11-5213-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TARA RANIERE, NICHOL BODDEN, and MARK A. VOSBURGH,
On Behalf of Themselves Individually,
And On Behalf Of All Similarly Situated Persons,

Plaintiffs-Appellees,

v.

Citigroup Inc., Citibank, N.A., CitiMortgage, Inc.,

Defendants-Appellants.

On Appeal from the United States District Court
For the Southern District of New York

BRIEF FOR *AMICI CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, NATIONAL EMPLOYMENT LAW PROJECT, and THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY

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I. STATEMENT OF *AMICI CURIAE*

Amici curiae ("*Amici*") are organizations dedicated to securing enforcement of state, federal, and local laws, regulations, and ordinances that have been enacted for the purpose of protecting workers in the area of wages, hours, and working conditions, and thereby promoting the general welfare. A specific statement of *Amici* is attached as Exhibit 1 hereto. *Amici* respectfully submit this brief pursuant to Rule 29 of the Rules of Appellate Procedure.[1]

Amici write to highlight the important national public policies that support the availability of collective actions under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.* and protection of workers' concerted activity for mutual aid or protection under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.*, and the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.* Depriving workers of their ability to fully enforce their rights to be paid minimum wage and overtime pay by prohibiting collective action in any forum undermines

[1] Pursuant to Federal Rule of Appellate Procedure 29(c) and Second Circuit Local Rule 29.1, *Amici Curiae* National Employment Lawyers Association, The Employee Rights Advocacy Institute for Law & Policy, and National Employment Law Project hereby disclose that they are not-for-profit corporations, with no parent corporation and no publicly-traded stock. No party or counsel for any party was involved in authoring or editing this brief in whole or in part and no entity or person, aside from the *Amici Curiae*, its members, and counsel, made any monetary contribution towards the preparation and submission of this brief.

the wage protection policies of the FLSA, rewards unfair competition by encouraging employers to engage in wage theft, and interferes with employees' exercise of their right to engage in concerted activity. All parties have consented to the filing of this brief. Fed. R. App. P. 29(a).

II. SUMMARY OF ARGUMENT

The purpose of this brief is to show that the District Court's rejection of the collective action prohibition imposed by Defendants-Appellants (collectively "Citi") on their employees is supported by independent legal grounds. Such a ban violates both the NLRA and the Norris-LaGuardia Act, each of which protects both union and non-union workers. The ban is therefore unenforceable in court. In addition, the ban, as a policy matter, conflicts with the broad remedial goals of the FLSA and prevents employees from vindicating their FLSA statutory rights.

III. ARGUMENT

A. Collective Action Prohibitions Imposed as a Condition of Employment Are Unenforceable Because They Violate the NLRA and the Norris-LaGuardia Act.

The District Court issued its order before the seminal decision of the National Labor Relations Board ("the Board"), *In re D.R. Horton*, 357 NLRB No. 184, 2012 WL 36274, at *17 (NLRB Jan. 3, 2012) ("*D.R. Horton*"), which held that an employer violates the NLRA's prohibition on interference with or restraint on employees' concerted activities "by requiring employees to waive their right to

collectively pursue employment-related claims in all forums, arbitral and judicial." The Board's views on interpretation of the NLRA are entitled to the "greatest deference." *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324 (1994) (the Board's views are entitled to "the greatest deference"); *see also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (interpretations of the Board will be upheld if "reasonably defensible"). A court may not enforce a contractual provision that violates the NLRA. *Kaiser Steel Corp. v. Mullin*, 455 U.S. 72, 83-84 (1982).

The Board's ruling should be applied here because Citi's prohibition on collective actions violates the NLRA's prohibition of employer interference with concerted activities. As explained in *D.R. Horton*, Citi's collective action ban also violates the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq*. Thus, the Board's ruling provides an independent legal basis for affirming the ruling below. *See Sutherland v. Ernst & Young LLP*, No. 10 Civ. 3332 (KMW) (MHD), 2012 WL 751970, at *2 n.1 (S.D.N.Y. Mar. 6, 2012) (prospects for employer's appeal of decision invalidating a collective action prohibition questionable given *D.R. Horton*).[2]

