No. 16-689

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

24 HOUR FITNESS USA, INC., ET AL.

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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QUESTION PRESENTED

Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. 158(a)(1), because they limit the employees' right under the National Labor Relations Act to engage in "concerted activities" in pursuit of their "mutual aid or protection," 29 U.S.C. 157, and are therefore unenforceable under the saving clause of the Federal Arbitration Act, 9 U.S.C. 2.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Alton J. Sanders was the charging party before the National Labor Relations Board and an intervenor in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The National Labor Relations Board respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals granting summary reversal of the National Labor Relations Board's decision (App., *infra*, 1a) is not published in the *Federal Reporter* but is available at 2016 WL 3668038. The decision and order of the Board (App., *infra*, 2a-60a) are reported at 363 N.L.R.B. No. 84.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2016. On September 21, 2016, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including October 26, 2016. On October 19, 2016, Justice Thomas further

extended the time to November 23, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 77a-80a.

STATEMENT

1. a. The National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, provides that "[e]mployees 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 "to refrain from any or all of such activities." 29 U.S.C. 157. This Court has described the rights under Section 157 as including employees' efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship," including "through resort to administrative and judicial forums." *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-566 (1978). An employer that "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section 157" commits an unfair labor practice. 29 U.S.C. 158(a)(1). The National Labor Relations Board (Board) "is empowered * * * to prevent any person from engaging in any unfair labor practice * * * affecting commerce." 29 U.S.C. 160(a).

b. The Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, provides that any written contract "evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and en-

forceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2.

c. In decisions issued in 2012 and 2014, the Board held that an employer could not, as a condition of employment, require its employees to limit the resolution of employment-related claims to individual arbitration and thereby prevent them from pursuing class or collective actions about such claims in any forum. See *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), enforcement denied in relevant part, 737 F.3d 344 (5th Cir. 2013); *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014), enforcement denied in relevant part, 808 F.3d 1013 (5th Cir. 2015), petition for cert. pending, No. 16-307 (filed Sept. 9, 2016).

In both of those cases, the Fifth Circuit denied enforcement of the Board's orders in relevant part, holding that the NLRA does not override the FAA and that the use of class-action or collective procedures is not a substantive right under the NLRA. See App., *infra*, 62a-76a (reprinting the Fifth Circuit's decision in *Murphy Oil*); *id.* at 62a-63a, 65a-66a, 68a-69a (describing, and treating as controlling, the Fifth Circuit's prior holding in *D.R. Horton*).

2. The material facts in this case are similar to those in *Murphy Oil*. Respondent 24 Hour Fitness USA, Inc. (respondent), required its employees, nationwide, to agree to an Arbitration of Disputes Policy. That policy provided, as relevant here, that employment-related disputes would be submitted exclusively to binding arbitration and that "there will be no right or authority for any dispute to be brought, heard or arbitrated as a class action (including without limitation opt out class actions or opt in collective class actions)." App., *infra*, 27a; see *id.* at 23a-32a. Unlike in *Murphy*

Oil, the policy allowed employees to follow a procedure to opt out of mandatory arbitration. *Id.* at 23a-32a. Respondent sought to enforce the policy's class-action ban in several court cases filed against it by its employees or former employees. *Id.* at 33a-38a.

a. In April 2012, on the basis of an unfair-labor-practice charge filed by Alton J. Sanders, the Board's Acting General Counsel issued an administrative complaint alleging that respondent's arbitration policy constituted an unfair labor practice in violation of Section 158(a)(1) because it interfered with its employees' Section 157 right to engage in concerted legal activity.[1] App., *infra*, 19a-20a. In December 2015, the Board held that respondent's class-action ban is invalid in light of the Board's own decisions in *D.R. Horton* and *Murphy Oil*, as applied to cover agreements with opt-out procedures in *On Assignment Staffing Services, Inc.*, 362 N.L.R.B. No. 189 (2015), enforcement denied in relevant part, No. 15-60642, 2016 WL 3685206 (5th Cir. June 6, 2016). App., *infra*, 2a-5a.

b. As he had done in *Murphy Oil*, Member Miscimarra dissented, adhering to his view that the Board's decision in *Murphy Oil* was incorrect, and also concluding that it should not be extended to agreements that include an opt-out procedure. App., *infra*, 10a-15a.

