UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

D.R. HORTON, INC.	:	
and	:	Case No. 12-CA-25764
MICHAEL CUDA, an Individual	:	

BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the Chamber of Commerce of the United States of America (the "Chamber"), is a non-profit corporation organized and existing under the laws of the District of Columbia. The Chamber is the largest federation of business, trade, and professional organizations in the United States. The Chamber represents 300,000 direct members and indirectly represents three million businesses and organizations. The Chamber has members of every size, in every sector, and in every region of the United States. A principal function of the Chamber is to represent the interest of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community. Given the enormous costs, risks, and evolving burdens and liabilities confronting businesses in the United States, the interests of the business community at large encompass a statement of position that is broader and more far-reaching than the more limited interests of the litigants.

This case presents the question of whether an employer violates Section 8(a)(1) of the National Labor Relations Act ("NLRA") by maintaining and enforcing a Mutual Arbitration Agreement, under which employees are required, as a condition of employment, to agree to submit all employment disputes to individual arbitration, waiving all rights to a judicial forum, where the arbitration agreement further provides that arbitrators will have no authority to consolidate claims or to fashion a proceeding as a class or collective action. This question is of significant concern to the Chamber as many of its members are employers subject to the NLRA.

The decision below holding holds that an employer may include a class action waiver in a mandatory arbitration agreement without violating Section 8(a)(1) of the NLRA should be

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

affirmed. As one of the largest representatives of employers in the United States, the Chamber has a vital interest in ensuring that the federal labor law regime to which its members may be subject is rational, fair and consistent, and that the agency responsible for enforcing the NLRA at all times is acting within its authority in fulfilling its obligations and responsibilities under the Act.

SUMMARY OF ARGUMENT

The issue presented directly implicates the competing boundaries of the NLRA and the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), both of which are supported by strong federal policies and both of which have been construed broadly in an effort to effect those policies. The issue at hand demands that the Board strike a balance between the right of employees to engage in protected concerted activity, as adumbrated by the NLRA, and the right of parties to contract to determine the appropriate forum for resolution of their disputes, as intended by the FAA.

In terms of striking this balance, the strong federal policies underlying the FAA and the weight of Supreme Court precedent interpreting its breadth must be accounted for. The right of parties to contract, the right of parties to contract for a non-judicial forum for resolution of their disputes, and the right of parties to select the procedures that will govern their dispute are well-established. Moreover, the Supreme Court recently reaffirmed that class action waivers are fully enforceable and, in so doing, identified three critical features of arbitration that render it ill-suited to administer class actions, including: (i) the sacrifice of the benefits of arbitration, namely, cost and efficiency; (ii) the potential for the informal rules (or an inexperienced arbitrator implementing those rules) to undermine the complex class procedure; and (iii) the risk to a defendant from having to defend potentially financially ruinous claims without a multi-tiered system of review for errors. If the Board were to hold class action waivers impermissible under

Section 7 of the Act, the holding would be akin to *requiring* employers to submit to class actions in arbitration and imposing the very burdens identified by the Supreme Court on employers involuntarily, in a process that is traditionally and philosophically rooted in mutuality.

Further, in addition to treading upon substantive federal policies and legislation that does not fall within the Board's auspices, the Board would be doing so with respect to a right that is fundamentally procedural in nature. While *amicus* does not challenge that the Board may protect the concerted activity of employees discussing their grievances and deciding to pursue class action litigation - each of which are arguably substantive rights protected by Section 7 - *maintaining* that class action once the forum is convened implicates a procedural right alone far removed from the confines of Section 7. A class action is merely a tool with which to enforce substantive rights that arise from other constitutional, statutory or common-law sources. Lest there be any doubt, the Supreme Court's recent jurisprudence with respect to the validity of Rule 23 of the Federal Rules of Civil Procedure under the Rules Enabling Act resolved definitively that class actions confer procedural rights that *remain* procedural, even if they incidentally impact arguably substantive rights.

