting the FAA was to make arbitration agreements "as enforceable as other contracts, but not more so." *Id.* at 1159 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)).

The Ninth Circuit reached the same result in *Morris*, __ F.3d __, 2016 WL 4433080, in which Chief Judge Thomas, writing for a divided panel (Ikuta, J., dissenting) concluded that no conflict exists between the NLRA and FAA because "when an arbitration contract professes to waive a substantive federal right, the saving clause of the FAA prevents the enforcement of that waiver." *Id.* at *8. The panel further noted that enforcing the right to concerted legal activity in this context does not disfavor arbitration because "[t]he same provision in a contract that required court adjudication as the exclusive remedy would equally violate the NLRA," *id.* at *6, and adding that "our holding is simply that when arbitration or any other mechanism is used exclusively, substantive federal rights continue to apply in those proceedings." *Id.* at *10. Accordingly, the panel concluded: "The NLRA establishes a core right to concerted activity. Irrespective of the forum in which disputes are resolved, employees must be able to act in the forum *together*." *Id.* (emphasis in original).

Most recently, the Second Circuit determined that absent rehearing en banc it was bound by a footnote in an earlier decision following the Fifth and Eighth Circuits in rejecting *D.R. Horton*. *Patterson*, 2016 WL 4598542, at *2-3 (citing *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013)). After considering the Seventh and Ninth Circuits' analysis, however, the Second Circuit panel wrote: "If we were writing on a clean slate, we might well be persuaded, for the reasons forcefully stated in Chief Judge Wood's and Chief Judge Thomas's opinions in *Lewis* and *Morris*, to join the Seventh and Ninth Circuits and hold that the [employer's arbitration agreement's] waiver of collective action is unenforceable. But we are bound by our Court's decision in *Sutherland*." *Id.* at *2.

Thus, the Seventh and Ninth Circuits have joined the NLRB in holding that employees may not be required to waive the right to engage in concerted adjudication activity, and that no conflict exists between the federal labor statutes and the FAA because of the FAA's savings clause, 9 U.S.C. § 2. By contrast, the Fifth and Eighth Circuits, as well as the Second Circuit (although not without expressing discomfort with the controlling circuit authority), and the California and Nevada Supreme Courts have rejected the

Board's reasoning and have concluded that the right to concerted legal activity must yield in the face of the FAA's general policy favoring enforcement of private arbitration agreements according to their terms.

These competing decisions create enormous uncertainly concerning an issue of utmost importance to workers and employers throughout the country concerning the scope and enforceability of the "core, substantive right" established by Congress in the NLGA and NLRA more than 80 years ago. *Morris*, 2016 WL 4433080 at *9. Because the conflict between the courts of appeals is irreconcilable, plenary review by this Court is both necessary and appropriate.

Petitioner requests that the Court grant certiorari in the pending Fifth Circuit *Murphy Oil* case and hold this petition until that case is resolved, thus permitting the Solicitor General, on behalf of the federal administrative agency charged with implementing and enforcing federal labor policy, to take the lead in defending the Board's underlying analysis in these cases.

B. The Decision Below Deprives Workers of the Core, Substantive Right Guaranteed by the Federal Labor Statutes, and it Conflicts with this Court's Precedents Applying Those Statutes

Since the early 1930s, federal labor policies and statutes have guaranteed employees the right to engage in "concerted activities for the purpose of . . . mutual aid or protection." This fundamental principle of national labor policy was first established by the NLGA in 1932, when Congress declared as "the public policy of the United States" that individual employees have the right to be "free from the interference, restraint, or coercion of employers" in the "designation of . . . representatives" and "other concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 102. In unequivocal terms, the NLGA states that "[*a*]*ny* undertaking or promise . . . in conflict with" that policy is "contrary to the public policy of the United States [and] *shall not be enforceable in any court* of the United States . . . ." *Id.* § 103 (emphasis added). The NLGA also includes a clear expression of Congress's intent to ensure the primacy of this statutory right, as it further states: "All acts and parts of acts in conflict with the provisions of this chapter are repealed," *id.* § 115; *see also On Assignment Staffing Servs.*, 2015 WL 5113231 at *10 (describing purpose and scope of NLGA).

The NLGA was enacted in response to employers' then-common practice of requiring workers to submit to contract terms prohibiting them from joining a union (or certain unions) or from engaging in other group or concerted action to improve workplace conditions. *See Iskanian*, 59 Cal.4th at 397-400 (Werdegar, J., concurring and dissenting) (describing history of NLGA and explaining that "[e]ight decades ago, Congress made clear that employees have a right to engage in collective action and that contractual clauses purporting to strip them of those rights as a condition of employment are illegal"); *id.* at 399 (quoting the NLGA's co-sponsor, who urged enactment to "end a regime in which 'the laboring man . . . must singly present any grievance he has.' " (Remarks of Sen. Norris, Debate on Sen. No. 935, 72nd Cong., 1st Sess., 75 Cong. Rec. 4504 (1932))); Matthew W. Finkin, *The Meaning and*

Contemporary Vitality of the Norris LaGuardia Act, 93 Neb. L. Rev. 6 (2014).

Just three years after Congress enacted the NLGA, it reiterated those central principles of federal labor policy in the NLRA, which created the Board and vested in it the authority to construe and administer the statutory right of employees to engage in concerted activity. In the section of the NLRA entitled "Rights of employees as to organization, collective bargaining, etc.," Congress expressly guaranteed "[e]mployees . . . the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection," 29 U.S.C. § 157; and in the next section, Congress provided that "[i]t shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title," 29 U.S.C. § 158(a)(1); *see also Murphy Oil*, 2014 WL 5465454, at *1, *9-*10, *13 (describing statutory basis and history of right to engage in concerted activity). Both Depression-era labor statutes were enacted to redress the enormous disparity of bargaining power that left individual employees unable to meaningfully improve the terms and conditions of their employment. *See Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 753-54 (1985). As this Court has explained, Congress chose to protect the right to engage in concerted activity under Section 7 "not for [its] own sake but as an instrument of the national labor policy . . . ." *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975); *see also NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (NLRA and NLGA right to engage in collective activity is "fundamental" to national labor policy).

The broad statutory guarantee of the right to engage in concerted activity has long been held to protect collective efforts to improve working conditions "through resort to administrative and judicial forums"—*i.e.*, through group adjudication (which of course encompasses more than just class actions). *Eastex, Inc. v. NLRB*, 437 U.S.at 565-66; *Brady*, 644 F.3d at 673 ("a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under § 7 of the [NLRA]"); *Mohave Elec. Co-op.*, 206 F.3d at 1188-89 (filing judicial petition "supported by fellow employees and joined by a co-employee" constitutes protected concerted activity); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365, 1975 WL 6428, *2-*3 (1975) ("filing of the civil action by a group of employees is protected activity"), *enforced*, 567 F.2d 391 (7th Cir. 1977) (mem. disp.), *cert. denied*, 438 U.S. 914 (1978); *see also City Disposal Sys. Inc.*, 465 U.S. at 835 ("There is no indication that Congress intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way.").

Any employer policy or agreement that interferes with, restrains, or coerces employees in their exercise of Section 7 rights constitutes an unfair labor practice under Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), a result that is especially clear when the employer, like respondent here, imposes a workplace policy or agreement that "*explicitly* restricts activities protected by Section 7." *Martin Luther Mem'l Home, Inc.*, 343 NLRB 646, 646, 2004 WL 2678632, *1 (2004) (emphasis in original). An employment arbitration agreement that prohibits employees from initiating, joining, or supporting group legal activity to enforce workplace rights, like any other contract or workplace policy prohibiting concerted protected activity, is therefore unlawful on its face as a matter of federal labor law. *See id.* at 646 n.5; *Ashley Furniture Indus. Inc.*, 353 NLRB 649, 653-54, 2008 WL 5427716, *10-*11 (2008).

If 24 Hour Fitness had inserted its prohibition against concerted legal activity in a stand-alone employment contract or in a stand-alone workplace policy rather than as part of its Arbitration Policy, the prohibition would surely be unenforceable under Sections 7 and 8(a)(1) of the NLRA and Sections 2 and 3 of the NLGA. *See, e.g.*, *Convergys Corp.*, 363 NLRB No. 51, 2015 WL 7750753 (2015). Surely an employer cannot obtain a different result by the simple expedient of embedding its prohibition in a pre-dispute employment arbitration agreement. If statutory labor protections could be bypassed so easily, nothing would prevent employers from prohibiting their employees from picketing, striking, or taking other concerted actions to improve workplace conditions—as long as the employer required its employees to pursue their workplace complaints through an individual arbitration procedure instead.

The reason this absurd result is not required by the FAA is because Congress in 1925 included in the FAA a broad savings clause, which provides that an arbitration agreement, like any other contract, is *not* enforceable if any “grounds . . . exist at law or in equity for [its] revocation . . . .” 9 U.S.C. § 2. As this Court explained in *Prima Paint*, 388 U.S. 395, “the purpose of Congress [in enacting the FAA] was to make arbitration agreements as enforceable as other contracts, but not more so. To immunize an arbitration agreement from judicial challenge [on grounds applicable to other contracts] would be to elevate it over other forms of contract . . . ." *Id.* at 404 n.12; *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006) ("substantive command" of FAA is that "arbitration agreements be treated like all other contracts"). Because contracts that violate expressly stated public policy are void and unenforceable, *see, e.g.*, *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987), any contract term that violates the NLRA and/or NLGA is invalid, both as a matter of national labor policy and under the specific provisions of the NLGA. *See, e.g.*, *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982) ("It is . . . well established . . . that a federal court has a duty to determine whether a contract violates federal law before enforcing it."); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) (courts may not enforce individual employment contract provisions that violate the NLRA); 29 U.S.C. § 103 ("Any undertaking or promise . . . in conflict with the public policy declared in section 102 of this title, 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.").[10]

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[10] This Court's decision in *CompuCredit Corp v. Greenwood*, __ U.S. __, 132 S.Ct. 665 (2012), does not require a different result. In *CompuCredit*, this Court considered whether claims under the Credit Repair Organization Act ("CROA") were arbitrable. The Court held that because CROA contained no express command to the contrary, the consumer