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[1] In *NLRB* v. *SW General, Inc.*, No. 15-1251 (argued Nov. 7, 2016), the Court is currently considering whether the Acting General Counsel's service in that capacity was consistent with the Federal Vacancies Reform Act of 1988 (FVRA), 5 U.S.C. 3345 *et seq.* Respondent in this case has not objected to the Board's unfair-labor-practice proceeding on FVRA grounds.

3. Respondent elected to file its petition for review of the Board's decision in the Fifth Circuit. See 29 U.S.C. 160(f). The Board moved to stay proceedings pending resolution of its petition for rehearing en banc in *Murphy Oil*. On January 25, 2016, the court of appeals granted the Board's motion. App., *infra*, 61a. On June 8, 2016, after the court had denied rehearing in *Murphy Oil*, the Board moved for a further stay of this case pending the filing and resolution of any petition for a writ of certiorari in *Murphy Oil*. On June 13, 2016, the court denied that motion.

On June 20, 2016, respondent filed a motion for summary disposition of its petition for review and reversal of the Board's decision in light of the court of appeals' decisions in *D.R. Horton* and *Murphy Oil*. On June 27, 2016, the court of appeals granted that motion. App., *infra*, 1a.

4. On September 9, 2016, this Office filed, on behalf of the Board, a petition for a writ of certiorari to review the Fifth Circuit's decision in *Murphy Oil*. See *NLRB* v. *Murphy Oil USA, Inc.*, No. 16-307. As that petition explains (at 19-24), there is an acknowledged conflict in the courts of appeals about the invalidity of arbitration agreements that would preclude employees from pursuing class or collective actions that assert employment-related claims. The respondent in *Murphy Oil* agrees with the Fifth Circuit's decision on the merits but supports the Board's petition for a writ of certiorari and agrees that "the Board's petition provides an appropriate vehicle for the Court to resolve the issue that has caused the courts of appeals to issue conflicting opinions." Br. for Resp. in Support of Granting Pet. at 11, *Murphy Oil*, *supra* (No. 16-307).

Three additional petitions for writs of certiorari—arising from other cases in the circuit split—are also pending in this Court. The Seventh and Ninth Circuits have expressly rejected the Fifth Circuit's analysis in *Murphy Oil*, and the employers in those cases are seeking this Court's review. See *Morris* v. *Ernst & Young, LLP*, 834 F.3d 975, 990 n.16 (9th Cir. 2016), petition for cert. pending, No. 16-300 (filed Sept. 8, 2016); *Lewis* v. *Epic Sys. Corp.*, 823 F.3d 1147, 1157 & n.† (7th Cir. 2016), petition for cert. pending, No. 16-285 (filed Sept. 2, 2016). Meanwhile, the Second Circuit has reaffirmed an earlier decision that declined to follow the Board's approach in *D.R. Horton*, and the employees in that case are seeking this Court's review. See *Patterson* v. *Raymours Furniture Co.*, No. 15-2820, 2016 WL 4598542, at *2-*3 (Sept. 14, 2016), petition for cert. pending, No. 16-388 (filed Sept. 22, 2016).[2]

REASONS FOR GRANTING THE PETITION

In this case, the court of appeals granted a motion for summary reversal of the Board's decision in light of its earlier decisions in *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.* v. *NLRB*, 808 F.3d 1013 (5th Cir. 2015), petition for cert. pending, No. 16-307 (filed Sept. 9, 2016). App., *infra*, 1a. There is a clear conflict in the courts of appeals regarding the validity, in light of the NLRA, of arbitration agreements that would preclude employees from pursuing class or collective actions that

[2] After *Murphy Oil*, the Eighth Circuit also reaffirmed an earlier decision rejecting the Board's position. See *Cellular Sales of Mo., LLC* v. *NLRB*, 824 F.3d 772, 776 (2016). The Board did not seek further review of that decision.

assert employment-related claims. See pp. 5-6, *supra*. The Board has already filed an unopposed petition for a writ of certiorari seeking this Court's review of the decision in *Murphy Oil*, on which the decision below relies.