The Board has the ability to adjust its analysis of Section 7 in a manner that allows for the accommodation of Section 7 rights and the FAA. Employers should be permitted to include class action waivers in mandatory arbitration agreements as long as employees are permitted to discuss their grievances with other employees, seek common counsel, pool resources, information or funds, and seek review by class or collective action in any forum at any time, subject to the rules of the forum and subject to the employer's right to interpose the private arbitration agreement between the parties as the parties' chosen device for resolving workplace disputes. Such a harmonizing of the NLRA and the FAA accommodates the coordinate interests

of each by preserving the right to engage in concerted activity under the former, while preserving the right of the parties to contract for a forum and the rules of that forum under the latter.

ARGUMENT

I. THE STRONG FEDERAL POLICY FAVORING ARBITRATION SUPPORTS THE RIGHT OF PARTIES TO INCORPORATE CLASS ACTION WAIVERS IN MANDATORY ARBITRATION AGREEMENTS

It is well-settled that employers have the right to contract with employees who are not represented by a union regarding the terms and conditions of their employment. *See J.I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 339-40 (1944). As a necessary corollary, it is equally well-settled that an employer may contract with unrepresented employees and include a mechanism for the private arbitration of disputes arising out of the employment relationship. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). An employer also may impose a mandatory arbitration agreement as a condition of continued employment. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 102 (2001). "The Board, of course, has no power to adjudicate the validity or effect of such contracts except as to their effect on matters within its jurisdiction." *J.I. Case Co.*, 321 U.S. at 340.

The FAA, enacted in 1925 to combat the "judicial hostility to arbitration agreements," sought to "place arbitration agreements upon the same footing as other contracts," and incorporated a "liberal federal policy favoring arbitration agreements." *Gilmer*, 500 U.S. at 24 (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-220 (1985) and *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); *see also AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011). The primary purpose of the FAA is to "ensure that private agreements to arbitrate are enforced according to their terms." *See Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S.Ct. 1758, 1773 (2010) (quoting *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). In

the *Steelworkers Trilogy*, the Supreme Court ensured that arbitration would serve as a cornerstone of the labor movement. *See Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).[2]

The strong policy favoring arbitration has been reflected by various courts in opinions addressing a variety of issues that demonstrate its breadth. For instance, it is clear that statutory claims may be the subject of an arbitration agreement, with the Supreme Court itself addressing the permissibility of arbitration of claims under the Age Discrimination in Employment Act, the Sherman Act, the Securities Exchange Act of 1934, the civil provisions of the Racketeer Influenced and Corrupt Organizations Act, and Section 12(2) of the Securities Act of 1933. *See Gilmer*, 500 U.S. at 26; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (noting that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). The same holds true with respect to arbitration provisions contained in the collective bargaining agreements of

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[2] The benefits to employees by resort to arbitration are apparent by reference to various studies that have been conducted. For instance, in a 2004 study, the National Workrights Institute found that employees were twenty percent more likely to win an employment case in arbitration than in court. *See* National Workrights Institute, *Employment Arbitration: What Does the Data Show?* (2004); *see also* Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where do Plaintiffs Better Vindicate Their Rights?*, DISP. RESOL. J. (Nov. 2003-2004) (finding that plaintiffs in the securities industry who pursue employment arbitration were twelve percent more likely to win their disputes than employees litigating in the United States District Court for the Southern District of New York); Lewis L. Maltby, *Employment Arbitration: Is It Really Second-Class Justice?*, DISPUTE RESOLUTION MAGAZINE, 23-24 (Fall 1999) (noting that employment discrimination cases are disposed of in federal court with much greater frequency pre-trial than in arbitration). Further, access to process is more readily available in arbitration than in court with or without a lawyer and irrespective of the size of the plaintiff's claim. Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RIGHTS L. REV. 29 (1998); Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 IND. L. J. 83 (2001).

unionized employees. *See 14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456, 1474 (2009) (enforcing provision in collective bargaining agreement requiring arbitration of ADEA claims). So strong is this policy in favor of arbitration and the presumptive arbitrability of statutory claims that even where state law prohibits the arbitration of a particular type of claim, the conflicting state statute, *see Preston v. Ferrer*, 552 U.S. 346, 353 (2008), or state common law rule, *see AT&T Mobility LLC*, 131 S.Ct. at 1747, will be preempted.