[2] This Court may affirm on any ground supported in the record, even if not expressed by the district court. *Johnson v. Smithsonian Inst.*, 189 F.3d 180, 187 (2d Cir. 1999). While the district court did not consider *D.R. Horton* and the collective action prohibition's unenforceability under the NLRA and Norris-LaGuardia Act, no additional fact finding is necessary to reach the argument because the facts concerning the arbitration agreement and its prohibition on collective actions are contained in the record. *See Raniere v. Citigroup, Inc.*, No. 11 Civ. 2448, 2011 WL 5881926, at *7-11 (S.D.N.Y. Nov. 22, 2011). In addition,

1. Collective Action Prohibitions Are Unenforceable Because They Violate the NLRA.

a. Collective Action Prohibitions Imposed as a Condition of Employment Violate the NLRA

The NLRA protects workers from interference with their exercise of the right to engage in concerted activities, including pursuit of a collective action. Section 7 of the NLRA guarantees employees "the right to . . . engage in . . . concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. This right includes efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Section 7 specifically affords protection to employees "when they seek to improve working conditions through resort to administrative and judicial forums." *Id*. at 566. "The same is equally true of resort to arbitration." *D.R. Horton*, 2012 WL 36274, at *2. Thus, "[t]he Board and the courts have long held that conduct of employees to vindicate rights to payment for overtime work, and availing themselves of the [FLSA], is protected concerted activity under Section 7 of the [NLRA]." *52nd St. Hotel Assocs.*, 321 NLRB 624, 633, 1996 WL 384240

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there should be no dispute that Plaintiffs-Appellees, two Home Lending Specialists and a Loan Consultant, fall under the NLRA's expansive definition of "employee." Citi employed them and they do not fall under any of the exclusions listed in the statute. *See* 29 U.S.C. § 152(3).

(NLRB July 8, 1996) *abrogated on other grounds by In re Stericycle, Inc.*, 357 NLRB No. 61, 2011 WL 3703426 (NLRB Aug. 23, 2011) (citations omitted). The Board and courts have also consistently held that Section 7 guarantees workers the right to act in concert by pursuing legal claims against their employers on a class or joint action basis. *See, e.g.*, *Brady v. NFL*, 644 F.3d 661 (8th Cir. 2011); *Harco Trucking, LLC*, 344 NLRB 478, 481, 2005 WL 762110 (NLRB Mar. 31, 2005).

Under Section 8(a)(1) of the NLRA, employers may not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. § 158(a)(1). In *D.R. Horton*, the Board held that an employer violates Section 8(a)(1) of the NLRA when it requires employees, as a condition of their employment, to sign an agreement that prohibits them from filing collective action claims concerning their wages, hours or other working conditions against the employer in any forum because "such an agreement unlawfully restricts employees' Section 7 right to engage in concerted action for mutual aid or protection." 2012 WL 36274, at *1.

In its decision, the Board explained that a collective claim filed on behalf of multiple employee-plaintiffs constitutes "concerted activity" within the meaning of Section 7 because "an individual who files a class or collective action regarding wages, hours, or working conditions, whether in court or before an arbitrator seeks to initiate or induce group action . . . ." *Id.*, at *4. "Such conduct is . . . central to

the [NLRA's] purposes. After all, if the [employer's workers] struck in order to induce [the employer] to comply with the FLSA, that form of concerted activity would clearly have been protected . . . . [The NLRA] . . . equally protects the concerted pursuit of workplace grievances in court or arbitration" and advances "the policy of the [NLRA] to protect the right of workers to act together to better their working conditions." *Id.* (internal citation omitted). Thus, the Board concluded that the agreement at issue in *D.R. Horton* – which contained a collective action prohibition that is materially the same as the one at issue in the case before this Court – "clearly and expressly bars employees from exercising substantive rights that have long been protected by Section 7 . . . ." *Id.*, at *5.