The Court should hold the petition in this case pending its disposition of *Murphy Oil* and the other petitions presenting variants of the same question presented (*i.e.*, *Patterson* v. *Raymours Furniture Co.*, No. 16-388; *Ernst & Young, LLP* v. *Morris*, No. 16-300; and *Epic Systems Corp.* v. *Lewis*, No. 16-285) and then dispose of this case accordingly.[3]

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[3] The Board's decision in this case acknowledged that the ability of respondent's employees to opt out of the Arbitration of Disputes Policy presented a further question that had not been resolved in *Murphy Oil* itself. App., *infra*, 5a. Because the court of appeals did not reach that question, this Court would not typically address it in the first instance. If the Court were to grant review in one or more of the four petitions mentioned above and ultimately to agree with the Board's position in *Murphy Oil* that employees' class- or collective-action waivers are invalid, it would be appropriate to grant certiorari in this case, vacate the decision below, and remand for further proceedings to consider the additional question about the presence of an opt-out provision. See, *e.g.*, *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) ("[W]hen we reverse on a threshold question, we typically remand for resolution of any claims the lower courts' error prevented them from addressing.").

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of the petition for a writ of certiorari in *NLRB* v. *Murphy Oil USA, Inc.*, No. 16-307, as well as those in *Patterson* v. *Raymours Furniture Co.*, No. 16-388, *Ernst & Young, LLP* v. *Morris*, No. 16-300, and *Epic Systems Corp.* v. *Lewis*, No. 16-285, and then be disposed of as appropriate.

Respectfully submitted.

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NOVEMBER 2016

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* The Acting Solicitor General is recused in this case.

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

Filed: June 27, 2016

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

NATIONAL LABOR RELATIONS BOARD

Case 20-CA-035419

24 HOUR FITNESS USA, INC. *AND* ALTON J. SANDERS

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

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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.

[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. 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

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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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 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

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 "[e]xcept as may be required by

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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 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

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)).

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.

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mentioned at hearing only as a counter to the Respondent's assertion that the arbitration policy allowed for joinder of claims.

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

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[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."

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 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. Dec. 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 em-

ployees 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 overwhelming 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

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[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.").

[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 agree-

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 employee's Section 7 right to "refrain from" engaging in protected concerted activities.[4] Although questions may arise re-

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ment 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).

[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

garding 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.

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 im-

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basis. See *Bristol Farms*, above, slip op. at 2-4 (Member Miscimarra, dissenting).

[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.

properly 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 partial 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. Dec. 24, 2015

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.

[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.

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 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 ar-

bitration 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.

[QR CODE OMITTED]

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.

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.

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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.

[QR CODE OMITTED]

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]

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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

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.

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.

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granted the request of the Chamber to appear as amicus curiae to file a brief in support of Respondent's position.

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 funda-

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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.

mentally 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 employed 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 bind-

> ing 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 at 1.866.288.3263. 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 employees 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

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[3] This anomaly as to the Texas employees resulted from a court-mandated agreement in *Carey v. 24 Hour Fitness USA 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 opt-out by virtue of this special, court-approved procedure.

> 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. 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 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.

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

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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.

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

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

(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 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. 20-201l-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]

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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 Respon-

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:

> 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. Em-

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dent'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.

> ployers 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:
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> 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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> . . . .
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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.
>
> 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. Con-*

cepcion, 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 forum-selection 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 require-

ments.[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 full-range 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 policy 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

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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.

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 arbitration 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 ordi-

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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 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.

nary 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 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 l378 (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 per-

missible 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]

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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

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 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 or-

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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.

dered 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

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[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.

(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.

(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

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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."

duplicate and mail, at its own expense, 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. Nov. 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,

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-60005

24 HOUR FITNESS USA, INCORPORATED, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Jan. 25, 2016

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

ORDER :

IT IS ORDERED that respondent's unopposed motion to stay further proceedings in this case until petition for rehearing en banc is resolved in 14-60800 – *Murphy Oil USA, Inc. v. NLRB* is GRANTED.

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

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-60800

MURPHY OIL USA, INCORPORATED,
PETITIONER/CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT/CROSS-PETITIONER

Oct. 26, 2015

On Petitions for Review of an Order of the
National Labor Relations Board

Before: JONES, SMITH, and SOUTHWICK, Circuit Judges.