The agreement between parties to waive the ability to institute class or collective actions in arbitration also has been addressed and, importantly, resolved in favor of enforceability under the FAA. In *Gilmer*, for instance, the Supreme Court recognized that the unavailability of class action procedures in arbitration did not necessarily provide a basis for holding the arbitration agreement unlawful. *See* 500 U.S. at 32. More recently, in *AT&T Mobility LLC*, the Supreme Court refused to invalidate a class action waiver on the basis of state common law unconscionability principles (the so-called California "*Discover Bank* Rule") because it found the agreement of the parties paramount and noted that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S.Ct. at 1748. That proceeding on a class basis in arbitration is not favored is also apparent in the Supreme Court's refusal to allow class arbitration in the face of silence in the arbitration agreement. *See Stolt-Nielsen*, 130 S.Ct. at 1775 ("From these principles, it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."); *see also Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 453-54 (2003) (noting that the ultimate question is "what kind of arbitration proceeding the parties agreed to.").

In sum, the right of employers and employees to contract and the right to contract for resolution of disputes by resort to arbitration is not easily fettered. The right to contract for class action waivers is also apparent under the FAA. *Amicus* respectfully submits that these rights can be balanced with the rights afforded under the NLRA, as more fully explained below, by permitting employers to include class action waivers in mandatory arbitration agreements and permitting employees to mobilize and ultimately file actions seeking class relief, subject to challenge by the employer on the basis of the parties' previously agreed upon dispute resolution procedures.

II. THE BOARD SHOULD NOT HOLD THAT CLASS ACTION WAIVERS VIOLATE THE NLRA BECAUSE IT WOULD IMPERMISSIBLY UNDERMINE THE POLICIES AND PURPOSES OF THE FAA & AN ALTERNATIVE EXISTS

In light of the aforementioned principles of arbitration, the Board must balance its efforts to enforce the NLRA with the other federal legislation with which the NLRA resides. A ruling that class action waivers in mandatory arbitration agreements are unlawful under the NLRA intrudes too deeply into the policies underlying the FAA and would, in fact, undermine them. For this reason, the Board should hold that class action waivers are permissible under the NLRA, provided that employees retain the right to act concertedly to initiate a claim in any forum, to pursue a claim or to test the agreement to arbitrate itself including its restrictions on class or collective actions.

A. The Board's Power to Enforce the NLRA is Limited by Other Federal Policies and Legislation

Although the Board is charged with policing the NLRA and enjoys admittedly wide latitude in that regard, its power is not unlimited. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 142-43 (2002). For example, the Board does not have the power to construe the NLRA in a manner that would infringe upon constitutional rights. *See Edward J. DeBartolo*

Corp v. Florida Gulf Coast Bldg. and Constr. Trades Council, 485 U.S. 568, 575-76 (1988) (rejecting Board's construction of Section 8(b)(4) of the Act to prohibit peaceful hand-billing urging a boycott, as it directly implicated First Amendment rights); *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 497-99 (1979) (refusing to allow Board to exercise jurisdiction over church-operated school and its lay-faculty because it would implicate the freedom of religion clause of the First Amendment).

Likewise, the Board's broad discretion under the NLRA may not invalidate other federal policies and legislation. In *Hoffman Plastic Compounds*, for instance, the Board awarded back pay under the NLRA to an undocumented illegal alien who had never been legally authorized to work in the United States. *See id.* at 140. The Court determined that the award conflicted with the Immigration and Reform Control Act of 1986, which incorporated employment verification procedures and required the discharge of any employees that were not authorized to work in the United States. *See id.* at 147-48. Thus, the Court concluded:

> [A]llowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as express in IRCA...However broad the Board's discretion to fashion remedies when dealing only with the NLRA, it is not so bounded so as to authorize this sort of an award.

Id. at 151-52; *see also Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883 (1984) (refusing to enforce order directing reinstatement of illegal aliens as being in conflict with the Immigration and Nationality Act, and noting that "[i]n devising remedies for unfair labor practices, the Board is obliged to take into account another 'equally important Congressional objectives.'").

In *Southern S.S. Co. v. N.L.R.B.*, the Supreme Court rejected a Board decision that awarded reinstatement with backpay to five employees whose strike on a ship had amounted to a mutiny in violation of the "mutiny" statute, 18 U.S.C.A. § 2192. *See* 316 U.S. 31, 46-47 (1942). Instructively, the Supreme Court stated:

> It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives.

