No. 16-285

IN THE

Supreme Court of the United States

EPIC SYSTEMS CORPORATION,

Petitioner,

v.

JACOB LEWIS,

Respondent.

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

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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The Equal Employment Advisory Council (EEAC) respectfully submits this brief *amicus curiae* with the consent of the parties. The brief supports the petition for a writ of certiorari.[1]

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. All parties have consented to the filing of this brief. 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.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's member companies seek to establish and enforce internal policies that are consistent with federal employment non-discrimination laws. This commitment extends to the prompt and effective resolution of employment disputes using arbitration and other forms of alternative dispute resolution. Many of them thus have adopted company-wide policies requiring the use of binding arbitration to resolve such disputes. Some of those arbitration agreements contain class action waiver provisions, which primarily are designed to preserve the benefits of arbitration, while at the same time avoiding costly, complex, and protracted class-based litigation. The issues presented in this case thus are extremely important to the nationwide employer constituency that EEAC represents.

Agreements to arbitrate, like other privately negotiated contracts, afford parties to a dispute the right to establish clear standards and criteria against which

their future conduct will be judged. Accordingly, such agreements must be strictly enforced in the same manner and to the same extent as any other valid contract. Disregarding these well-established legal principles and according undue deference to the National Labor Relations Board's (NLRB) *D.R. Horton* ruling, the Seventh Circuit below incorrectly held that an agreement requiring employees to submit their work-related disputes to binding arbitration as a condition of employment, but which contains a clause barring class-based or collective claims, impermissibly restricts the right of employees to engage in protected concerted activity for their "mutual aid and protection," in violation of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq.*

EEAC seeks to assist the Court by highlighting the impact the decision below may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the Court's attention relevant matters that the parties have not raised. Because of its experience in these matters, EEAC is well-situated to brief the Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Respondent Jacob Lewis worked for Petitioner Epic Systems Corporation (Epic) as a technical writer. Pet. App. 24a. In April 2014, Epic sent an email to staff advising that the company would now require that all wage and hour disputes be submitted to binding, individual arbitration. *Id.* at 2a. The agreement contained an express clause barring class, collective, and representative proceedings, which specified that if the class waiver were ever deemed unenforceable, any class-based claim would have to be brought in court.

Id. Employees were required to agree as a condition of employment. *Id.*

Sometime thereafter, Lewis sued Epic in federal court, accusing the company of misclassifying him and others similarly situated as exempt in violation of the Fair Labor Standards Act (FLSA). *Id.* Pointing to the agreement to arbitrate, Epic moved to dismiss the action and to compel individual arbitration of Lewis's claims. *Id.* Lewis responded that the arbitration agreement was unconscionable and thus unenforceable. *Id.* at 2a-3a. Alternatively, he contended that the class waiver provision impermissibly interfered with the right of employees to engage in protected concerted activities under Section 7 of the NLRA, 29 U.S.C. § 157, and therefore was unlawful. *Id*. at 3a.

Deferring to the NLRB's position on the question, the trial judge held that the class waiver was inconsistent with the NLRA's "concerted activity" protections. *Id.* It found there to be no conflict with the FAA, because the FAA does not mandate enforcement of arbitration agreements that "conflict with substantive provisions" of other federal laws, like the NLRA. *Id.* at 27a. Therefore, the trial court refused to dismiss Lewis's court claim and order him into arbitration. *Id.* at 28a-29a.

Epic appealed to the Seventh Circuit, which affirmed. *Id.* at 2a. Like the trial court, the appeals court accorded great deference to the Board's view that class waivers impermissibly interfere with employee Section 7 rights, and therefore are unenforceable under the NLRA. *Id.* at 23a. Epic filed a petition for a writ of certiorari with this Court on September 2, 2016.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Seventh Circuit below, relying on the National Labor Relations Board's discredited administrative ruling in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), *overruled by D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), incorrectly held that an employment arbitration agreement containing a class waiver provision unlawfully deprives employees of their right under Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. § 157, to engage in protected concerted activity. Embracing the Board's wrong-headed analysis, the lower court found that Section 7 protection extends to the ability of employees to join together in class proceedings, and that access to such procedures is a non-waivable, "substantive" right. Pet. App. 27a. Because it conflicts with the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, as construed repeatedly by this Court, and deepens an already well-defined conflict in the courts on this question, review and reversal of the decision below is warranted.