When a question arises concerning a potential conflict among federal statutes, the relevant inquiry is one of "implied repeal"—whether Congress intended to repeal part or all of a previously enacted statute as a result of its enactment of a subsequent, inconsistent statute. Findings of implied repeal are highly disfavored and may never be presumed. *See*, *e.g.*, *J.E.M. Ag Supply*, *Inc. v. Pioneer Hi-Bred Intern.*, *Inc.*, 534 U.S. 124, 142 (2001) ("stringent" standard requires "irreconcilable conflict"); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (intention must be "clear and manifest"). Certainly the 1925 FAA did not repeal *in advance* the fundamental labor law right to join with co-workers in seeking to vindicate workplace rights through collective legal activity, especially because Section 15 of the NLGA, 29 U.S.C. § 115, expressly states Congress's intent to supersede prior, inconsistent statutory law. But even if there were a conflict between the federal labor statutes and the FAA, it would have to be resolved in favor of the later-enacted labor statutes. *See Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936) (in the rare case

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plaintiffs would be bound by their agreement to arbitrate their statutory CROA claims. *Id.* at 670, 673. Nothing in that case held that the FAA would require enforcement of an arbitration agreement that deprived a contracting party of rights protected by federal statute or that would be unenforceable under another federal statute. For example, Title VII would surely preclude enforcement of an arbitration agreement that required all gender discrimination claims to be heard by male arbitrators, or that required Hispanic employees to comply with burdensome arbitration procedures that did not apply to claims filed by other employees—even though nothing in Title VII expressly refers to the FAA.

of an "irreconcilable" statutory conflict, the later-enacted statute controls).[11]

Moreover, permitting employees a time-limited opportunity to opt out of an otherwise unlawful prohibition on concerted legal activity does not eliminate the violation of rights secured by the federal labor statutes. An employer cannot impose forfeiture of such rights as the default condition of employment and then require that its employees act affirmatively in order to reinstate such rights. *See On Assignment Staffing*, 362 NLRB No. 189 at *5-*7. The Board has explained that such a procedure is inherently coercive and violative of the NLRA and NLGA in at least two ways. First, "the opt-out procedure interferes with Section 7 rights by requiring employees to take affirmative steps . . . to retain those rights," *id.* at *5, and "the fact that employees must take any steps to preserve their Section 7 rights burdens the exercise of those rights," *id.* at *6; *see also id.* at *5 ("Section 8(a)(1)'s reach is not limited to employer conduct that completely prevents the exercise of Section 7 rights. Instead, the long-established test is whether the employer's conduct *reasonably tends to interfere* with the free exercise of employee rights under the Act."). Second, the "opt-out procedure interferes with Section 7 rights because it requires employees who wish to retain their right to pursue class or collective claims to 'make an observable choice that demonstrates their support for or rejection of' con-

[11] Although the NLRA was substantively amended in 1947, Taft-Hartley Act, Pub. L. 80-101, 61 Stat. 136 (1947), the FAA has not been, and the 1947 re-codification was not a substantive reenactment. *See supra* at 19.

certed activity," and placing the burden on employees to visibly reject their employer's "strong preference" is inherently coercive. *Id.* at *6, *7.[12] The Board's construction of 8(a)(1) with respect to the effect of the opt out provision is entitled to the same deference as its construction of Section 8(a)(1) in other contexts. *City Disposal Sys.*, 465 U.S. at 829.

The decision of the Fifth Circuit in this case, as well as those of the Second and Eighth Circuits, improperly allow employers to use the FAA as a mechanism to extinguish their employees' fundamental statutory right to pursue workplace claims on a concerted action basis by prohibiting such concerted action in a pre-dispute employment arbitration agreement. Allowing those decisions to stand would presage a return to precisely the type of Depression-era employer conduct that the NLGA, and later the NLRA, were enacted more than 80 years ago to prevent.

C. The Issue Presented is of Great Importance for Workers and Employers Around the Country and a Uniform Rule is Necessary

The question presented is of great nationwide importance. Due to the relatively low monetary value of

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[12] Similarly, this Court has repeatedly held that employer pressure to enter into an agreement to waive Section 7 rights violates the NLRA even if not all employees succumb to that pressure. *See J.I. Case*, 321 U.S. at 337; *Nat'l Licorice*, 309 U.S. at 360; *see also NLRB v. J.H. Stone & Sons*, 125 F.2d 752, 756 (7th Cir. 1942); *D.R. Horton*, 357 NLRB No. 184 at *5-*7. And the NLGA provides that it is the "public policy of the United States" that workers be "free from . . . interference, restraint, or coercion . . . in . . . concerted activities for . . . mutual aid or protection." 29 U.S.C. § 102.

many individual employees' workplace claims and the relatively high costs of litigation, workers have long relied on their ability to band together to pursue workplace grievances and enforce their rights, including through class, collective, joint, and representative actions. In the absence of the right to join together it becomes nearly impossible for many workers to vindicate workplace rights, leaving employers effectively immune from legal challenge. Perhaps for this reason, employers throughout the country have begun routinely to include clauses in their arbitration agreements that strip workers of their right to pursue legal claims in conjunction with their co-workers. *See* Nicole Wredberg, *Subverting Workers' Rights: Class Action Waivers and the Arbitral Threat to the NLRA*, 67 HASTINGS L.J. 881 (2016); Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011). The sheer number of Board decisions striking down such provisions in the four years since *D.R. Horton* shows how pervasive this rights-stripping practice has become.

The Court now has five petitions pending before it that present the same legal issue. The underlying conflict among the federal and state appellate courts is causing great uncertainty to workers and employers alike, including employers like 24 Hour Fitness that operate in different states and different circuits, and whose ability to enforce their contractual prohibition against concerted adjudicative activity may depend on whether they are sued in state or federal court, or in which state, or whether an unfair labor practice charge is filed separately or in conjunction with such a lawsuit. Further delay in resolving this issue will only lead to greater uncertainty. Thus, whether the Court grants certiorari in *Murphy Oil*, in this case, or in one of the others, it is critical that this issue be resolved this Term.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and hold this case pending resolution of *NLRB v. Murphy Oil*, No. 16-307, in which certiorari should also be granted.

Respectfully submitted,

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November 2016

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-60005

24 HOUR FITNESS USA, INCORPORATED,
Petitioner,
v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Review of an Order of the National Labor Relations Board

Before DAVIS, JONES, and HAYNES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that petitioner's opposed motion for summary disposition is **GRANTED**.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-60005

24 HOUR FITNESS USA, INCORPORATED,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Review of an Order of the National Labor Relations Board

ORDER:

IT IS ORDERED that the opposed motion of Alton J. Sanders to intervene in support of the respondent is **GRANTED**.

/s/ W. Eugene Davis
W. EUGENE DAVIS
UNITED STATES CIRCUIT JUDGE

APPENDIX C

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

24 Hour Fitness USA, Inc. ***and*** **Alton J. Sanders.**

Case 20–CA–035419

December 24, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On November 6, 2012, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel filed an answering brief and cross-exceptions with a supporting brief. The Charging Party together with the Intervenor Union (collectively, the Charging Party) filed a cross-exception and a combined brief in opposition to the Respondent's exceptions and in support of its cross-exception. The Respondent filed a combined answering brief to the Acting General Counsel's and Charging Party's cross-exceptions, and separate reply briefs to the Acting General Counsel's and the Charging Party's answering briefs. In addition, the Chamber of Commerce of the United States of America filed an amicus curiae brief in support of the Respondent.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Applying the Board's decision in *D. R. Horton*, 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), the judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an arbitration policy that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part *Murphy Oil USA, Inc. v. NLRB*, No. 14–60800 (5th Cir. 2015), the Board reaffirmed the relevant holdings of *D. R. Horton*, supra.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and, based on the judge's application of *D. R. Horton*, and on our subsequent decision in *Murphy Oil*, we affirm the judge's rulings, findings, and conclusions,[2] and

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[1] The Respondent has requested oral argument. The request is denied as the record and briefs adequately present the issues and the positions of the parties.

[2] For the reasons fully stated in *Murphy Oil*, we reject the Respondent's contentions that *D. R. Horton* was not decided by a validly appointed Board, that it was wrongly decided and should be overruled, and that its holding is inconsistent with Supreme Court decisions regarding the Federal Arbitration Act issued both before and after *D. R. Horton* was decided.

adopt the recommended Order as modified and set forth in full below.[3]

[3] There were 11 identified collective lawsuits in which the Respondent sought to enforce the class action ban portion of its arbitration policy during the 6 months preceding the unfair labor practice charge. While the parties' exceptions were pending with the Board, we took administrative notice of documents indicating that 6 of the 11 lawsuits had been dismissed with prejudice at the plaintiffs' request. Therefore, to the extent that the plaintiffs in the 11 identified lawsuits have not already settled their respective claims against the Respondent, and consistent with our decision in *Murphy Oil*, supra, at 21, we amend the judge's remedy and shall order the Respondent to reimburse those plaintiffs for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful motions in the identified courts to compel individual arbitration of their class or collective claims. See *Bill Johnson's Restaurants v. NLRB*, 461 U. S. 731, 747 (1983) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" as well as "any other proper relief that would effectuate the policies of the Act.").

We reject our dissenting colleague's view that the Respondent's motions to compel arbitration were protected by the First Amendment's Petition Clause. In *Bill Johnson's* the Court identified two situations in which a lawsuit enjoys no such First Amendment protection: where the action is beyond a State court's jurisdiction because of Federal preemption, and where "a suit . . . has an objective that is illegal under federal law." 461 U.S. at 737 fn. 5. Thus, the Board may properly restrain litigation efforts such as the Respondent's motions to compel arbitration that have the illegal objective of limiting an employee's exercise of Sec. 7 rights and enforcing an unlawful contractual provision, even if the litigation was otherwise meritorious or reasonable. See *Murphy Oil*, supra, slip op. at 20–21.

Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No.

1. The Respondent and our dissenting colleague contend that the opt-out provision of the arbitration policy places it outside the scope of the prohibition against mandatory individual arbitration agreements under *D. R. Horton*. Deciding an issue left open in *D. R. Horton*, the Board now has rejected this argument, holding that an opt-out procedure still imposes an unlawful mandatory condition of employment that falls squarely within the rule of *D. R. Horton* and affirmed in *Murphy Oil*. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 1, 4–5 (2015). The Board further held in *On Assignment*, slip op. at 1, 5–8, that even if nonmandatory, an arbitration policy precluding collective action in all forums is unlawful because it requires employees to prospectively waive their Section 7 right to engage in concerted activity.[4]

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8 (2010). See *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991) ("[I]n makewhole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses"), enfd. 973 F.2d 230 (3d Cir. 1992).