LESLIE H. SOUTHWICK, Circuit Judge:

The National Labor Relations Board concluded that Murphy Oil USA, Inc., had unlawfully required employees at its Alabama facility to sign an arbitration agreement waiving their right to pursue class and collective actions. Murphy Oil, aware that this circuit had already held to the contrary, used the broad venue rights governing the review of Board orders to file its petition with this circuit. The Board, also aware, moved for en banc review in order to allow arguments that the prior decision should be overturned. Having failed in that motion

and having the case instead heard by a three-judge panel, the Board will not be surprised that we adhere, as we must, to our prior ruling. We GRANT Murphy Oil's petition, and hold that the corporation did not commit unfair labor practices by requiring employees to sign its arbitration agreement or seeking to enforce that agreement in federal district court.

We DENY Murphy Oil's petition insofar as the Board's order directed the corporation to clarify language in its arbitration agreement applicable to employees hired prior to March 2012 to ensure they understand they are not barred from filing charges with the Board.

FACTS AND PROCEDURAL BACKGROUND

Murphy Oil USA, Inc., operates retail gas stations in several states. Sheila Hobson, the charging party, began working for Murphy Oil at its Calera, Alabama facility in November 2008. She signed a "Binding Arbitration Agreement and Waiver of Jury Trial" (the "Arbitration Agreement"). The Arbitration Agreement provides that, "[e]xcluding claims which must, by . . . law, be resolved in other forums, [Murphy Oil] and Individual agree to resolve any and all disputes or claims . . . which relate . . . to Individual's employment . . . by binding arbitration." The Arbitration Agreement further requires employees to waive the right to pursue class or collective claims in an arbitral or judicial forum.

In June 2010, Hobson and three other employees filed a collective action against Murphy Oil in the United States District Court for the Northern District of Alabama alleging violations of the Fair Labor Standards Act ("FLSA"). Murphy Oil moved to dismiss the collective action and compel individual arbitration pursuant to the

Arbitration Agreement. The employees opposed the motion, contending that the FLSA prevented enforcement of the Arbitration Agreement because that statute grants a substantive right to collective action that cannot be waived. The employees also argued that the Arbitration Agreement interfered with their right under the National Labor Relations Act ("NLRA") to engage in Section 7 protected concerted activity.

While Murphy Oil's motion to dismiss was pending, Hobson filed an unfair labor charge with the Board in January 2011 based on the claim that the Arbitration Agreement interfered with her Section 7 rights under the NLRA. The General Counsel for the Board issued a complaint and notice of hearing to Murphy Oil in March 2011.

In a separate case of first impression, the Board held in January 2012 that an employer violates Section 8(a)(1) of the NLRA by requiring employees to sign an arbitration agreement waiving their right to pursue class and collective claims in all forums. *D.R. Horton, Inc.*, 357 N.L.R.B. 184 (2012). The Board concluded that such agreements restrict employees' Section 7 right to engage in protected concerted activity in violation of Section 8(a)(1). *Id.* The Board also held that employees could reasonably construe the language in the *D.R. Horton* arbitration agreement to preclude employees from filing an unfair labor practice charge, which also violates Section 8(a)(1). *Id.* at *2, *18.

Following the Board's decision in *D.R. Horton*, Murphy Oil implemented a "Revised Arbitration Agreement" for all employees hired after March 2012. The revision provided that employees were not barred from "participating in proceedings to adjudicate unfair labor practice[]

charges before the" Board. Because Hobson and the other employees involved in the Alabama lawsuit were hired before March 2012, the revision did not apply to them.

In September 2012, the Alabama district court stayed the FLSA collective action and compelled the employees to submit their claims to arbitration pursuant to the Arbitration Agreement.[1] One month later, the General Counsel amended the complaint before the Board stemming from Hobson's charge to allege that Murphy Oil's motion to dismiss and compel arbitration in the Alabama lawsuit violated Section 8(a)(1) of the NLRA.