Id. at 47. Indeed, the Supreme Court has consistently stated that the Board may not assert its prerogative in matters that would trench upon federal statutes and policies unrelated to the NLRA. *See N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 532-34 (1984) (refusing to enforce an award that conflicted with the Bankruptcy Code and stating that "[w]hile the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel."); *Connell Constr. Co. v. Plumbers*, 421 U.S. 616, 626 (1975) (rejecting argument that federal antitrust policy should defer to the NLRA); *Carpenters v. N.L.R.B.*, 357 U.S. 93, 108-10 (1958) (precluding Board from selecting remedies pursuant to its own interpretation of the Interstate Commerce Act).

B. The Board Should Not Hold Class Action Waivers to be Unlawful Because it Would Infringe on the FAA, Equally Important Federal Legislation

Against this backdrop, it is incumbent upon the Board to interpret the NLRA with a healthy regard for the scope of the FAA and the strong federal policies supporting it. The right of parties to contract and the right of parties to contract for a private dispute resolution mechanism such as arbitration are, at this point, deeply rooted in the Supreme Court's FAA jurisprudence, as discussed *supra*. *See J.I. Case Co.*, 321 U.S. at 339-40; *Gilmer*, 500 U.S. at 26. Moreover, the federal policies favoring arbitration also favor the freedom of parties to define the contours of their agreement and direct the courts to "ensure that private agreements to arbitrate are enforced according to their terms." *See Stolt-Nielsen S.A.*, 130 S.Ct. at 1773. These policy considerations, which are entitled to deference, bear on the matter at hand in two important ways.

First, a proclamation from the NLRB that class action waivers in mandatory arbitration agreements between employers and employees run afoul of the NLRA threatens to curtail the parties' freedom to contract and freedom to determine the mechanisms that will be operable in the dispute resolution mechanisms they have chosen. The Supreme Court has been steadfast in upholding the mechanisms that arise by agreement, evident in *Gilmer*, where it made clear that even statutory claims may be subject to arbitration if the parties so agree, 500 U.S. at 26, and evident in *AT&T Mobility Corp.*, where it made clear that a class action waiver will be enforced even where it would otherwise be unenforceable under state law, 131 S.Ct. at 1747.

Second, if the Board were to find class action waivers in mandatory arbitration agreements unenforceable under the NLRA, the Board would contravene the specific federal policies recently reaffirmed by the Supreme Court pertaining to class actions in arbitration. *Stolt-Nielsen* and *AT&T Mobility LLC* reflect the Supreme Court's recognition that arbitrations are not particularly well-suited to administer class actions. In *Stolt-Nielsen*, the Court refused to require a party to arbitrate class claims in the face of silence in the arbitration agreement because the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." 130 S.Ct. at 1776. In *AT&T Mobility*, the Court again explained that permitting class actions in arbitration undermines one of arbitration's principle advantages, namely, the cheaper and more efficient resolution of disputes. 131 S.Ct. at 1751. The parties would have to first submit to the arbitrator whether the class should be certified, whether the named parties are sufficiently representative and typical of the class, and how discovery would proceed. These procedural steps contravene the basic purpose of arbitration. *See id.*

In addition, the Court noted that class arbitration, given its procedural complexity, demands procedural formality that is not always present in arbitration. *See id.* While a

seemingly adequate response would posit that the rules of a sophisticated arbitration entity like the American Arbitration Association will suffice, the fact is that for a class-action judgment to bind absentee members of the class, they must be adequately represented, afforded notice and an opportunity to be heard. *See id.* (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985)). Indeed, the Court expressly noted:

> We find it unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator. Indeed, class arbitration was not even envisioned by Congress when it passed the FAA in 1925…And it is at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied.

Id. at 1751-52. There are simply less safeguards in arbitration that these important matters will be appropriately cared for.