To the extent that any of the 11 identified lawsuits are still pending in court, we shall also amend the judge's remedy to order the Respondent to notify the identified courts that it has rescinded or revised the arbitration policy and to inform the courts that it no longer opposes plaintiffs' lawsuits on the basis of the arbitration policy.

We shall substitute a new notice to conform to the Order as modified.

[4] Our dissenting colleague also observes that the Act "creates no substantive right for employees to insist on class-type treatment of non-NLRA claims." This is surely correct, as the Board has previously explained in *Murphy Oil*, supra, slip op. at 2, 16 and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 and

2. We also reject the Respondent's contention that the asserted potential for joinder of claims under its arbitration policy renders the policy lawful. We need not decide whether an unambiguous provision for arbitral joinder, standing alone, would satisfy the *D. R. Horton* standard, because the Respondent's policy lacks such a provision. The Respondent points to the policy's statement that "[i]n arbitration, the parties will have the right to conduct civil discovery and bring motions as provided by the Federal Rules of Civil Procedure." But this spare language, which makes no specific mention of joinder, is insufficient to put employees on notice that the policy permits them to pursue joint claims together with their coworkers. Moreover, the policy's nondisclosure provision[5]—stating that

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fn. 2 (2015). But what our colleague ignores is that the Act does "create[] the right to pursue joint, class, or collective claims in and as available without the interference of an employer-imposed restraint." *Murphy Oil*, slip op at 16–17 (emphasis in original). The Respondent's arbitration policy is just such an unlawful restraint.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding the arbitration policy unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected activity. See *Murphy Oil*, slip op. at 18; *Bristol Farms*, slip op. at 3. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. *Murphy Oil*, slip op. at 17–18; *Bristol Farms*, slip op. at 2.

[5] We reject the Acting General Counsel's exception that the judge erred in failing to find that the nondisclosure provision independently violated the Act. We agree with the judge that the policy's nondisclosure provision would normally present an

"[e]xcept as may be required by law, neither a party nor an arbitrator may disclose the existence, content or results of any arbitration hereunder without the prior consent of both parties"—would effectively preclude employees in many circumstances from learning that coworkers are pursuing arbitral claims that might be joined and from communicating with them about that possibility. There is no evidence, meanwhile, that any employees have successfully sought to join their claims in arbitration. Under these circumstances, we conclude that employees would reasonably construe the policy to prohibit the joinder of claims in arbitration (along with other forms of concerted legal activity), which suffices to make the policy unlawful. See *D. R. Horton*, slip op. at 4 (applying test of *Lutheran Heritage Village-Livonia*, 343 NLRB 46 (2004)).

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independent violation of Sec. 8(a)(1), as a workplace rule that categorically prohibits the discussion of terms and conditions of employment. See, e.g., *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 1–3 (2015) (finding unlawful rule that prohibited disclosure of "any information about the Company which has not been shared by the Company with the general public"). See also *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004), enfd. 414 F. 3d 1249 (10th Cir. 2005), cert denied 546 U.S. 1170 (2006) (finding unlawful handbook rule that prohibited disclosure of "confidential information," including "grievance/ complaint information"). However, on the facts of this case, we find that the legality of the nondisclosure provision was not fully and fairly litigated. There was no corresponding allegation in the complaint, and the issue was mentioned at hearing only as a counter to the Respondent's assertion that the arbitration policy allowed for joinder of claims.

3. The Respondent further argues that the complaint is time barred by Section 10(b) as to employees hired before 2007 because the initial unfair labor practice charge was filed and served more than 6 months after those employees became subject to a prior version of the arbitration policy (from which they could not opt out), and because there is no evidence that the policy was enforced against any of these employees within the 10(b) period. We reject this argument because the Respondent continued to maintain the unlawful arbitration policy during the 6-month period preceding the filing of the initial charge. The Board has held under these circumstances that maintenance of an unlawful workplace rule, such as the Respondent's arbitration policy, constitutes a continuing violation that is not time-barred by Section 10(b). See *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 1 (2015); *Neiman Marcus Group*, 362 NLRB No. 157, slip op. at 2 fn. 6 (2015); and *Cellular Sales of Missouri*, LLC, 362 NLRB No. 27, slip op. at 2 fn. 7 (2015).

ORDER

The National Labor Relations Board orders that the Respondent, 24 Hour Fitness USA, Inc., San Ramon, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and/or enforcing a mandatory arbitration policy that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory arbitration policy in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration policy does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all current and former employees who were required to sign or otherwise become bound to the mandatory arbitration policy in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised policy.

(c) Notify each of the courts in which one or more of the 11 identified collective lawsuits is still pending that it has rescinded or revised the mandatory arbitration policy upon which it based its motions to compel individual arbitration of plaintiffs' claims, and inform the courts that it no longer opposes the lawsuits on the basis of the arbitration policy.

(d) In the manner set forth in this decision, reimburse plaintiffs in each of the 11 identified collective lawsuits that has not settled for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's motions to compel individual arbitration.

(e) Within 14 days after service by the Region, post at its San Ramon, California facility copies of the attached notice marked "Appendix A," and at all other facilities where the unlawful arbitration policy is or has been in effect, copies of the attached notice marked "Appendix B."[6] Copies of the notices, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix A" to all current employees and former employees employed by the Respondent at any time since August 15, 2010, and all current and former employees against whom the Respondent has attempted to enforce its arbitration policy since August 15, 2010.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 24, 2015

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

In this case, my colleagues find that the Respondent's Arbitration of Disputes Policy (the Policy) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Policy waives the right to participate in class or collective actions regarding non-NLRA employment claims, even though the Policy gives employees the right to opt out of the waiver. Various employees signed the Policy, did not exercise the right to opt out, and later filed class action lawsuits against the Respondent in Federal and State court alleging violations of Federal and State wage and hour and other employment laws. In reliance on the Policy, the Respondent filed motions to compel individual arbitration, which were granted in some cases and denied in others. My colleagues find that the Respondent thereby unlawfully enforced its Policy. I respectfully dissent from these findings for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA. However, I disagree with my colleagues' finding that Section 8(a)(1) of the NLRA prohibits agreements that waive class and collective actions, and I especially disagree with the Board's finding here, similar to the Board majority's finding in *On Assignment Staffing Services*, that class-waiver agreements violate the NLRA even when they contain an opt-out provision. In my view, Sections 7 and 9(a) of the NLRA render untenable both of these propositions. As discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time." This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[1] (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the over-

[1] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12–60031 (5th Cir. 2014); *Deposit Guaranty National Bank 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.").

whelming majority of courts to reject the Board's position regarding class-waiver agreements;[2] (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA);[3] and (iv) for the reasons stated in my dissenting opinion in *Nijjar Realty d/b/a Pama Management*, 363 NLRB No. 38, slip op. at 3–5 (2015), the legality of such a waiver is even more self-evident when the agreement contains an opt-out provision, based on every employee's 9(a) right to present and adjust grievances on an "individual" basis and each em-

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[2] The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil, Inc., USA v. NLRB*, above; *D. R. Horton, Inc. v. NLRB*, above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co.*, No. 14-CV-5882 (VEC), 2015 WL 1433219 (S.D.N.Y. Mar. 27, 2015); *Nanavati v. Adecco USA, Inc.*, No. 14-CV-04145-BLF, 2015 WL 1738152 (N.D. Cal. Apr. 13, 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services*, No. 1:12-CV-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA).

[3] For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil*, above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

ployee's Section 7 right to "refrain from" engaging in protected concerted activities.[4] Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

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[4] The legality of the Policy is further reinforced by the fact that it authorizes the parties to "bring motions as provided by the Federal Rules of Civil Procedure" and thus permits joinder of claims before an arbitrator under FRCP 20.

The class-action waiver agreements were voluntarily signed, even though the Respondent was willing to hire applicants only if they entered into the agreements. For my colleagues, however, the voluntariness of such a waiver is immaterial. They believe that even if a waiver is nonmandatory, it is still unenforceable. See *On Assignment Staffing Services*, above (finding class-action waiver agreement unlawful even where employees are free to opt out of the agreement); *Bristol Farms*, 363 NLRB No. 45 (2015) (finding class-action waiver agreement unlawful even where employees must affirmatively opt *in* before they will be covered by a class-action waiver agreement, and where they are free to decline to do so). By definition, every agreement sets forth terms upon which each party may insist as a condition to entering into the relationship governed by the agreement. Thus, conditioning employment on the execution of a class-action waiver does not make it involuntary. However, the Board's position is even less defensible when the Board finds that NLRA "protection" operates in reverse—not to *protect* employees' rights to engage or refrain from engaging in certain kinds of collective action, but to *divest* employees of those rights by denying them the right *to choose* whether to be covered by an agreement to litigate non-NLRA claims on an individual basis. See *Bristol Farms*, above, slip op. at 2–4 (Member Miscimarra, dissenting).

Because I believe the Respondent's Policy was lawful under the NLRA, I would find it was similarly lawful for the Respondent to file motions in Federal and State courts seeking to enforce the Policy. It is relevant that the courts having jurisdiction over the non-NLRA claims *granted* the Respondent's motion to compel arbitration in several of the cases cited by the majority. That the Respondent's motions were reasonably based is also supported by the multitude of court decisions that have enforced similar agreements.[5] As the Fifth Circuit recently observed after rejecting (for the second time) the Board's position regarding the legality of class waiver agreements: "[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D. R. Horton* decision had no basis in fact or law or an 'illegal objective' in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders."[6] I also believe that any Board finding of a violation based on the Respondent's meritorious motions to compel arbitration would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002); see also my par-

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[5] See, e.g., *Murphy Oil, Inc., USA v. NLRB*, above; *Johnmohammadi v. Bloomingdale's*, 755 F.3d 1072 (9th Cir. 2014); *D. R. Horton, Inc. v. NLRB*, above; *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013).

[6] *Murphy Oil, Inc., USA v. NLRB*, above, at fn. 6.

tial dissent in *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 33–35. Finally, for similar reasons, I believe the Board cannot properly require the Respondent to reimburse the employee-plaintiffs for their attorneys' fees in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.

Accordingly, as to these issues,[7] I respectfully dissent.

Dated, Washington, D.C. December 24, 2015

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Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

[7] I agree with the majority's reversal of the judge's finding that the Policy's confidentiality clause violates the Act. Like my colleagues, I believe that issue was not fully and fairly litigated.