Meanwhile, the petition for review of the Board's decision in *D.R. Horton* was making its way to this court. In December 2013, we rejected the Board's analysis of arbitration agreements. *D.R. Horton, Inc. v. NLRB,* 737 F.3d 344 (5th Cir. 2013). We held: (1) the NLRA does not contain a "congressional command overriding" the Federal Arbitration Act ("FAA");[2] and (2) "use of class action procedures . . . is not a substantive right" under Section 7 of the NLRA. *Id.* at 357, 360-

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[1] The employees never submitted their claims to arbitration. In February 2015, the employees moved for reconsideration of the Alabama district court's order compelling arbitration. The district court denied their motion and ordered the employees to show cause why their case should not be dismissed with prejudice for failing to adhere to the court's order compelling arbitration. The district court ultimately dismissed the case with prejudice for "willful disregard" of its instructions in order to "gain [a] strategic advantage." *Hobson v. Murphy Oil USA, Inc.*, No. CV-10-S-1486-S, 2015 WL 4111661, at *3 (N.D. Ala. July 8, 2015), *appeal docketed,* No. 15-13507 (11th Cir. Aug. 5, 2015). The employees timely appealed. The case is pending before the Eleventh Circuit.

[2] 9 U.S.C. § 1 *et seq.*

62. This holding means an employer does not engage in unfair labor practices by maintaining and enforcing an arbitration agreement prohibiting employee class or collective actions and requiring employment-related claims to be resolved through individual arbitration. *Id.* at 362.

In analyzing the specific arbitration agreement at issue in *D.R. Horton*, however, we held that its language could be "misconstrued" as prohibiting employees from filing an unfair labor practice charge, which would violate Section 8(a)(1). *Id.* at 364. We enforced the Board's order requiring the employer to clarify the agreement. *Id.* The Board petitioned for rehearing en banc, which was denied without a poll in April 2014.

The Board's decision as to Murphy Oil was issued in October 2014, ten months after our initial *D.R. Horton* decision and six months after rehearing was denied. The Board, unpersuaded by our analysis, reaffirmed its *D.R. Horton* decision. It held that Murphy Oil violated Section 8(a)(1) by "requiring its employees to agree to resolve all employment-related claims through individual arbitration, and by taking steps to enforce the unlawful agreements in [f]ederal district court." The Board also held that both the Arbitration Agreement and Revised Arbitration Agreement were unlawful because employees would reasonably construe them to prohibit filing Board charges.

The Board ordered numerous remedies. Murphy Oil was required to rescind or revise the Arbitration and Revised Arbitration agreements, send notification of the rescission or revision to signatories and to the Alabama district court, post a notice regarding the violation at its facilities, reimburse the employees' attorneys' fees in-

curred in opposing the company's motion to dismiss and compel arbitration in the Alabama litigation, and file a sworn declaration outlining the steps it had taken to comply with the Board order.

Murphy Oil timely petitioned this court for review of the Board decision.

DISCUSSION

Board decisions that are "reasonable and supported by substantial evidence on the record considered as a whole" are upheld. *Strand Theatre of Shreveport Corp. v. NLRB,* 493 F.3d 515, 518 (5th Cir. 2007) (citation and quotation marks omitted); *see also* 29 U.S.C. § 160(e). "Substantial evidence is such relevant evidence as a reasonable mind would accept to support a conclusion." *J. Vallery Elec., Inc. v. NLRB,* 337 F.3d 446, 450 (5th Cir. 2003) (citation and quotation marks omitted). This court reviews the Board's legal conclusions *de novo,* but "[w]e will enforce the Board's order if its construction of the statute is reasonably defensible." *Strand Theatre,* 493 F.3d at 518 (citation and quotation marks omitted).

I. Statute of Limitations and Collateral Estoppel

Murphy Oil asserts that Hobson filed her charge too late after the execution of the Arbitration Agreement and the submission of Murphy Oil's motion to compel in the Alabama litigation. By statute, "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b). Murphy Oil also contends that the Board is collaterally estopped from considering whether it was lawful to enforce the Arbitration Agreement because the district court had already decided that issue in the Alabama litigation.

Both of these arguments were raised in Murphy Oil's answer to the Board's complaint. They were not, though, discussed in its brief before the Board. "No objection that has not been urged before the Board . . . shall be considered by the court. . . ." 29 U.S.C. § 160(e), (f). Similarly, we have held that "[a]ppellate preservation principles apply equally to petitions for enforcement or review of NLRB decisions." *NLRB v. Catalytic Indus. Maint. Co. (CIMCO),* 964 F.2d 513, 521 (5th Cir. 1992). While Murphy Oil may have properly pled its statute of limitations and collateral estoppel defenses, it did not sufficiently press those arguments before the Board. Thus, they are waived. *See* 29 U.S.C. § 160(e), (f).