Lastly, the *AT&T Mobility* Court recognized that arbitration greatly increases the risk to a defendant. *See id.* at 1752. In arbitration, multi-level review may not be had and thus errors may stand uncorrected. Though this concern is minimal, at least from a cost perspective, in individual arbitrations, it presents a potentially ruinous financial hurdle in class action litigation where an employer might be potentially liable to hundreds if not thousands of employees. "*In terrorem*" settlements, as they have been termed, will become an all too frequent occurrence. *See id.*

Notably, if the Board declines to draw a "line of reason" between the substantive Section 7 activity in which employees may engage prior to and including the initiation of class litigation, and the procedural aspects of *maintaining* a class once the forum has convened, then employers may never properly enter into private agreements designed to avoid the costs, inefficiencies, and burdens of class action litigation, a result severely at odds with the strictures of the FAA and not mandated by the NLRA. Such a ruling would effectively require an employer to submit to class action procedures in arbitration and would accomplish something the Supreme Court has held even the FAA cannot do. Specifically, in *Stolt-Nielsen*, the Court held that "a party may not be

compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." 130 S.Ct. at 1774. Echoing this principle, the *AT&T Mobility* Court stated, "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S.Ct. at 1748.

A ruling by the NLRB that the NLRA *prohibits* class action waivers in mandatory arbitration agreements intrudes too heavily upon the strong federal policies underlying the FAA and the wealth of Supreme Court jurisprudence interpreting the FAA. While the Board's authority to administer the NLRA is broad, it cannot and should not undermine these equally compelling federal interests. *See, e.g., Hoffman Plastic Compounds,* 535 U.S. at 142-43; *Edward J. DeBartolo Corp.*, 485 U.S. at 575-76; *Sure-Tan, Inc.*, 467 U.S. at 885; *Catholic Bishop of Chicago*, 440 U.S. at 497-99. A noted in Section IV, *infra*, the NLRB has the ability to strike a balance that preserves both the rights protected by the NLRA and the legislative policies underlying the FAA.

III. THE RIGHT TO MAINTAIN A CLASS ACTION IS FUNDAMENTALLY PROCEDURAL

The Board should uphold the permissibility of class action waivers under the NLRA because the right to maintain a class or collective action does not confer substantive rights under the NLRA. The lack of a substantive right in maintaining a class action is particularly important given the potential for usurpation of the federal policies underlying the FAA, as noted above, were the Board to hold waivers of such a right impermissible.

Analytically, the set of rights implicated by the initiation of a class action procedure may be viewed in three parts. First, there is the act of employees communicating for purposes of determining whether they should seek redress on a class or collective basis with respect to the particular substantive right they may feel has been violated. This concept embraces all activity

from initial discussions among employees to mobilization to agreement to seek class relief, stopping short of the physical act of filing a class action complaint or statement of claim. *Amicus* acknowledges that this activity may, in appropriate circumstances, constitute Section 7 activity, so long as it passes muster under the *Meyers* line of cases.[3] *See Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556 (1978) (noting that efforts by employees to improve their working conditions "through resort to administrative and judicial forums" constitutes protected activity); *Harco Trucking, LLC*, 344 N.L.R.B. 478 (2005); *U Ocean Palace Pavilion, Inc.*, 345 N.L.R.B. 1162 (2005); *Novotel New York*, 321 N.L.R.B. 624, 633 (1996). *Amicus* further acknowledges that any prohibition on engaging in such threshold activity would be akin to an impermissible "yellow dog" contract. *See, e.g., Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004) (noting that a rule that explicitly restricts Section 7 activity will be held unlawful). A class action waiver in a mandatory arbitration agreement does not seek to regulate this potentially substantive right and conduct, and thus it should be of no concern to the Board in passing on the NRLA's impact on waivers of class action mechanisms.

Second, there is the physical act of filing a class or collective action in the forum of the employees' choice; that is, the very act of gaining access to process. Again, under appropriate circumstances, the act of filing a physical complaint may constitute concerted activity provided it meets the standards set forth in the *Meyers*' line of cases. This potentially substantive right is

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[3] *Meyers Indus., Inc.*, 268 N.L.R.B. No. 493 (1984) ("*Meyers I*"), *rev'd sub nom, Prill v. N.L.R.B.*, 755 F.2d 941 (D.C. Cir. 1985 ("*Prill I*"), *cert. denied*, 474 U.S. 948 (1985), *on remand, Meyers Indus., Inc.*, 281 N.L.R.B. No. 118 (1986) ("*Meyers II*"), *aff'd, Prill v. N.L.R.B.*, 835 F.2d 1481 (D.C. Cir. 1987 ("*Prill II*"), *cert. denied*, 487 U.S. 1205 (1988). In *Meyers II*, the Board confirmed that an employee's actions are concerted for purposes of the NLRA only if the action is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Prill II*, 835 F.3d at 1483. "Concerted action cannot be imputed from the object of the action. In other words, if a worker takes action by himself without contacting his fellow employees, even though he has a desire to help all workers, not just himself, he will not have satisfied the concerted action requirement." *Id.* Accordingly, under appropriate circumstances, the act of fellow employees communicating for the purposes of determining whether to seek redress for a perceived injury may constitute Section 7 activity.