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain and/or enforce a mandatory arbitration policy that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration policy in all of its forms, or revise it in all of its forms to make clear that the arbitration policy does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the mandatory arbitration policy in all of its forms that the arbitration policy has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised policy.

WE WILL notify each of the courts in which one or more of the 11 identified collective lawsuits are still pending that we have rescinded or revised the mandatory arbitration policy upon which we based our motions to compel individual arbitration, and WE WILL inform the courts that we no longer oppose plaintiffs' collective lawsuits on the basis of that policy.

WE WILL reimburse plaintiffs' in each of the 11 identified collective lawsuits that have not settled for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our motions to compel individual arbitration.

24 HOUR FITNESS USA, INC.

The Board's decision can be found at www.nlrb.gov/case/20–CA–035419 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

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WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration policy in all of its forms, or revise it in all of its forms to make clear that the arbitration policy does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify current and former employees who were required to sign or otherwise become bound to the mandatory arbitration policy in all of its forms that the arbitration policy has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised policy.

24 Hour Fitness USA, Inc.

The Board's decision can be found at www.nlrb.gov/case/20–CA–035419 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Carmen Leon and Richard J. McPalmer, Attys., for the Acting General Counsel.

Marshall Babson, Atty. (Seyfarth Shaw LLP), of New York, New York; *Garry G. Mathiason, Atty. (Littler Mendelson, P.C.)*, of San Francisco, California; and *Daniel L. Nash, Atty. (Akin Gump Strauss Hauer & Feld)*, of Washington, DC, for the Respondent.

Cliff Palefsky, Atty. (McGuinn, Hillsman, & Palefsky), of San Francisco, California, for the Charging Party *with Michael Rubin and Caroline P. Cincotta, Attys. (Altshuler Berzon LLP)*, San Francisco, California, and *Judith A. Scott, Atty.*, Service Employees International Union, Washington, DC, on the posthearing brief.

Willis J. Goldsmith and Kristina A. Yost, Attys. (Jones Day), of New York, New York, and *Robin S. Conrad and Shane B. Kawka, Attys., National Chamber Litigation Center*, Washington, DC, submitted a brief amicus curiae on behalf of the Chamber of Commerce of the United States of America in support of 24 Hour Fitness USA, Inc.

DECISION

Statement of the Case

WILLIAM L. SCHMIDT, Administrative Law Judge. I heard this case at San Francisco, California, on June 28, 2012. The unfair labor practice charge, filed by Alton J. Sanders (Sanders), an individual, on February 15, 2011, alleges that 24 Hour Fitness USA, Inc. (Company or Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA). On April 30, 2012, the Regional Director for Region 20 of the National Labor Relations Board (Board or NLRB) issued a formal complaint alleging that Respondent violated Section 8(a)(1) by maintaining and enforcing a provision in the arbitration policy, contained in its employee handbook, that requires employees to forego any rights they have to the resolution of employment-related disputes by collective or class action (the class action ban). The complaint also alleges that Respondent violated Section 8(a)(1) by asserting the class action ban in the 10(b) period in eight specific cases brought against it by employees. The Respondent filed a timely answer denying that it engaged in the unfair labor practices alleged and interposing a variety of affirmative defenses, including a claim the Board lacked a quorum when it decided a case critical to the outcome here due to the expiration of the term of one of the Board Members.

Having now carefully considered the entire record, including the demeanor of the witnesses and the reliability of their testimony, together with the arguments set forth in the extensive briefs filed on behalf of the Acting General Counsel (AGC), the Respondent, and the Charging Party as well as the briefs amicus curiae filed by the Service Employees International Union (SEIU) and the Chamber of Commerce of the United States of America (Chamber), I find that Respondent violated the Act as alleged based on the following[1]

Findings of Fact

I. JURISDICTION

Respondent, a California corporation, operates fitness centers in seventeen different states, including a facility in San Ramon, California. During the calendar year ending December 31, 2011, Respondent, in conducting its business operations, derived gross revenues in excess of $500,000. During the same period, Respondent purchased and received, at its San Ramon facility, products, goods, and services valued in excess of $5000 directly from points outside of the State of California. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find that it would effectuate the purposes of the Act for the Board to exercise its statutory jurisdiction to resolve this labor dispute.

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[1] On May 18, 2012, Associate Chief Judge Cracraft granted the Service Employees International Union (SEIU) motion to intervene but limited the degree of the SEIU's participation to that of "an amicus curiae in briefing to the administrative law judge and to the Board." In an order issued September 10, 2012, I likewise granted the request of the Chamber to appear as amicus curiae to file a brief in support of Respondent's position.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Pleadings and the Basic Arguments about the Merits

The complaint alleges that in the 6-month period preceding the filing of the charge Respondent enforced the provisions in its employee handbook that requires employees to "forego any rights they have to the resolution of employment-related disputes by collective or class action." In that same period, the complaint alleges that Respondent initiated legal actions in eight separate cases pending in both State and Federal courts seeking to enforce the unlawful terms of its arbitration policy. Respondent's answer admits that it "has maintained and enforced" employee handbook policies, including its arbitration policy, but denies that its arbitration policy violates the Act. Respondent also denies that it violated the Act by taking the certain legal actions to enforce the class action ban contained in its arbitration policy in the eight specific cases cited in the complaint, as well as three others identified in a hearing stipulation.

The AGC, the Charging Party, and the SEIU contend that *D. R. Horton*, 357 NLRB No. 184 (2012), controls the outcome here. (AGC Br., p. 1). They argue that employees have a right under Section 7 to engage in collective or class activities when seeking to resolve disputes with their employer about their wages, hours, and other terms and conditions of employment and, hence, the ban on those particular activities contained in Respondent's arbitration policy unlawfully interferes with employee Section 7 rights within the meaning of Section 8(a)(1).[2]

Respondent disputes the controlling effect of *Horton* on the facts present here. Instead, Respondent and the Chamber argue that the opt-out feature of its arbitration policy, described in more detail below, establishes that the waiver of collective or class action is voluntary on the part of the employee, thereby making this case fundamentally distinguishable from *Horton*. They argue that Horton applies only to arbitration agreements containing a class action ban that are a mandatory condition of employment. Because the employees here have the opportunity to opt-out of Respondent's arbitration policy completely, the policy cannot be fairly characterized as mandatory. Hence, as Respondent's policy is not mandatory, they argue, *Horton* does not apply.

B. Relevant Facts

The Company, which commenced operations in the early 1980s, currently operates more than 400 membership fitness clubs scattered across 17 states. Charging Party Sanders submitted an application for work at the Company on August 25, 2008, and commenced working on October 6. He remained em-

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[2] In pertinent part, Sec. 7 of the Act protects the right of employees "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to *engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.*" (Emphasis added.) Sec. 8(a)(1) provides that it is an unfair labor practice for an employer to "interfere with, restrain, or coerce" employees in the exercise of their Sec. 7 rights.

ployed at the Company for approximately 2 years as a group exercise instructor providing instruction primarily in yoga and spinning. During his tenure, he worked at Company facilities in Larkspur, Santa Rosa, Petaluma, and Fairfield, California.

The 3-page employment application that Sanders submitted in August 2008 contained an "Applicant's Certification" that included the following:

> I understand that as an expeditious and economical way to settle employment disputes without need to go through courts, 24 Hour Fitness agrees to submit such disputes to final and binding arbitration. I understand that I may opt out of the arbitration procedure, within a specified period of time, as the procedure provides. 24 Hour Fitness and I also understand that if I am offered employment and I do not opt out, we both will submit exclusively to final and binding arbitration all disputes arising out of or relating to my employment. This means a neutral arbitrator, rather than a court or jury, will decide the dispute. (R. Exh. 1, p. 3).

No evidence establishes that Sanders sought or was provided with any information at that time concerning the opt-out procedures.

Later in October 2008, when he commenced working for the Company, Sanders went through the typical "on-boarding" process required of all employees. At that time, he received a copy of the 2007 Team Member Handbook (employee handbook) and a copy of the "New Team Member Handbook Receipt Acknowledgement (handbook receipt form). He was requested to sign and return the handbook receipt form to the Company, which he did. The handbook receipt form included the following statement:

> I have received the 2007 Handbook and I understand that in consideration for my employment it is my responsibility to read and comply with the policies contained in this Handbook and any revisions made to it. In particular, I agree that if there is a dispute arising out of or related to my employment as described in the 'Arbitration of Disputes' policy, I will submit it exclusively to binding and final arbitration according to its terms, unless I elect to opt out of the 'Arbitration of Disputes' policy as set forth below.
>
> I understand that I may opt out of the 'Arbitration of Disputes' policy by signing the Arbitration of Disputes Opt-Out Form ('Opt-Out Form') and returning it through interoffice mail to the CAC/HR File Room no later than 30 calendar days after the date I received this Handbook, as determined by the Company's record. I understand that I can obtain the Opt-Out Form by calling the Employee Hotline at1.866.288.3263. I understand that if I do not opt out, disputes arising out of or related to my employment will be resolved under the 'Arbitration of Disputes' policy. I understand that my decision to opt out or not opt out will not be used as a basis for the Company taking any retaliatory action against me. (G.C. Exh. 2) (Emphasis in original.)

Concededly, Sanders did not opt-out of the Respondent's arbitration policy. When he later learned of a race and sex discrimination case another employee brought against the Company and sought to join in the case, he was informed that he would have to proceed individually.

As noted, the process that Sanders encountered when he began employment with the Respondent is typical. All new employees receive a copy (or access to a copy) of the Respondent's 60-plus page handbook usually on their first day of work. The handbook contains a description of various work policies. For example, the initial section headed "our employment relationship" in the 2010 edition of the handbook contains provisions related to the Respondent's open door policy, the at-will nature of the employment relationship, its policies concerning equal employment opportunity and accommodations for disabilities, its policy against harassment, discrimination and retaliation, its policy regarding the arbitration of disputes (the provision at issue here), policies regarding conflicts of interest and nonfraternization, and its policies regarding confidentiality, proprietary information, trademarks, and copyrights. Other sections of the handbook contain detailed provisions about workplace conduct, health, security and safety, employee development, compensation and benefits to name only a few. Each new employee is also given a copy of the handbook receipt form designed to acknowledge receipt of the handbook and is requested to sign it. Employees who decline to sign the receipt form are told that the policies described in the handbook will, nonetheless, apply to them. Both the handbook and the handbook receipt form have gone through several revisions in the last decade.