II. D.R. Horton *and Board Nonacquiescence*

The Board, reaffirming its *D.R. Horton* analysis, held that Murphy Oil violated Section 8(a)(1) of the NLRA by enforcing agreements that "requir[ed] . . . employees to agree to resolve all employment-related claims through individual arbitration." In doing so, of course, the Board disregarded this court's contrary *D.R. Horton* ruling that such arbitration agreements are enforceable and not unlawful. *D.R. Horton,* 737 F.3d at 362.[3] Our

[3] Several of our sister circuits have either indicated or expressly stated that they would agree with our holding in *D.R. Horton* if faced with the same question: whether an employer's maintenance and enforcement of a class or collective action waiver in an arbitration agreement violates the NLRA. *See Walthour v. Chipio Windshield Repair, LLC,* 745 F.3d 1326, 1336 (11th Cir. 2014), *cert. denied,* — U.S. —, 134 S. Ct. 2886, 189 L. Ed. 2d 836 (2014); *Richards v. Ernst & Young, LLP,* 744 F.3d 1072, 1075 n.3 (9th Cir. 2013), *cert. denied,* — U.S. —, 135 S. Ct. 355, 190 L. Ed. 2d 249 (2014); *Owen v. Bristol Care, Inc.,* 702 F.3d 1050, 1053-55 (8th Cir.

decision was issued not quite two years ago; we will not repeat its analysis here. Murphy Oil committed no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing the arbitration agreements at issue here. *See id.*

Murphy Oil argues that the Board's explicit "defiance" of *D.R. Horton* warrants issuing a writ or holding the Board in contempt so as to "restrain [it] from continuing its nonacquiescence practice with respect to this [c]ourt's directive." The Board, as far as we know, has not failed to apply our ruling in *D.R. Horton* to the parties in that case. The concern here is the application of *D.R. Horton* to new parties and agreements.

An administrative agency's need to acquiesce to an earlier circuit court decision when deciding similar issues in later cases will be affected by whether the new decision will be reviewed in that same circuit. *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 735-43 (1989). Murphy Oil could have sought review in (1) the circuit where the unfair labor practice allegedly took place, (2) any circuit in which Murphy Oil transacts business, or (3) the United States Court of Appeals for the District of Columbia. 29 U.S.C. § 160(f). The Board may well not know which circuit's law will be applied on a petition for review. We do not celebrate the Board's failure to follow our *D.R. Horton* reasoning, but neither do we condemn its nonacquiescence.

2013); *Sutherland v. Ernst & Young LLP,* 726 F.3d 290, 297 n.8 (2d Cir. 2013).

III. The Agreements and NLRA Section 8(a)(1)

The Board also held that Murphy Oil's enforcement of the Arbitration Agreement and Revised Arbitration Agreement violated Section 8(a)(1) of the NLRA because employees could reasonably believe the contracts precluded the filing of Board charges. Hobson and the other employees involved in the Alabama litigation were subject to the Arbitration Agreement applicable to employees hired before March 2012. The Revised Arbitration Agreement contains language that sought to correct the possible ambiguity.

A. The Arbitration Agreement in Effect Before March 2012

Section 8(a) of the NLRA makes it unlawful for an employer to commit unfair labor practices. 29 U.S.C. § 158(a). For example, an employer is prohibited from interfering with employees' exercise of their Section 7 rights. *Id.* § 158(a)(1). Under Section 7, employees have the right to self-organize and "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.* § 157.

The Board is empowered to prevent unfair labor practices. This power cannot be limited by an agreement between employees and the employer. *See id.* § 160(a). "Wherever private contracts conflict with [the Board's] functions, they . . . must yield or the [NLRA] would be reduced to a futility." *J.I. Case Co. v. NLRB,* 321 U.S. 332, 337, 64 S. Ct. 576, 88 L. Ed. 762 (1944). Accordingly, as we held in *D.R. Horton*, an arbitration agreement violates the NLRA if employees would reasonably construe it as prohibiting filing unfair labor practice charges with the Board. 737 F.3d at 363.