The FAA "was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility, Inc. v. Concepcion*, 563 U.S. 333, 339 (2011). The Act "declares as a matter of federal law that arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989) (quoting 9 U.S.C. § 2). Thus, only generally applicable contract defenses, such as fraud, duress, or unconscionability, can be used to invalidate an arbitration agreement.

Among the FAA's foundational principles is "'that arbitration is a matter of consent, not coercion.'" *Stolt-*

Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 681 (2010). Indeed, "'[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that [courts] rigorously enforce agreements to arbitrate.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)). Thus, "[b]y its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter*, 470 U.S. at 218 (citations omitted).

In *AT&T Mobility LLC v. Concepcion*, this Court once again made clear that rules imposing burdens on arbitration agreements that do not exist for other types of contracts are incompatible with, and thus displaced by, the FAA. 563 U.S. 333 (2011). The NLRB's *D.R. Horton* decision – on which the Seventh Circuit relied to invalidate an arbitration agreement simply because it contained a class waiver provision – is such a rule. In addition to contravening the strong federal policy favoring arbitration, the *D.R. Horton* rule, which in effect establishes an across-the-board ban on class waivers, also undermines most, if not all, of the practical benefits that inure to employers and employees alike by agreeing to arbitrate workplace disputes.

For employees, the speed of resolving disputes through arbitration can be particularly advantageous, especially for those who will continue their employment well after their claims have been addressed. For employers, the well-recognized practical and financial advantages of arbitration are likely to disappear

altogether if they are forced to submit to complex, class-based procedures, despite having expressly agreed to waive such procedures. As this Court observed in *Concepcion*, for example, "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Concepcion*, 563 U.S. at 350.

The *D.R. Horton* rule – which has been embraced by two courts of appeals, but categorically rejected by three others – thus creates a chilling effect on employers' efforts to establish binding arbitration programs, making it extremely difficult to effectuate the aims and practical benefits underlying employment arbitration. Persistent questions in the courts regarding its validity threaten to deprive employers and employees of the many well-established benefits afforded by an arbitral forum, including "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Concepcion*, 563 U.S. at 348 (citation omitted).

REASONS FOR GRANTING THE WRIT

I. REVIEW OF THE DECISION BELOW IS NEEDED TO RESOLVE ISSUES OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYER COMMUNITY

A. The *D.R. Horton* Rule Endorsed By The Court Below Cannot Be Reconciled With This Court's Repeated Admonition That Arbitration Agreements Are To Be Enforced In Accordance With Their Terms

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, "declares as a matter of federal law that arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989) (quoting 9 U.S.C. § 2). This Court has repeatedly reaffirmed the federal policy favoring arbitration, noting that the FAA was enacted in 1925 in an effort to curb "widespread judicial hostility to arbitration agreements," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011), and "to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citations omitted); *see also Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000).

Section 2 of the FAA is the "primary substantive provision" of the Act. *Gilmer*, 500 U.S. at 24. This section has been described as "reflecting both a 'liberal federal policy favoring arbitration,' and the 'fundamental principle that arbitration is a matter of

contract.'" *Concepcion*, 563 U.S. at 339 (citations omitted); *see also Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). Indeed, this Court has declared "on numerous occasions that the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (citation omitted). *See also Concepcion*, 563 U.S. at 344 ("The overarching purpose of the FAA … is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985) ("'The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that [courts] rigorously enforce agreements to arbitrate'") (citation omitted). Accordingly, "'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" *Gilmer*, 500 U.S. at 26 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

In judging the arbitration agreement in the instant case to be an unlawful restraint on employee rights under Section 7 of the NLRA simply because it contained a class waiver provision, the Seventh Circuit disregarded this Court's settled FAA jurisprudence, and instead embraced a controversial, legally unsupportable policy position invented by the NLRB just four years ago. *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), *overruled by D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). In doing so, it deepened the conflict in the courts of appeals on an important issue affecting businesses and their employees nationwide.

The Seventh Circuit sidestepped Epic's assertion that the FAA expresses a federal policy favoring arbitration in accordance with the parties' written agreement, and that forcing employers into class arbitration improperly interferes with arbitration, in violation of the Act. Pet. App. 1a-2a. It interpreted the NLRA as creating a *substantive* right to engage in collective action for the "mutual aid and protection" of employees and that such a right necessarily includes access to the class action device. Pet. App. 3a. Accordingly, it concluded that because class waivers violate a substantive right, they are illegal and thus subject to invalidation under the FAA's savings clause.