also not implicated by a class action waiver as it would not be prohibited by the agreement, nor could an employer practically prohibit such conduct regardless of an agreement to arbitrate.

Third, and most importantly here, there is the act or process of actually *maintaining* a class or collective action. This is directly implicated by the class action waiver at issue in this case. The right *to maintain* a class action at this stage, however, must be procedural and does not bear on any substantive right provided for by the NLRA or otherwise. Given the discretion inherent in the process by which judges approve or disapprove of the maintenance of a class once the action has commenced, surely the Congress did not intend for the substantive rights the NLRA and FAA confer to be subject to ouster upon the trial court's review. In fact, the genesis of the class action mechanism was the legislative and judicial desire for a procedural tool that served the interests of efficiency and convenience in litigation. *See Gen. Tele. Co. of Southwest v. Falcon*, 457 U.S. 147, 155 (1982); *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974). It does not confer any right to substantive relief and is merely a method to enforce rights found elsewhere. *See Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431, 1435 (2010).

Numerous courts have uniformly agreed with this characterization of the right to maintain a class or collective action as purely procedural. *See Deposit Guarantee Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 332 (1980) ("However, the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."); *In re Amer. Exp. Merchants' Lit.*, 554 F.3d 300, 312 (2d Cir. 2009) ("We begin by recognizing that insofar as a plaintiff may be said to possess a "right" to litigate an action in federal court as a class action under [Rule 23], the right "is a procedural right only, ancillary to the litigation of substantive claims."); *Cummings v. Connell*, 402 F.3d 936, 944 (9th Cir. 2005) (noting that "[c]lass action

litigation is a procedural mechanism designed to join multiple parties with similar or identical claims."); *Kristian v. Comcast Corp.*, 446 F.3d 25, 54 (1st Cir. 2006) (holding that class action (and class arbitration) is simply a procedure for redressing claims, and not a substantive or statutory right in and of itself); *Blas v. Belfer*, 368 F.3d 501, 505 (5th Cir. 2004) (holding that "there is no substantive right to a class remedy; a class action is a procedural device.").

That the maintenance of a class action is merely a procedural right is also apparent in the Supreme Court's Rules Enabling Act jurisprudence. The Rules Enabling Act authorizes the Supreme Court to promulgate rules of procedure subject to Congress's review, with the limitation that those rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C.A. § 2072; *Shady Grove*, 130 S.Ct. at 1442. In *Shady Grove*, the Supreme Court interpreted this limitation to mean:

> [T]hat the Rule must "really regulat[e] procedure - the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. The test is not whether the rule affects a litigant's substantive rights; most procedural rules do. What matters is what the rule itself regulates: *If it governs only "the manner and the means" by which the litigants' rights are "enforced," it is valid; if it alters "the rules of decision by which the court will adjudicate [those] rights," it is not.*

Id. (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)) (emphasis added). In light of this unambiguous standard, which renders a challenged rule permissible so long as it truly regulates only procedure, the Supreme Court has found Rule 23 and the class action device incorporated therein to pass muster:

> Though a Rule may incidentally affect a party's rights, it is valid so long as it regulates only the process for enforcing those rights, and not the rights themselves, the available remedies, or the rules of decision for adjudicating either. *Rule 23 satisfies that criterion*, at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants.

Id. at 1435 (emphasis added).

> Rule 23 - at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants in a class action - falls within § 2072(b)'s authorization. A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.

Id. at 1443.