The Respondent first instituted its unilaterally devised arbitration policy for resolving employment-related disputes that it imposed as a condition of employment more than a decade ago. Since that time Respondent has fervently promoted its arbitration policy in documents distributed to employees. The heart of Respondent's arbitration policy has always provided that "any employment-related dispute between a Team Member and 24 Hour Fitness" must be submitted to final and binding arbitration. All versions of the Company's arbitration policy since 2005 have provided explicitly that nothing in the policy "shall be deemed to preclude a Team Member from filing or maintaining a charge with the Equal Employment Opportunity Commission or the National Labor Relations Board."

Additionally, the Respondent made another significant modification to its arbitration policy in 2005 by adding language that banned class and other forms of concerted actions. This revised language set forth in the handbook sought to effectively preclude employees from combining their identical or closely related employment disputes against Respondent. The policy adopted in 2005 and retained in various editions of the handbook thereafter provided:

> In arbitration, the parties will have the right to conduct civil discovery and bring motions as provided by the Federal Rules of Civil Procedure. However, 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.

In addition, Respondent's revised arbitration policy further limited employee collaboration by including nondisclosure language stating that "[e]xcept as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties." All subsequent editions of the handbook after 2005 retained these restrictions barring concerted employee activity in pursuit of employment-related disputes.

The accompanying handbook receipt containing limited information about the arbitration policy made no reference to these new limitations on concerted activities. Respondent's practice of applying all of its handbook policies to employees whether or not they signed the handbook receipt effectively made the handbook policies a condition of employment applicable to all current employees immediately and to future employees on their first day of work.

The next revision to Respondent's arbitration policy occurred in or about January 2007. Although the language of its arbitration policy as set forth in its 2005 handbook remained the same, the Respondent gave each newly-hired employee an opportunity to opt out of the arbitration policy provided the employee did so within the 30-day period following their receipt of the handbook. Except for its employees working in the State of Texas, none of the employees hired before 2007 were provided with an opportunity to opt out of the arbitration policy.[3] As a consequence, those em-

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[3] This anomaly as to the Texas employees resulted from a courtmandated agreement in *Carey v. 24 Hour Fitness USA*

ployees remained bound by the arbitration policy in effect when they were originally hired.

The opt-out revision resulted in changes to two employment forms, the application for employment and the handbook receipt. The last paragraph of the employment application form was revised to include a general reference to the new opt-out procedure. It stated only that an employee could "opt out of the arbitration procedure within a specified period of time, as the procedure provides." It then went on to state that if the applicant chose not to opt-out of the yet undisclosed arbitration policy, it would be binding on both parties.

The new handbook receipt form contained the following language describing the opt-out procedure in detail:

> I have received the January 2005 handbook and I understand that in consideration for my employment it is my responsibility to read and comply with the policies contained in this handbook and any revisions made to it. In particular, I agree that if there is a dispute arising out of or related to my employment as described in the "Arbitration of Disputes" policy, I will submit it exclusively to binding and final arbitration according to its terms,

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Inc., No. 10-03009 (S.D. Tex.). Although the full details are not known, it appears that all of the Respondent's Texas employees were provided a full written explanation of the arbitration policy and another opportunity to opt out if they so choose. Consequently, Texas employees of the Respondent hired before January 1, 2007, received an opportunity to optout by virtue of this special, court-approved procedure.

> unless I elect to opt out of the "Arbitration of Disputes" policy as set forth below. I understand that I may opt out of the "Arbitration of Disputes" policy by signing the Arbitration of Disputes Opt-Out Form ("Opt-Out Form") and returning it through interoffice mail to the CAC/HR File Room no later than 30 calendar days after the date I received this handbook, as determined by the Company's records. I understand that I can obtain the Opt-Out Form by calling the Employee Hotline at 1.866.288.3283. I understand that if I do not opt out, disputes arising out of or related to my employment will be resolved under the "Arbitration of Disputes" policy. I understand that my decision to opt out or not opt out will not be used as a basis for the Company taking any retaliatory action against me. [Jt. Exh. 5.]

In September 2007, Respondent issued a new employee handbook and a new handbook receipt form. The new handbook contained no changes in Respondent's arbitration policy. The handbook receipt form was revised to reflect that the employee had received the new 2007 handbook rather than the 2005 handbook. The 2010 edition of Respondent's handbook retained the same arbitration policy language as set forth in the 2007 handbook.

In or about February 2009, Respondent converted its new employee on-boarding process to an electronic system. This new digital system required the new employee to review the new employee materials, including the 60 plus page handbook, at a computer terminal and provide a digital signature where required. All of the materials included a print option that the employee could use to obtain a copy for her or his personal records. A separate series of screens dealt with the terms of the arbitration policy and the opt-out process. After completing the electronic on-boarding process, employees always had access to an electronic version of the handbook at any location though their electronic employee account.

The 2009 digital version of the employee handbook receipt retained the same notice providing that employees who declined to sign would nonetheless be bound by all policies set forth in the handbook. This digital version of the arbitration policy in the employee handbook contained three added paragraphs that had not previously appeared in the hardcopy versions of the handbook. Those added paragraphs stated:

> I agree that if there is a dispute arising out of or related to my employment as described in the Arbitration of Disputes Policy, I will submit it exclusively to binding and final arbitration according to its terms, unless I elect to opt out of the Arbitration of Disputes Policy as set forth below.
>
> I understand that I may opt out of the Arbitration of Disputes Policy by signing the Arbitration of Disputes Opt-Out Form ("Opt-Out Form") and returning it through interoffice mail to the CAC/HR File Room no later than 30 calendar days after the date I click on the button below. I understand that I can obtain the Opt-Out Form by calling the Employee Hotline at 1.866.288.3283. I understand that if I do not opt out, disputes arising out of or related to my employment will be resolved under the Arbitration of Disputes Policy. I understand that my

decision to opt out or not opt out will not be used as a basis for 24 Hour Fitness taking any retaliatory action against me.

I UNDERSTAND THAT BY ENTERING MY INITIALS AND CLICKING THE "CLICK TO ACCEPT" BUTTON, I AM AGREEING TO THE ARBITRATION OF DISPUTES POLICY (WHICH INCLUDES MY ABILITY TO OPTOUT OF THE POLICY WITHIN THE PERIOD OF TIME NOTED ABOVE). I ALSO AGREE THAT THIS ELECTRONIC COMMUNICATION SATISFIES ANY LEGAL REQUIREMENT THAT SUCH COMMUNICATION BE IN WRITING.

Employees who successfully pursued the opt-out alternative received a simple form to sign, date and return. The current form, sans the signature and other identity lines, reads as follows:[4]

DISPUTE RESOLUTION AGREEMENT
OPT-OUT FORM

By signing and dating below, I am choosing to opt-out of the 24 Hour Fitness' Dispute

Resolution Agreement ("Agreement"). I understand that by opting out, I will not participate in or

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[4] The Respondent modified the opt-out notices and its internal procedures for handling opt-out requests in 2010 when it shifted responsibility for handling and dealing with opt-out inquiries from its human resources to its legal department. The new opt-out information sheet instructed employees interested in the process to contact a paralegal with that responsibility rather than the employee hotline connected with its human resources department.

> be bound by the alternative dispute resolution procedures described in the Agreement.
>
> . . .
>
> IN ORDER TO OPT-OUT OF THE DISPUTE RESOLUTION AGREEMENT, YOU MUST SIGN AND RETURN THIS FORM TO THE LEGAL DEPARTMENT THROUGH INTEROFFICE MAIL OR BY FAX TO 925-543-3358, NO LATER THAN 30 CALENDAR DAYS AFTER DATE OF HIRE.

The Respondent's brief argues that the next to last sentence of the above quoted paragraph establishes that the arbitration policy is inoperative until the 30-day opt out period expires. (R. Br., p. 9) Deborah Lauber, Respondent's vice president and corporate counsel, explained that this bifurcated opt-out procedure was adopted to minimize the potential for retaliation or adverse inferences that might result if local managers knew of an employee's opt-out decision. In addition, she said, the procedure provided the employee with the opportunity to reflect on that "important decision."

In the week before the hearing, the Respondent employed 20,563 "Team Members" to serve the more than three million members of its clubs. It admits that 19,614 are employees within the meaning of Section 2(3). Of that number, 3,605 were hired prior to January 1, 2007, when the opt-out aspect of its arbitration policy became effective. Based on Respondent's review of approximately 20,000 personnel files "out of a universe of approximately 70,000 files," the parties stipulated that "no fewer and no more than 70 Section 2(3) employees" successfully opted out of the Respondent's arbitration policy. The number of pre-2007 Texas employees who opted out under the special agreement in the *Carey* case is unknown.

Since August 15, 2010 (the last day of the 10(b) period), Respondent has sought in several court cases to enforce the class action ban aspect of its arbitration policy, including the *Carey* case previously mentioned. Respondent acknowledges that it took action to enforce the class action ban in the following cases alleged in complaint paragraph 5:

(1) *Fulcher v. 24 Hour Fitness USA, Inc.*, No. RG 10524911 (Alameda County Superior Court, Cal.), a class action case initiated by former employee Raoul Fulcher and other named plaintiffs containing causes of action brought individually and on behalf of others similarly situated for (1) Race, Color, National Origin Discrimination (California Fair Employment and Housing Act, Government Code Section 12940, et seq., "FEHA"), (2) Gender Discrimination (FEHA), and (3) Violations of the California Unfair Competition Law, Business & Professions Code Sections 1700, et seq., ("UCL"). On October 22, 2010, Respondent filed a motion to compel individual arbitration under the terms of the Arbitration Policy. On March 29, 2011, the court granted the motion, in part ordering the plaintiffs to submit their individual claims for monetary relief to binding arbitration pursuant to the terms of the Arbitration Policy. However, the court retained jurisdiction over the plaintiffs' claims for declaratory and injunctive relief. On January 17, 2012, the court denied Respondent's motion to compel arbitration of plaintiffs' claims for declaratory and injunctive relief. On January

27, 2012, Respondent appealed the court's January 17 ruling.