Murphy Oil argues that Hobson's choice to file a charge with the Board proves that the pre-March 2012 Arbitration Agreement did not state or suggest such charges could not be filed. The argument misconstrues the question. "[T]he actual practice of employees is not determinative" of whether an employer has committed an unfair labor practice. *See Flex Frac Logistics, L.L.C. v. NLRB,* 746 F.3d 205, 209 (5th Cir. 2014). The Board has said that the test is whether the employer action is "likely to have a chilling effect" on employees' exercise of their rights. *Id.* (citing *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998)). The possibility that employees will misunderstand their rights was a reason we upheld the Board's rejection of a similar provision of the arbitration agreement in *D.R. Horton.* We explained that the FAA and NLRA have "equal importance in our review" of employment arbitration contracts. *D.R. Horton*, 737 F.3d. at 357. We held that even though requiring arbitration of class or collective claims in all forums does not "deny a party any statutory right," an agreement reasonably interpreted as prohibiting the filing of unfair labor charges would unlawfully deny employees their rights under the NLRA. *Id.* at 357-58, 363-64.

Murphy Oil's Arbitration Agreement provided that "any and all disputes or claims [employees] may have . . . which relate in any manner . . . to . . . employment" must be resolved by individual arbitration. Signatories further "waive their right to . . . be a party to any group, class or collective action claim in . . . any other forum." The problem is that broad "any claims" language can create "[t]he reasonable impression . . . that an employee is waiving not just [her] trial rights, but [her] administrative rights as well."

D.R. Horton, 737 F.3d at 363-64 (citing *Bill's Electric, Inc.*, 350 N.L.R.B. 292, 295-96 (2007)).

We do not hold that an express statement must be made that an employee's right to file Board charges remains intact before an employment arbitration agreement is lawful. Such a provision would assist, though, if incompatible or confusing language appears in the contract. *See id.* at 364.

We conclude that the Arbitration Agreement in effect for employees hired before March 2012, including Hobson and the others involved in the Alabama case, violates the NLRA. The Board's order that Murphy Oil take corrective action as to any employees that remain subject to that version of the contract is valid.

B. The Revised Arbitration Agreement in Effect After March 2012

In March 2012, following the Board's decision in *D.R. Horton*, Murphy Oil added the following clause in the Revised Arbitration Agreement: "[N]othing in this Agreement precludes [employees] . . . from participating in proceedings to adjudicate unfair labor practice[] charges before the [Board]." The Board contends that Murphy Oil's modification is also unlawful because it "leaves intact the entirety of the original Agreement" including employees' waiver of their right "to commence or be a party to any group, class or collective action claim in . . . any other forum." This provision, the Board said, could be reasonably interpreted as prohibiting employees from pursuing an administrative remedy "since such a claim could be construed as having 'commence[d]' a class action in the event that the [Board] decides to seek classwide relief."

We disagree with the Board. Reading the Murphy Oil contract as a whole, it would be unreasonable for an employee to construe the Revised Arbitration Agreement as prohibiting the filing of Board charges when the agreement says the opposite. The other clauses of the agreement do not negate that language. We decline to enforce the Board's order as to the Revised Arbitration Agreement.

IV. Murphy Oil's Motion to Dismiss and NLRA Section 8(a)(1)

Finally, the Board held that Murphy Oil violated Section 8(a)(1) by filing its motion to dismiss and compel arbitration in the Alabama litigation. As noted above, Section 8(a) prohibits employers from engaging in unfair labor practices. 29 U.S.C. § 158(a). Section 8(a)(1) provides that an employer commits an unfair labor practice by "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise" of their Section 7 rights, including engaging in protected concerted activity. *Id.* §§ 157, 158(a)(1).

The Board said that in filing its dispositive motion and "eight separate court pleadings and related [documents] . . . between September 2010 and February 2012," Murphy Oil "acted with an illegal objective [in]. . . . 'seeking to enforce an unlawful contract provision'" that would chill employees' Section 7 rights, and awarded attorneys' fees and expenses incurred in "opposing the . . . unlawful motion." We disagree and decline to enforce the fees award.

The Board rooted its analysis in part in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983). That decision discussed the balance between an employer's First Amend-

ment right to litigate and an employee's Section 7 right to engage in concerted activity. In that case, a waitress filed a charge with the Board after a restaurant terminated her employment; she believed she was fired because she attempted to organize a union. *Id.* at 733, 103 S. Ct. 2161. After the Board's General Counsel issued a complaint, the waitress and several others picketed the restaurant, handing out leaflets and asking customers to boycott eating there. *Id.* In response, the restaurant filed a lawsuit in state court against the demonstrators alleging that they had blocked access to the restaurant, created a threat to public safety, and made libelous statements about the business and its management. *Id.* at 734, 103 S. Ct. 2161. The waitress filed a second charge with the Board alleging that the restaurant initiated the civil suit in retaliation for employees' engaging in Section 7 protected concerted activity, which violated Section 8(a)(1) and (4) of the NLRA. *Id.* at 734-35, 103 S. Ct. 2161.