In so holding, the Seventh Circuit expressly endorsed the NLRB's controversial decision in *D.R. Horton*, which held that the ability to file employment-related claims on a class or collective basis is protected conduct under NLRA Section 7, and the agreement in question – which prohibited such activity – unlawfully interferes with, restrains and/or coerces employees seeking to assert their Section 7 rights, in violation of Section 8(a)(1) of the Act. There, the Board declared for the first time that barring enforcement of agreements containing class action waivers does not impermissibly conflict with the FAA "or undermine the pro-arbitration policy" on which it is based, *D.R. Horton*, 357 N.L.R.B. at 2285, because such an agreement "interferes with substantive statutory rights under the NLRA, and the intent of the FAA was to leave substantive rights undisturbed." *Id.* at 2286. In the Board's view, its broad interpretation of Section 7 rights under the NLRA does not conflict at all with what it characterized as the FAA's policy "permitting" enforcement of private arbitration agreements. *Id.* at 2285. Even assuming such a conflict did exist, the Board reasoned that its construction "represents an

appropriate accommodation of the policies underlying the two statutes." *Id.* at 2284.

On the contrary, to the extent that the Board's rationale, on which the decision below rests, effectively precludes enforcement of any employment arbitration agreement containing a class waiver provision, it conflicts directly with the FAA and represents an unjustifiable departure from this Court's FAA jurisprudence. Accordingly, review of the decision below is warranted.

B. The Decision Below Magnifies The Conflict In The Courts Regarding Whether The Availability Of Class Procedures Is A Non-Waivable, Substantive Right Under The National Labor Relations Act

1. The Fifth, Eighth and Second Circuits have categorically rejected the *D.R. Horton* rule as contrary to the FAA

This Court made clear in *AT&T Mobility LLC v. Concepcion* that rules purporting to place burdens on arbitration agreements that do not exist for other types of contracts are incompatible with the FAA, and therefore are invalid. 563 U.S. 333 (2011). Since *Concepcion*, most courts have come around to the idea that the mere presence of a class waiver clause in an otherwise enforceable arbitration agreement simply is not enough to declare it unenforceable. In fact, "[b]efore the NLRB inserted itself into what appeared to be a well-settled legal dialogue, existing policy and Supreme Court precedent generally favored the enforcement[ ] of arbitration agreements containing class waivers." Laura L. Mall, *Practical Implications*

of Murphy Oil *on Employee Waivers: An Ecological Disaster or a Dissenter's Pipeline to Freedom*, 89-MAY Fla. B.J. 38 (2015). And soon after *D.R. Horton* was decided, courts began to uniformly reject the Board's rationale as unsound, including the Fifth Circuit – which in fact reversed the ruling in all material respects. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).

As a threshold matter, the Fifth Circuit fundamentally disagreed with the Board's contention that class waivers are categorically prohibited by the NLRA. Acknowledging that the Act was intended to strengthen employee bargaining rights by providing for collective activity, and that the Board and some courts have held that an employee's right to pursue class or collective actions constitutes protected concerted activity, the court also pointed out that no court had ever interpreted the NLRA to impose a categorical prohibition on the enforcement of class waivers contained in arbitration agreements. While the Board's rationale might carry sway were the NLRA the only statute implicated, the court found that the FAA "has equal importance" to resolution of the issue. 737 F.3d at 357. Indeed, the body of case law decided under the FAA "points us in a different direction than the course taken by the Board." *Id.*

The Fifth Circuit found that like the California law at issue in *Concepcion*, the Board's decision purports to effectively impose an across-the-board ban on class waivers – the effect of which is to disfavor arbitration. It observed, "As *Concepcion* held as to classwide arbitration, requiring the availability of class actions 'interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.'" *Id.* at 359-60 (citation omitted). Because

Congress failed to include in the NLRA a non-waivable right to class or collective procedures, the Fifth Circuit found that the Board was not at liberty to disregard the FAA's command that arbitration agreements be enforced according to their terms – including those limiting the availability of class procedures. Moreover, "Having worked in tandem with arbitration agreements in the past, the NLRA has no inherent conflict with the FAA." *Id.* at 361.