(2) *Beauperthuy v. 24 Hour Fitness USA, Inc.*, No. 06-715 SC (N.D. Cal.), a class action brought by former employee Gabe Beauperthuy and other named plaintiffs (current and former employees of Respondent) who had worked (or were working) in 11 states in various capacities as managers, sales counselors, and trainers as well as others similarly situated alleging violations of the Fair Labor Standards Act (FSLA), 29 U.S.C. § 201 *et seq*. On February 21, 2006, Respondent filed a motion to dismiss the complaint based on the failure to state a claim upon which relief can be granted (FRCP 12(b)(6)) or, in the alternative, for a more definite statement (FRCP 12(e)), because the plaintiffs had agreed to the Arbitration Policy. On February 21, 2006, Respondent filed a Motion to Dismiss. On April 11, 2006, the court denied Respondent's motion to dismiss, but granted the motion for a more definite statement. On November 28, 2006, the Court issued an order that Respondent had waived its right to compel arbitration. On February 24, 2011, the court granted Respondent's motion to decertify the class. The court has retained jurisdiction over the plaintiffs' claims.[5]

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[5] When the court denied Respondent's 2006 motion to dismiss, it held that Respondent's conduct amounted to a waiver of its right to compel plaintiffs to arbitrate their claims and barred it from any future effort to do so. But when the court granted the Respondent's motion in February 2011 to decertify the various classes previously recognized, it provided the

(3) *Lee v. 24 Hour Fitness USA, Inc.*, No. 11-22700 (S.D. Fla.), a class action brought by a former employee Jeanlin Lee and other named plaintiffs on behalf of themselves and others similarly situated alleging FSLA violations. On September 6, 2011, Respondent filed a motion to compel individual arbitration and to stay proceedings pending arbitration based in part on the Arbitration Policy. On October 18, 2011, the court granted Respondent's motion to compel arbitration pursuant to the terms of the Arbitration Policy and granted Respondent's motion to stay proceedings pending arbitration. The court has retained jurisdiction over this case.

(4) *Constanza v. 24 Hour Fitness USA, Inc.*, No. 11-22694 (S.D. Fla.), a class action brought by a former employee Elio Constanza on behalf of himself and others similarly situated alleging violations of the FLSA. On September 6, 2011, Respondent filed a motion to compel individual arbitration and to stay proceedings pending arbitration based on the Arbitration Policy. On November I, 2011, the court granted Respondent's motion. The court has retained jurisdiction over this case.

(5) *Carey v. 24 Hour Fitness USA, Inc.*, No. 10–03009 (S.D. Tex.), a class action brought by a former employee John Carey on behalf of himself and others similarly situated alleging violations of the FLSA. On October 27, 2010, Respondent filed a motion to stay and to compel individual arbitration based on the Arbitration Policy. On December

named plaintiffs with the option of arbitrating their individual claims or proceeding before the court.

1, 2010, the court denied Respondent's motion. On December 13, 2010, Respondent filed an appeal. On January 25, 2012, the United States Court of Appeals for the Fifth Circuit affirmed the court's decision. The District Court has retained jurisdiction allowing plaintiffs to pursue a collective action in court.

(6) *Lewis v. 24 Hour Fitness USA*, *Inc.*, (Cal.App. 2 Dist. 2011), a class action brought by former employee Kevin Lewis and other named plaintiffs on behalf of themselves and others similarly situated alleging violations of the California Labor Code, Lab. Code §§ 510, 1194(a), 203, 226 (a), 226(e), 2698(a), 2698(f), and UCL. On July 29, 2010, Respondent filed a motion to compel individual arbitration and stay all civil court proceedings based on the Arbitration Policy. On September 20, 2010, the court denied the motion to compel arbitration. The court has retained jurisdiction over this case. On November 3, 2011, Respondent successfully appealed the denial of its motion. In March 2012, the trial court ruled that the plaintiffs' claim for relief under California's Private Attorney General Act is not subject to arbitration and ordered that claim to proceed while staying the arbitration on the other claims. Respondent has appealed the court's ruling on that matter.

(7) *Dominguez v. 24 Hour Fitness USA*, *Inc.*, No. BC439206 (Los Angeles County Superior Ct.), a class action brought by former employee Iva Dominguez on behalf of herself and others similarly situated alleging violations of the California Labor Code. On September 16, 2010, Respondent

filed a motion to compel individual arbitration and stay all civil court proceedings based on the Arbitration Policy. On December 7, 2010, the court granted Respondent's motion. The court has retained jurisdiction over this case.

(8) *Martinez v. 24 Hour Fitness USA*, *Inc.*, No. 20-2011-00484316-CU-CE-CXC (Orange County Superior Court), originally brought as a class action by a former employee Max Martinez on behalf of himself and others similarly situated alleging violations of the California Labor Code, Lab. Code §§ 510, 1198, 226.7, 512, 201, et seq., and the UCL. On December 9, 2011, Respondent filed a motion to compel individual arbitration and stay judicial proceedings based on the Arbitration Policy. On January 31, 2012, the court granted Respondent's motion. The court has retained jurisdiction over this case.

In addition to the foregoing proceedings, the parties stipulated that the Respondent sought to enforce the class action ban in other legal proceedings pending as of August 15, 2010, including, but not limited to, the following cases in the California courts:

1) *Rosenloev*, *et al. v. 24 Hour Fitness USA*, *Inc.*, Orange County Superior Court Case No. 30-2009-00180140, and *Suppa v. 24 Hour Fitness*, *USA*, *Inc.*, Los Angeles County Superior Court Case No. BC4221O: The *Suppa* case was transferred and coordinated as a single action with the *Rosenloev* case. Respondent sought to compel individual arbitration. The trial court denied Respondent's motion. Respondent appealed the decision, and the Court of Appeal affirmed the trial court;

2) *Burton v. 24 Hour Fitness USA, Inc.*, Orange County Superior Court, Case No. 30-2007-00031558: Respondent sought to compel individual arbitration. The trial court denied Respondent's motion. Respondent appealed the decision. The Court of Appeal affirmed the trial court; and

3) *Lawler v. 24 Hour Fitness, Inc.*, San Bernardino County Superior Court, Case No. CNDS 1001737: Respondent sought to compel individual arbitration. The trial court granted Respondent's motion.

C. Further Findings and Conclusions

An employer violates Section 8(a)(1) by maintaining work rules that tend to chill employee Section 7 activities. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Rules explicitly restricting Section 7 activities violate Section 8(a)(1). *Lutheran Heritage Village—Livonia*, 343 NLRB 646 (2004). But where a workplace rule does not explicitly restrict Section 7 activity, the General Counsel must establish by a preponderance of the evidence that: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the employer adopted the rule in response to union activity; or (3) the employer applied a rule to restrict employee Section 7 activity. Id. at 647. If a rule explicitly infringes on the Section 7 rights of employees, the mere maintenance of the rule violates the Act without regard for whether the employer ever applied the rule for that purpose. *Guardsmark v. NLRB*, 475 F.3d 369, 375–376 (DC Cir. 2007).

Relying on these fundamental principles, the Board found the mandatory arbitration agreement in *Horton* violated Section 8(a)(1) because it expressly restricted protected activity by requiring employees to "refrain from bringing collective or class claims *in any forum*."[6] 357 NLRB No. 184, slip op. at 5. (Emphasis added). This conclusion is predicated on the conclusion that "*employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA*."[7] Id. at 3. (Emphasis added.) In finding the violation, the Board stated:

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[6] The Board separately found the *Horton* arbitration agreement violated Sec. 8(a)(1) because employees would reasonably interpret it as barring or restricting their right to file charges with the Board. No such claim is made here presumably because Respondent's arbitration policy specifically provides that it does not preclude the filing charges with the NLRB or the EEOC.

[7] *Horton* cites three prior Board cases (two of which were enforced in court) and two added court cases decided between 1980 and 2011, for the proposition that the filing of a civil action by employees relating to their wages, hours, and other terms and conditions of employment is activity protected by Section 7. 357 NLRB No. 184, slip op. 2 fn 4. The Supreme Court has reached a similar conclusion. In *Eastex, Inc. v NLRB*, 437 U.S. 556, 565–566 (1978), Justice Powell, writing for the majority, noted "it has been held that the 'mutual protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums." It cited numerous prior Board and lower court decisions with approval. Id at fn. 15. Yet, Respondent explicitly rejects the notion that "the right to engage in class or collective action is a protected, concerted activity under Section 7 of the Act" but provides no convincing rationale. See R. Br., p. 30.

> We need not and do not mandate class arbitration in order to protect employees' rights under the NLRA. Rather, we hold only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration. Employers remain free to insist that *arbitral* proceedings be conducted on an individual basis.

The Acting General Counsel argues that all renditions of Respondent's arbitration policy have been incompatible with the first prong of the *Lutheran Heritage Village-Livonia* test since the class action ban in 2007 prohibited employees from pursuing employment-related claims collectively in any forum. But assuming that this arbitration policy does not expressly restrict Section 7 activity, the Acting General Counsel contends that the Respondent has repeatedly applied the class action ban in pending cases in order to restrict collective activity contrary to the second prong of the *Lutheran Heritage Village-Livonia* test. The Acting General Counsel further contends, in effect, that the opt-out provision fixes the removal of Section 7 protections as the default position and puts employees in the position of following a convoluted process to regain their statutory rights. This requirement that employees act affirmatively to secure rights the law already provides, the Acting General Counsel argues, has long been found to be unlawful. In support, the Acting General Counsel cites this rationale in *Horton*:

That this restriction on the exercise of Section 7 rights is imposed in the form of an agreement between the employee and the employer makes no difference. From its earliest days, the Board, again with uniform judicial approval, has found unlawful employer-imposed, individual agreements that purport to restrict Section 7 rights –including, notably, agreements that employees will pursue claims against their employer only individually.

In *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), the Supreme Court upheld the Board's holding that individual employment contracts that included a clause discouraging, if not forbidding, a discharged employee from presenting his grievance to the employer "through a labor organization or his chosen representatives, or in any way except personally" was unlawful and unenforceable. Id. at 360. The Court agreed that the contracts "were a continuing means of thwarting the policy of the Act. Id. at 361. "Obviously," the Court concluded, "employers cannot set at naught the NationalLabor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes." Id. at 364.