The Board held that the restaurant's lawsuit constituted an unfair labor practice because it was filed for the purpose of discouraging employees from seeking relief with the Board. *Id.* at 735-37, 103 S. Ct. 2161. The Supreme Court remanded the case for further consideration, stating: "The right to litigate is an important one," but it can be "used by an employer as a powerful instrument of coercion or retaliation." *Id.* at 740, 744, 103 S. Ct. 2161. To be enjoinable, the Court said the lawsuit prosecuted by the employer must (1) be "baseless" or "lack[ing] a reasonable basis in fact or law," and be filed "with the intent of retaliating against an employee for the exercise of rights protected by" Section 7, or (2) have "an objective that is illegal under federal law." *Id.* at 737 n.5, 744, 748, 103 S. Ct. 2161.

We start by distinguishing this dispute from that in *Bill Johnson's*. The current controversy began when three Murphy Oil employees filed suit in Alabama. Murphy Oil defended itself against the employees' claims by seeking to enforce the Arbitration Agreement. Murphy Oil was not retaliating as Bill Johnson's may have been. Moreover, the Board's holding is based solely on Murphy Oil's enforcement of an agreement that the Board deemed unlawful because it required employees to individually arbitrate employment-related disputes. Our decision in *D.R. Horton* forecloses that argument in this circuit. 737 F.3d at 362. Though the Board might not need to acquiesce in our decisions, it is a bit bold for it 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.

Moreover, the timing of Murphy Oil's motion to dismiss when compared to the timing of the *D.R. Horton* decisions counsels against finding a violation of Section 8(a)(1). The relevant timeline of events is as follows:

(1) July 2010: Murphy Oil filed its motion to dismiss and sought to compel arbitration in the Alabama litigation;

(2) January 2012: the Board in *D.R. Horton* held it to be unlawful to require employees to arbitrate employment-related claims individually, and the D.R. Horton agreement violated the NLRA because it could be reasonably construed as prohibiting the filing of Board charges;

(3) October 2012: the Board's General Counsel amended the complaint against Murphy Oil to allege that Murphy Oil's motion in the Alabama litigation violated Section 8(a)(1); and

(4) December 2013: this court granted D.R. Horton's petition for review of the Board's order and held that agreements requiring individual arbitration of employment-related claims are lawful but that the specific agreement was unlawful because it could be reasonably interpreted as prohibiting the filing of Board charges.

In summary, Murphy Oil's motion was filed a year and a half before the Board had even spoken on the lawfulness of such agreements in light of the NLRA. This court later held that such agreements were generally lawful. Murphy Oil had at least a colorable argument that the Arbitration Agreement was valid when its defensive motion was made, as its response to the lawsuit was not "lack[ing] a reasonable basis in fact or law," and was not filed with an illegal objective under federal law. *See Bill Johnson's*, 461 U.S. at 737 n.5, 744, 748, 103 S. Ct. 2161. Murphy Oil's motion to dismiss and compel arbitration did not constitute an unfair labor practice because it was not "baseless." We decline to enforce the Board's order awarding attorneys' fees and expenses.

* * *

The Board's order that Section 8(a)(1) has been violated because an employee would reasonably interpret the Arbitration Agreement in effect for employees hired before March 2012 as prohibiting the filing of an unfair labor practice charge is ENFORCED. Murphy Oil's petition for review of the Board's decision is otherwise GRANTED.

APPENDIX E

1. 9 U.S.C. 2 provides:

Validity, irrevocability, and enforcement of agreements to arbitrate

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.

2. 29 U.S.C. 151 provides:

Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the

market for goods flowing from or into the channels of commerce.

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.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

3. 29 U.S.C. 157 provides:

Right of employees as to organization, collective bargaining, etc.

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.

4. 29 U.S.C. 158(a)(1) provides:

Unfair labor practices

(a) Unfair labor practices by employer

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;