In so ruling, the Fifth Circuit observed that every other federal court of appeals to have weighed in on the issue at that point had "either suggested or expressly stated that they would not defer to the NLRB's rationale, and held arbitration agreements containing class waivers enforceable." *Id.* at 362 (citations and footnote omitted). In *Owen v. Bristol Care, Inc.*, for instance, the Eighth Circuit reversed a trial court ruling that relied on the Board's *D.R. Horton* rule in refusing to enforce arbitration of a claim brought under the Fair Labor Standards Act, simply because the arbitration agreement contained a class action waiver clause. 702 F.3d 1050 (8th Cir. 2013). The court explicitly rejected the Board's interpretation as incompatible with the FAA's pro-arbitration policy, concluding instead that courts are *required* (not merely *permitted*) to enforce arbitration agreements according to their terms unless Congress specifically has said otherwise. It then observed that nothing in the FLSA indicates that Congress intended to bar employees from either agreeing to arbitrate their FLSA claims or from agreeing to do so individually. *Owen*, 702 F.3d at 1052.

Likewise, the Second Circuit in *Sutherland v. Ernst & Young, LLP* held that a plaintiff who brought FLSA overtime claims on behalf of herself and others

similarly situated could not get out of the arbitration pledge she signed as a condition of employment simply by arguing that the high costs of litigating on an individual basis "would dwarf her potential recovery of less than $2,000." 726 F.3d 290, 294 (2d Cir. 2013) (*per curiam*) (footnote omitted). Examining the FLSA's text, as well as this Court's decision in *American Express Co. v. Italian Colors Restaurant*,[2] the court joined the Eighth Circuit in concluding that nothing in the Act's text or legislative history indicates a congressional intent to forbid enforcement of class waiver clauses contained in mandatory arbitration agreements. In doing so, it reaffirmed its prior holding that "the FLSA collective action 'right'" is merely procedural in nature. *Sutherland*, 726 F.3d at 297 n.6 (citation omitted). As particularly relevant here, it also expressly rejected the plaintiff's contention that it should defer to the Board's rationale in *D.R. Horton*. *Id.* at 297 n.8.

2. The Seventh and Ninth Circuits now agree with the NLRB that class waivers violate the NLRA and therefore are unenforceable

Although the Second and Eighth Circuits both have joined the Fifth Circuit in rejecting the Board's anti-class waiver interpretation, the Seventh Circuit below became the first federal appeals court to embrace it, holding that the NLRA creates a substantive right to engage in collective action for the "mutual aid and protection" of employees, Pet. App. 3a, and to the extent that a class waiver violates an employee's right to engage in such protected concerted activities, it violates the Act. Pet. App. 1a-2a. Exacerbating the

[2] 133 S. Ct. 2304 (2013).

growing conflict in the courts on this question, the Ninth Circuit shortly thereafter similarly held in *Morris v. Ernst & Young, LLP* that an arbitration agreement requiring employees to submit to binding, individual arbitration is incompatible with the "substantive right" of employees to engage in protected concerted activity under the Act. __ F.3d __, 2016 WL 4433080, at *2 (9th Cir. 2016), *petition for cert. filed*, No. 16-300 (Sept. 8, 2016). According to the Ninth Circuit, the ability of employees to collectively "pursue work-related legal claims" is an extension of their right to engage in concerted activity. *Id.* at *5.

Agreeing with the Seventh Circuit's rationale, the Ninth Circuit in *Morris* found that restrictions on class procedures are the "very antithesis" of NLRA-protected rights. *Id.* It rejected the contention that its interpretation is somehow anti-arbitration, expressing the view that the arbitration agreement in question is "not the problem." *Id.* at *6. Rather, the "NLRA obstacle is a ban on initiating, in any forum, concerted legal claims." *Id.* In other words, had the agreement in that case imposed binding arbitration but not imposed a restriction on class-based proceedings, the NLRA would not have been implicated. Such a conclusion is directly at odds with the FAA principles articulated by this Court, especially as stated in *Concepcion*.