The Court's decision in *Shady Grove* definitively ends the inquiry into whether the right to maintain a class action is procedural or substantive.[4] Any argument positing that parties to a class may derive substantive rights from, for instance, the effectiveness of seeking collective relief in large numbers, the extent to which class procedures may facilitate communication, or the ability of some employees in the class to act in a representative capacity, cannot be reconciled with *Shady Grove* which upheld the validity of Rule 23 because it only "regulates procedure." *Id.* at 1442. Indeed, *Shady Grove* recognizes that some tangential substantive rights, such as these, may be effected, but expressly held "most procedural rules do" so, and that it is not a basis for characterizing the rule as substantive. *Id.*

Since the right to maintain a class action is purely procedural, this right - as distinct from the concerted activities leading up to the filing of the class action - does not implicate Section 7 of the NLRA. As such, the Board should not hold class action waivers unenforceable, particularly given the potential for undermining the strong federal policies supporting the parties' right to determine by contract the parameters of their own dispute resolution mechanisms.

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[4] Interpreting the class action mechanism as conferring anything other than a procedural right would effectively convert the NLRA into a super class action statute guaranteeing a putative class the right to proceed under all circumstances. For instance, if the right to maintain a class action were a substantive right conferred by the NLRA, then any employer that resisted class certification arguably would violate Section 7. Likewise, each time a court denied class certification in a case involving employees, the decision would necessarily violate that individual plaintiff's right to engage in protected concerted activity. This cannot be the case and it is an untoward result that the Board should avoid.

IV. THE BOARD SHOULD PRESERVE THE PURPOSES OF BOTH THE FAA AND THE NLRA AND ALLOW CLASS ACTION WAIVERS

The potentially competing interests between the FAA and the NLRA may be harmonized in a way that allows each regime to exist side by side, and each to serve its intended purpose. The NLRB may uphold the right of parties to include class action waivers in arbitration agreements consistent with Section 7 of the NLRA by acknowledging the natural demarcation between the concerted activity that leads up to and often includes the filing of a class action proceeding and *maintenance* of the class action itself. Once the action has commenced, however, the NLRB should allow the employer to interpose its private agreement with the employee which often stipulates both the forum and the rules that shall be applied in that forum. Assuming that the private agreement passes muster pursuant to the applicable scheme for enforcement of such agreements, it is *not* within the purview of the NLRA under what terms that action shall be conducted or maintained. The protective arm of the NLRA is long and strong, but it does not extend within the forum's doors.

Such an application of the NLRA preserves the parties' freedom to contract, freedom to select the forum for the resolution of their disputes, and freedom to determine the procedures that will govern the resolution of those disputes. Such an application of the NLRA is consistent with the Supreme Court's precedent with respect to the FAA as illustrated in *J.I. Case*, *Gilmer*, and *Circuit City*, and upholds the "liberal federal policy favoring arbitration agreements." *Gilmer*, 500 U.S. at 24. In addition, it is consistent with the Supreme Court's recent holdings in *AT&T Mobility* and *Stolt-Nielsen*, as they pertain to the permissibility of class action waivers.

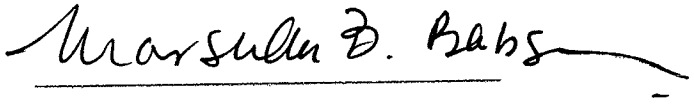
At the same time, such an application of the NLRA upholding the ability of employers to include class action waivers in arbitration agreements will not impede the ability of employees to discuss their grievances with other employees, seek common counsel, and pursue their

grievances collectively by filing their claim as a group. Such concerted and protected Section 7 activity will be preserved, while giving full effect to the compelling coordinate principles embodied in the FAA.

CONCLUSION

For the foregoing reasons, the Decision of the Division of Judges should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2011, I caused a true and accurate copy of the foregoing Brief for *Amicus Curiae* the Chamber of Commerce of the United States of America to be filed electronically using the National Labor Relation Board's Electronic Filing System, and that I caused the same to be served electronically upon the following:

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I further certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

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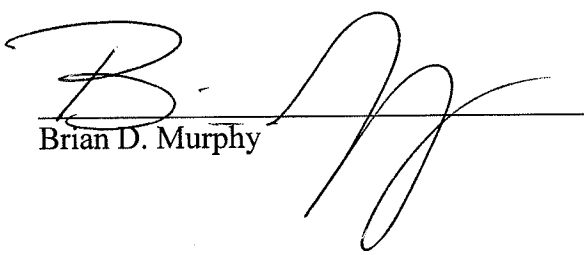

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