Four years later, the Court reaffirmed the principle that employers cannot enter into individual agreements with employees in which the employees cede their statutory rights to act collectively. In *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944), the Court held that individual employment contracts predating the certification of a union as the employees' representative cannot limit the scope of the employer's duty to bargain with the union. The Supreme Court observed that:

> Individual contracts no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act. . . .
>
> . . . .
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> Wherever private contracts conflict with [the Board's] functions [of preventing unfair labor practices], they obviously must yield or the Act would be reduced to a futility.
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> Id. at 337.
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> During this same period of time, the Board held unlawful a clause in individual employment contracts that required employees to attempt to resolve employment disputes individually with the employer and then provided for arbitration. *J. H. Stone & Sons*, 33 NLRB 1014 (1941), enfd. in relevant part 125 F.2d 752 (7th Cir. 1942). "The effect of this restriction," the Board explained, "is that, at the earliest and most crucial stages of adjustment of any dispute, the employee is denied the right to act through a representative and is compelled to pit his individual bargaining strength against the superior bargaining power of the employer." Id. at 1023 (footnote omitted). The Seventh Circuit affirmed the Board's holding, describing the contract clause as a *per se* violation of the Act, even if "entered into without coercion," because it "obligated [the employee] to bargain individually" and was a "restraint upon collective action." *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942).

357 NLRB No. 187, at 4–5.

Respondent seeks to distinguish its arbitration policy from the arbitration agreement in the *Horton* case by claiming that its opt-out opportunity makes the agreement voluntary. It asserts that no violation occurs when employees voluntarily refrain from exercising Section 7 rights. By providing employees with an opt-out opportunity, Respondent argues that it has properly balanced its arbitration policy with the policies contained in the NLRA, the Federal Arbitration Act (FAA), and the Rules Enabling Act. Respondent also argues that by incorporating the Federal Rules of Civil Procedure in its arbitration policy, it has provided an avenue for employees to pursue class action through a permissive joinder of claims under FRCP Rule 20. Even though Respondent explicitly rejects any notion that the right to engage in class or collective action is a protected concerted activity under Section 7, it argues that the Acting General Counsel failed to prove the essential elements of his case for other reasons. On this latter score, Respondent correctly argues that there is no evidence of interference, restraint, or coercion that brought about the Charging Party's or any other employee's voluntary decision at the beginning of their employment to forego participation in class or collective actions.

Respondent advances a variety of other claims. First, Respondent asserts that *Horton* "was wrongly decided" because "even an arbitration policy with a class action waiver that is a mandatory condition of employment must be enforced" under the FAA and Supreme Court precedent. Second, Respondent argues that the charge is untimely with respect to employees hired before January 2007 who have not been provided with an opt-out opportunity but, in the event a violation is found as to them, the appropriate remedy would be merely to require that they be provided with the opportunity to opt out of the arbitration policy. Third, Respondent asserts that its motion to dismiss complaint paragraph 5 should be granted because the NLRB does not have authority to require courts to undo determinations that they have already made and because a retroactive remedy in the case is not appropriate. And fourth, Respondent claims that the NLRB did not have a proper quorum when *Horton* was decided because the term of Board Member Becker (one of the panel participants) had expired when the case was decided.

As counsel for Respondent and the amicus know full well, I lack authority to adjudicate any claims that *Horton* was wrongly decided, or was decided after Member Becker's term expired. Even so, *Horton* compiles statutory declarations and case precedent that date back seven decades that are binding on me. So regardless of the outcome of that case, the precedent it details is clearly binding until overruled.

The most important beginning point in the analysis of the issues presented here is to recognize that this case does not place in question an employer's right to require employees to arbitrate employment-related disputes. For purposes of this decision, I have presumed that employers may do exactly that and, if they do so, they would be entitled to enforce that requirement. But the tedious arguments advanced by Respondent and its amicus ally fail to convince me that the FAA provides employers with a license to unilaterally craft an arbitration requirement in their terms and conditions of employment that serve to sweep away the well recognized statutory rights of employees to act concertedly by bringing legal actions against their employer. Quite plainly, this case presents the altogether different question as to whether an employer may design and enforce an arbitration policy that prevents its workers from acting in concert for their mutual aid and benefit by initiating and prosecuting a good-faith legal action against their employer.

If one accepts Respondent's arguments, the Supreme Court's recent decisions involving the FAA have radically empowered employers to limit employees Section 7 activity. Relatively speaking, *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) and *CompuCredit*, *v. Greenwood*, 132 S. Ct. 665 (2012), which Respondent cites in support, have little, if anything, to do with arbitration in the context of the employer-employer relationship. In *Concepcion*, the U.S. Supreme Court held FAA's requirement that the courts enforce private arbitration agreements preempted the California Supreme Court's holding in *Discover Bank v. Superior Court*, 30 Cal. Rptr. 3d 76 (2005), a case where the state court held that arbitration agreements containing class-action waivers in certain consumer contracts of adhesion unenforceable because they operated effectively as exculpatory contract clauses that are contrary to that state's public policy.

Further, *CompuCredit* is essentially a statutory construction case. It arose after lower courts decided to deny the defendant's motion to compel arbitration per a private agreement based on their conclusion that certain statutory language evidenced a congressional intent that claims arising under the Credit Repair Organizations Act (CROA) would not be arbitrable. In its decision, the Supreme Court concluded that the lower courts had misconstrued specific statutory language in CROA that required a consumer rights notice to include the right to "sue" as precluding litigation in an arbitral forum. It concluded that the remedial language elsewhere in CROA did not foreclose the parties from adopting "a reasonable forumselection clause" that included arbitration and, if they did so, the courts were obliged to enforce parties' agreement under the FAA. 132 S.Ct. at 671–672.

In my judgment, these cases do not address the fundamental question of whether, and to what degree, the FAA may be used as a tool to alter, by way of private "agreements" that are in large measure imposed unilaterally by employers, the fundamental substantive rights of workers established by decades old congressional legislation. There should be no mistake about it that such a conclusion would be a radical departure from the manner in which the NLRA has been applied in the past. Here, the core issue is whether or not the Respondent may restrict the rights of employees to engage in concerted activity long recognized and protected by Section 7. Though instructive with respect the FAA's standing in the world of general consumer litigation, the arguments Respondent and its amicus ally have fashioned from *Concepcion* and *CompuCredit* would require that the decades old statutory rights of employees be thrown overboard in order to reach the conclusions they advocate.

Employer devised agreements that seek to restrict employees from acting in concert with each other are the *raison d'être* for both the Norris-LaGuardia Act and Section 7 of the NLRA. The congressional findings giving rise to NLRA and Norris-LaGuardia plainly state that these statutes were intended to correct the massive imbalance in bargaining power between the individual worker and his employer. To correct this imbalance, Congress empowered workers to act concertedly for their mutual aid and benefit in the workplace. Thus, the public policy declaration in Section 2 of the Norris-LaGuardia Act passed in 1932 states:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization *or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection* . . . 29 USC § 102. (Emphasis added)

Similarly, Section 1 of the NLRA states in part:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who

> are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries. 29 USC § 151.

Respondent's arbitration policy serves to restore the imbalance between the individual worker and the corporate employer by prohibiting employees from pursuing the resolution of work place disputes with concerted legal actions and by imposing broad nondisclosure requirements.[8] Essentially, the Respondent and its amicus ally lobby for this administrative tribunal to establish an employer's right to restrict employees, in order to hold a job, from exercising their statutory right to use the fullrange of legal remedies generally available to all citizens.

Lafayette Park, supra, requires a determination as to whether Respondent's arbitration policy contains terms that would tend to chill its employees Section 7 activities. On this fundamental question, I find that both the class action ban and the nondisclosure restriction contained in Respondent's arbitration poli-

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[8] I found the claims made in the briefs filed by Respondent and the amicus that *Horton* seeks to alter all manner of rules governing the prosecution of complaints in federal and state courts unconvincing. All *Horton*, and this decision for that matter, seek to protect is the right of employees to *invoke* the ordinary rules that apply to all. Nothing would alter how the courts of any jurisdiction deal with complaints brought before them by Respondent's employees.

cy unlawfully limit Respondent's employees from exercising their Section 7 right to commence and prosecute employment-related legal actions in concert with other employees,

Respondent's arbitration policy unlawfully requires its employees to surrender core Section 7 rights by imposing significant restraints on concerted action regardless of whether the employee opts to be covered by it or not. For the purposes of worker rights protected by Section 7, the opt-out process designed by the Respondent is an illusion. The requirement that employees must affirmatively act to preserve rights already protected by Section 7 rights through the opt-out process is, as the Acting General Counsel argues, an unlawful burden on the right of employees to engage in collective litigation that may arise in the future. Board precedent establishes that employees may not be required to prospectively trade away their statutory rights. *Ishikawa Gasket American, Inc.*, 337 NLRB 175–176 (2001).

Even if a worker consciously chooses to opt-out and completes the separate process necessary to do so in a timely manner, the Respondent can still effectively prevent concerted employee activity between those who opt out and the vast majority of other employees who (1) consciously chose not to opt-out; (2) unconsciously failed to opt-out in a timely fashion; and (3) were hired before 2007 and thereby not given an opportunity to opt out.[9] Respondent's arbi-

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[9] Charging Party and its amicus ally suggested that I essentially conclude the Respondent deliberately designed its initial employment documents in order to, among other things, dupe

tration policy limits the assistance the opted-out employee may obtain from fellow workers even in pursuit of their own individual claims. But aside from that, any notion that an opt-out employee can identify others who have opted-out in order to secure their fullest cooperation in a collective action is simply belied by Respondent's own inability to readily identify other opted out individuals in responding to the Acting General Counsel's hearing subpoena.

Respondent also argues that its arbitration policy only requires employees to bring their employment-related disputes individually and does nothing to prevent ordinary concerted activities among employees. That assertion is simply far from the case. The nondisclosure requirement in Respondent's arbitration policy imposes extreme limitations on activities protected by Section 7. The following portion of the Board's decision in *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990), illustrates the long history of precedent finding that limitations on employee communications about their wages, hours and working conditions such as those imposed by this nondisclosure policy to be unlawful:

> Under Section 7 of the Act, employees have the right to engage in activities for their "mutual aid or protection," including communicating regarding their

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new employees into being bound by its arbitration policy. Although I am not willing to reach that conclusion based on the limited evidence in this case, I would be startled to learn that the number of employees who made a conscious, fully-informed decision to be bound by Respondent's highly self-serving arbitration policy even came close to the infinitesimal number of employees who actually opted out.

terms and conditions of employment.[3] It is well established that employees do not lose the protection of the Act if their communications are related to an ongoing labor dispute and are not so disloyal, reckless, or maliciously untrue[4] as to constitute, for example, "a disparagement or vilification of the employer's product or reputation."[5] For example, the Board has found employees' communications about their working conditions to be protected when directed to other employees,[6] an employer's customers,[7] its advertisers,[8] its parent company,[9] a news reporter,[10] and the public in general.[11]

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[3] See *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

[4] Cf. NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard), 346 U.S. 464 (1953).