In the wake of its *D.R. Horton* ruling, "numerous class and collective action litigants have been waiting for years to learn whether the Board can prohibit nonunion companies from including a waiver of such actions in a mandatory employment arbitration agreement." Zev J. Eigen & Sandro Garofalo, *Less is More: A Case For Structural Reform of the National Labor Relations Board*, 98 Minn. L. Rev. 1879, 1901

(2014) (footnote omitted). Five courts of appeals are hopelessly at odds on the question, and because the Board has pledged to continue pressing its controversial rule in the courts, the divide is likely to only grow.

Indeed, the Board "is likely to follow *D.R. Horton* absent a contrary ruling by [this] Court or the election of a new Administration and subsequent replacement of Board members." Stacey L. Pine, *Employment Arbitration Agreements and the Future of Class-Action Waivers*, 4 Am. U. Lab. & Emp. L.F. 1, at *24 (2014). As one commentator observed:

> The peril to employers is that while employers can appeal decisions of the NLRB to the federal courts, there is significant cost associated with doing so and the contradictory decisions of the NLRB that currently exist create much uncertainty relative to outcome. Additionally, this ruling puts employers who currently have agreements that prohibit class litigation and arbitration at considerable risk for charges of unfair labor practices by the NLRB as employees and unions will inevitably begin to challenge such agreements.

Id.

C. Without Definitive Guidance From This Court, The NLRB Will Continue To Enforce The *D.R. Horton* Rule Under Its Policy Of "Non-Acquiescence," To The Detriment Of Employers And Employees Alike

Although the Board's anti-class waiver ruling in *D.R. Horton* was reversed by the Fifth Circuit, and its underlying rationale categorically rejected by the Second and Eighth Circuits, the Board is expected to

continue its full-throated assault on class waivers until this Court directs otherwise. Indeed, the Board has doubled-down on its so-called policy of "non-acquiescence," despite being roundly criticized for doing so. As the Fifth Circuit observed in *Murphy Oil*:

> 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 law or fact 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.

Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1021 (5th Cir. 2015), *petition for cert. filed*, No. 16-307 (Sept. 9, 2016); *see also Heartland Plymouth Court MI, LLC v. NLRB*, __ F.3d __, 2016 WL 5485145 (D.C. Cir. 2016) ("facts may be stubborn things, but the Board's longstanding 'nonacquiescence' towards the law of any circuit diverging from the Board's preferred national labor policy takes obduracy to a new level").

Thus far, the Board has declined to follow the Fifth Circuit's sound advice. *See, e.g., U.S. Xpress Enters., Inc.*, 363 NLRB No. 46, 2015 WL 7750745, at *4 (N.L.R.B. Nov. 30, 2015) ("the Board has explained that it is not required, on either legal or pragmatic grounds, to automatically follow an adverse court decision but will instead respectfully regard such ruling solely as the law of the particular case"). As a consequence, employers with arbitration agreements containing class waivers face an unavoidable risk that those agreements will be invalidated by the Board. By embracing the Board's rule, the Seventh Circuit's decision below elevates that risk, and "effectively cripples the ability of employers and employees to

enter into binding agreements to arbitrate." *Morris*, 2016 WL 4433080, at *12 (Ikuta, J., dissenting).

II. IMPOSING CLASS ARBITRATION EVEN WHERE THE UNDERLYING AGREEMENT CONTAINS AN EXPRESS CLASS ACTION WAIVER PROVISION FUNDAMENTALLY WOULD ALTER THE EXPECTATIONS OF BOTH EMPLOYERS AND EMPLOYEES BY IMPOSING THE VERY COSTS AND BURDENS SOUGHT TO BE AVOIDED BY FORGOING CLASS PROCEDURES

Allowing the *D.R. Horton* rule to stand not only would significantly increase the cost of arbitration but also would defeat most, if not all, of the practical benefits of arbitration over litigation. Taking the decision as to whether class arbitration is permitted out of the hands of the parties and instead allowing the Board to dictate the terms of such private agreements would be contrary to the strong federal policy favoring arbitration and a disservice to the interests of employers and employees alike.

As this Court observed in *Mitsubishi*, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." 473 U.S. at 626-27. The outmoded hostility to arbitration agreements generally, and those containing class action waivers specifically, is particularly misplaced in the employment context, where arbitration offers significant mutual advantages.