[5] See Sahara Datsun, 278 NLRB 1044, 1046 (1986), enfd. 811 F.2d 1317 (9th Cir. 1987), quoting Allied Aviation Service Co. of New Jersey, 248 NLRB 229, 230 (1980), enfd. 636 F.2d 1210 (3d Cir. 1980).

[6] In addition to Waco, Inc., 273 NLRB 746 (1984), cited by the judge, see also Heck's, Inc., 293 NLRB No. 132, slip op. at 23 (May 18, 1989), and Scientific-Atlanta, Inc., 278 NLRB 622, 625 (1986).

[7] Greenwood Trucking, Inc., 283 NLRB 789 (1987).

[8] Sacramento Union, 291 NLRB No. 83 (Oct. 31, 1988), enfd. 899 F.2d 210 (9th Cir. 1989).

[9] Oakes Machine Corp., 288 NLRB 456 (1988), enfd. 897 F.2d 84 (2d Cir. 1990); Mitchell Manuals, Inc., 280 NLRB 230, 232 fn. 7 (1986).

[10] Auto Workers Local 980, 280 NLRB 1378 (1986), enfd. 819 F.2d 1134 (3d Cir. 1987); Roure Bertrand Dupont, Inc., 271 NLRB 443 (1984).

[11] Cincinnati Suburban Press, 289 NLRB No. 127 (July 20, 1988).

More to the point here, the Board found in *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004), that a communication rule providing for the discipline of any employee who disclosed "disciplinary information, *grievance/complaint information*, performance evaluations, salary information, salary grade, types of pay increases and termination data for employees who have left the company" to be unlawful on its face. (Emphasis added)

Although the nondisclosure requirement here does not specify the type of the remedial action available where an employee fails to heed its limitations, this lack of specificity permits the inference that Respondent could either resort to disciplinary action or institute a separate legal action for breach of the arbitration policy's terms. The chilling effect of either option should be obvious. Absent the unlikely consent of Respondent, this non-disclosure provision could be read by a reasonable employee as requiring the retention of a lawyer just to learn, among other things, whether it would be permissible to openly solicit one's fellow workers: (1) for evidence or service as a witness; (2) for monetary contributions to help pay for the very expensive costs of arbitration; or (3) for the presence of fellow employees at an arbitration proceeding merely for moral support. It also means, of course, that the employee who has gone through the arbitration process under Respondent's policy would be prohibited, again absent Respondent's very unlikely consent, from advising other employees who have like or similar employment disputes whether or not these other employees have opted out of the arbitration policy. Even though Respondent's management would have full access to the detail of prior arbitration decisions, the nondisclosure provision muzzles the employee who did not opt out and who invoked the arbitration process from providing a useful critique of the process, the outcome, or any other worthwhile advice to any fellow worker with a similar dispute whether that employee had opted out or not. This nondisclosure provision vividly illustrates that Respondent, by way of the restrictions in its arbitration policy, seeks to restore the power imbalance between workers and their employers that existed prior to congressional passage of Norris-LaGuardia and the NLRA.[10]

For the foregoing reasons, I find Respondent's arbitration policy with its class action ban and its nondisclosure provision amounts to the type of private employment agreement that is unlawful and unenforceable under the NLRA because it severely restricts protected concerted employee activity. By

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[10] Any claims that the nondisclosure provision in Respondent's arbitration policy was not properly plead nor fully litigated lack merit. In defending the class action ban in its arbitration policy, Respondent's arguments encompassed the entirety of its arbitration policy. Apart from Respondent's argument that its arbitration policy lawfully restricts class actions and does not otherwise restrict concerted employee activity, Respondent's defense relies on a variety of other provisions in its arbitration policy. The most striking illustration is found in its unmeritorious claim that FRCP Rule 20, incorporated in its policy by general reference to the FRCP, preserves an avenue for employees to join in a concerted judicial action, thereby satisfying the *Horton* requirement that there be an arbitral or judicial avenue open for collective litigation of employment claims. In as much as Respondent has chosen to cherry-pick provisions throughout its arbitration policy, whether explicitly stated or not, in support its defense, it cannot properly be heard to complain about the scrutiny of its entire policy on the ground that it has not been fully litigated.

maintaining it as well as enforcing it as to the pending cases described above against individuals who are employees within the meaning of Section 2(3), Respondent has violated, and is continuing to violate, Section 8(a)(1).

Conclusions of Law

1. Respondent is an employer engaged in commerce or an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining and enforcing the arbitration policy contained in its "Team Member Handbook," Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. Respondent's conduct found above affects commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In accord with the request of the Acting General Counsel, my recommended order will also require Respondent to notify "all judicial and arbitral forums wherein the (arbitration policy) has been enforced that it no longer opposes the seeking of collective or class action type relief." This will include a requirement that Respondent: (1) withdraw any pending motion for individual arbitration, and (2) request any appropriate court to vacate its order for individual arbitration granted at Respondent's request if a motion to vacate can still be timely filed.

Respondent opposes this added relief. It argues that the Board has no authority to direct a federal or state court, or an arbitration tribunal to modify its own prior orders or awards. In addition, Respondent argues that such retroactive relief is inappropriate.

I find the remedial action sought by the Acting General Counsel is appropriate here. Respondent's contention concerning the Board's lack of authority misapprehends the nature of this relief sought and granted. The Acting General Counsel seeks no order or directive that would *require* any federal or state court, or arbitral tribunal to do anything. Instead the relief sought, and which I grant, merely requires Respondent to take action consistent with this decision by notifying any court or arbitral tribunal that have compelled the individual arbitration of claims at the request of Respondent that it is withdrawing such a motion or request and no longer objects to class or collective employment-related claims brought by those of its workers who qualify as employees within the meaning of Section 2(3) of the Act. If the court or tribunal chooses not to honor Respondent's good-faith request for whatever reason, then so be it. And the same is true with respect to an order requiring Respondent to withdraw any pending motion seeking to prevent Section 2(3) employees from acting collectively.

Respondent's further assertion that such relief is inappropriate as retroactive in nature also misapprehends the nature of the relief. Any remedial order under Section 10(c) necessarily applies to the past conduct of the employer or labor organization against whom it is issued. An order that applies to a respondent's own past conduct found unlawful following a hearing conducted in accord with the principles of due process is not the type of order that would be subject to, or require justification under, the principles of retroactive application. My recommended order applies to no other pending case, no other employer, and to no other conduct than alleged unlawful in this complaint. For these reasons, Respondent's assertions about retroactive application lack merit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, 24 Hour Fitness USA, Inc., San Ramon, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining any provision in the arbitration of disputes section of its Team Member Handbook that prohibits its employees from bringing or participating in class or collective actions brought in any arbitral or judicial forum that relates to their wages, hours, or other terms and conditions of employment.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Enforcing, or seeking to enforce, any provision in the arbitration of disputes section of its Team Member Handbook that prohibits employees from bringing or participating in class or collective actions brought in any arbitral or judicial forum that relates to their wages, hours, or other terms and conditions of employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remove from the arbitration of disputes section of future editions of its Team Member Handbook any prohibition against employees from bringing or participating in class or collective actions brought in any arbitral or judicial forum that relates to their wages, hours, or other terms and conditions of employment.

(b) Notify present and future employees individually that the existing prohibition against bringing or participating in class or collective actions in any arbitral or judicial forum that relates to their wages, hours, or other terms and conditions of employment currently contained it the arbitration of disputes section of its Team Member Handbook will be given no effect and that the provision will be removed from subsequent editions of the Team Member Handbook.

(c) Notify any arbitral or judicial tribunal where it has pursued the enforcement of the prohibition against bringing or participating in class or collective actions relating to the wages, hours, or other terms and conditions of employment of its employees since August 15, 2010, that it desires to withdrawal any such motion or request, and that it no longer objects to it employees bringing or participating in such class or collective actions.

(d) Within 14 days after service by the Region, post at all of its facilities located in the United States and its territories copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 20 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, inasmuch as Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the posted hard copy notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own ex-

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[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

pense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 15, 2011.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 6, 2012

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.

Choose representatives to bargain with us on your behalf.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT maintain any provision in the Arbitration of Disputes section of our Team Member Handbook that prohibits you from bringing or participating in class or collective actions relating to your wages, hours, or other terms and conditions of employment brought in any arbitral or judicial forum.

WE WILL NOT enforce, or seek to enforce, any provision in the Arbitration of Disputes section of our Team Member Handbook that prohibits you from bringing or participating in class or collective actions relating to your wages, hours, or other terms and conditions of your employment in any arbitral or judicial forum.

WE WILL NOT prohibit you from disclosing the existence, content, or results of any arbitration conducted under our Arbitration of Disputes policy.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Federal labor law.

WE WILL remove from the Arbitration of Disputes section of future editions of our Team Member Handbook any prohibition against you from bringing or participating in class or collective actions relates to your wages, hours, or other terms and conditions of employment brought in any arbitral or judicial forum.

WE WILL remove from the Arbitration of Disputes section of future editions of our Team Member Handbook any prohibition against you from disclosing the existence, content, or results of any arbitration conducted under that policy

WE WILL notify present and future employees individually that our existing prohibition against bringing or participating in class or collective actions in any arbitral or judicial forum that relate to their wages, hours, or other terms and conditions of employment currently contained in the Arbitration of Disputes section of our Team Member Handbook will be given no effect and that the provision will be removed from subsequent editions of the Team Member Handbook.

WE WILL notify present and future employees individually that our existing prohibition against disclosing the existence, content, or results of any arbitration conducted under our Arbitration of Disputes policy will be given no effect and that the provision will be removed from subsequent editions of our Team Member Handbook.

WE WILL notify any arbitral or judicial tribunal where we have pursued the enforcement of our prohibition against bringing or participating in class or collective actions that relate to the wages, hours, or other terms and conditions of employment of our employees since August 15, 2010, that we desire to withdrawal any such motion or request, and that WE WILL no longer object to our employees bringing or participating in such class or collective actions.

24 HOUR FITNESS USA