From an employee relations viewpoint, the informal nature of arbitration is a tremendous benefit to both employers and employees. Many employers view

arbitration and other forms of alternative dispute resolution as an opportunity not only to resolve a specific dispute but also to preserve relationships with their employees, particularly those who will continue to work for them well after their claims are addressed.[3] Indeed, there are "real benefits to the enforcement of arbitration provisions," *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001), including significant cost savings, "a benefit that may be of particular importance in employment litigation ...." *Id.* at 123.

The financial benefits that employees derive from arbitration are likely to disappear altogether if they are forced to submit to complex, class-based arbitration, despite having agreed to waive such procedures. In addition to increasing the costs, adjudicating claims on a class-wide basis brings a level of complexity that undermines many of the core advantages of arbitration. Among other things:

> Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable

[3] Furthermore, an individual's waiver of class action procedures will not affect the ability of other private parties not subject to arbitration agreements or public enforcement agencies to pursue class-wide relief. *See, e.g.*, *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) (allowing Equal Employment Opportunity Commission to seek victim-specific relief in court – whether on behalf of an individual or an entire class – even when employees have signed an arbitration agreement).

> in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration, to the extent it is manufactured … rather than consensual, is inconsistent with the FAA.

Concepcion, 563 U.S. at 348.

Thus, despite the Board's views to the contrary – which now have been embraced by two courts of appeals, but firmly rejected by three others – allowing an arbitration to proceed as a class action despite unambiguous contractual language barring such procedures would profoundly undermine the efficiencies of arbitrating workplace disputes. Unlike the typical arbitration, employment class actions involving hundreds or thousands of class members can be extremely complex and time-consuming to defend, especially where each class member is entitled to substantial individual damages, including compensatory and punitive damages. *See, e.g.*, 42 U.S.C. § 1981a.

Perhaps even more so than other types of claims, class-wide arbitration of employment disputes "changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen*, 559 U.S. at 685. As this Court pointed out in *Stolt-Nielsen*:

> Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure … no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties … thus potentially

> frustrating the parties' assumptions when they agreed to arbitrate. The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. … And the commercial stakes of class-action arbitration are comparable to those of class-action litigation.

Id. at 686.

For employers, there are significant financial advantages to arbitration that are likely to disappear altogether if they are forced to submit to complex, class-based procedures, despite having expressly agreed to waive such procedures. For example, "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Concepcion*, 563 U.S. at 350.

Arbitration by its very nature is designed to promote, rather than discourage, cost-effective resolution of individual claims in as non-adversarial a manner as possible. Allowing an arbitration to proceed on a class-wide basis where the parties have agreed not to do so defeats most, if not all, of those aims. Besides the statutory mandate that arbitration agreements be enforced according to their terms, "[f]or parties to employment contracts … there are real benefits to the enforcement of arbitration agreements." *Circuit City Stores*, 532 U.S. at 122-23. As this Court observed over a decade ago:

> We have been clear in rejecting the supposition that the advantages of the arbitration process

> somehow disappear when transferred to the employment context. Arbitration agreements allow the parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.

Id. at 123 (citation omitted). Imposing class action procedures on parties who expressly agreed to waive such procedures in favor of bilateral arbitration changes the nature of arbitration to such a degree that it becomes a burden on the parties, rather than a means of resolving their dispute efficiently and in a less costly manner.

The risk is especially acute in the employment context. Class-based employment claims can be extremely complex and time-consuming to defend. Title VII[4] damage claims, for instance, require particularized analysis of the facts and circumstances of each employment action, and of the degree of actual harm to each class member if liability is found. Attempting to resolve Title VII class-based claims in arbitration would not be particularly efficient or cost-effective. Moreover, allowing class arbitration of employment disputes would enable savvy plaintiffs to avoid the strict requirements of, and deny defendants the due process protections afforded by, the federal procedural rules governing class action litigation. No rational employer would be willing to assume such a serious risk.

Without definitive guidance from this Court, the Board and lower courts following its anti-arbitration

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[4] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*.

policy will impose unfounded restrictions making it profoundly difficult, if not impossible, for employers to maintain alternative dispute resolution programs containing a bilateral arbitration component. The prospect of having to perpetually re-litigate the enforceability of their arbitration agreements creates a chilling effect on employers' efforts to establish uniform and consistent workplace arbitration programs, and significantly undercuts the strong federal policy, as endorsed repeatedly by this Court, favoring private arbitration of employment disputes.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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