The Board then turned to whether the collective action prohibition violated Section 8(a)(1) of the NLRA by interfering with, restricting, or coercing employees in the exercise of rights guaranteed in Section 7. The Board explained that "the prohibition of individual agreements imposed on employees as a means of requiring that they waive their right to engage in protected concerted activity lies at the core of the prohibitions contained in Section 8." *Id.*, at *7. It consulted the Act for guidance in construing the NLRA. The Act contains the same prohibition against interference with or restriction or coercion of concerted activity contained in Section 8 of the NLRA. The Act observed that the "individual unorganized worker" who "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." *D.R. Horton*, 2012 WL 36274, at *7. The Act "aimed to limit the power of Federal courts both to issue injunctions in labor disputes and to enforce 'yellow dog' contracts prohibiting employees from joining labor unions." *Id.* The Board noted that the Act specifically protects the concerted activity of acting "singly or in concert" to "'aid[] any person participating or interested in any labor dispute who . . . is *prosecuting, any action or suit* in any court of the United States or of any State.'" *Id.* (quoting 29 U.S.C. § 104(d)). The Act's definition of "labor dispute" includes "any controversy concerning terms or conditions of employment." 29 U.S.C. § 113(c). Because the Act "protects concerted employment-related litigation by employees against federal judicial restraint based upon agreements between employees and their employer," the Board concluded that the collective action prohibition at issue "not only bars the exercise of rights at the core of those protected by Section 7, but implicates prohibitions that predate the NLRA and are central to modern Federal labor policy." *D.R. Horton*, 2012 WL 36274, at *8.

Here, Citi imposed an arbitration agreement as a condition of continued employment that makes "arbitration on an individual basis … the exclusive remedy for any employment-related claims that might otherwise be brought on a class, collective or representative action basis." *See Raniere*, 2011 WL 5881926, at *7.

This prohibition precludes Citi employees from exercising their statutory right under Section 7 to engage in concerted activity for mutual aid or protection – the concerted activity of bringing a collective action in either a judicial or arbitral forum – and, therefore, violates Section 8(a)(1) of the NLRA.

b. Contract Provisions that Violate the NLRA, Such as Citi's Collective Action Prohibition, are Unenforceable.

Because the collective action prohibition at issue violates the NLRA, the District Court below was without power to enforce it. Generally, courts may not enforce unlawful contracts. *Kaiser Steel*, 455 U.S. at 83-84. The Supreme Court has made clear that this general principle applies to contracts that violate the NLRA, even though the Board generally has primary jurisdiction over matters involving that statute. *See id*. Thus, "[w]hile only the Board may provide affirmative remedies for unfair labor practices, a court may not enforce a contract provision which violates [the NLRA]" *Kaiser Steel*, 455 U.S. at 86.

Just last month, a court, following *Kaiser Steel*, applied the Board's ruling in *D.R. Horton* to find a collective action prohibition in an FLSA action unenforceable. *Herrington v. Waterstone Mortg. Corp.*, No. 11-cv-779-bbc, 2012 WL 1242318 (W.D. Wis. March 16, 2012).[3] The court explained that under *Kaiser*

[3] On February 28, 2012, another federal court cited *D.R. Horton* to support the principle that "an employer violates [the] NLRA statutory rights of its employee by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forum . . . ." *Owen v. Bristolcare*,

Steel, courts cannot enforce contracts that violate the NLRA. *Id.*, at *3. It also noted that under Supreme Court authority, courts must defer to the Board's interpretations of the NLRA. *Id.*, at *5 (citing *ABF Freight Sys.*, 510 U.S. at 324; *Sure-Tan*, 467 U.S. at 891). Thus, the court applied *D.R. Horton* to find the FLSA collective action ban at issue unenforceable. *Herrington*, 2012 WL 1242318, at *5 ("I see no reason to question the Board's judgment in this instance").

Here, the court's rejection of Citi's collective action prohibition is well supported on subsequent legal grounds it could not and did not consider its violation of the NLRA for the reasons explained in *D.R. Horton*, which is entitled to "the greatest deference." *ABF Freight Sys.*, 510 U.S. at 324. Because Citi's collective action prohibition violates the NLRA, it is unenforceable under *Kaiser Steel*. The court below reached the proper result in finding the collective action prohibition in Citi's arbitration agreement unenforceable. The independent legal reason that the prohibition violates the NLRA renders it unenforceable.

2. Collective Action Prohibitions Required by Employers Are Unenforceable Under the Norris-LaGuardia Act.

Collective action prohibitions are also unenforceable under the Norris-LaGuardia Act. "Congress has aimed to prevent employers from imposing contracts on individual employees requiring that they agree to forego engaging in

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Inc., No. 11-04258-CV-FJG, 2012 WL 1192005, at *4 (W.D. Mo. Feb. 28, 2012).

concerted activity since before passage of the NLRA." *D.R. Horton*, 2012 WL 36274, at *7. Congress first articulated the important national labor policy of protecting concerted activity in the Norris-LaGuardia Act. The Act sets forth Congress' intent that workers must be free "from . . . interference, restraint, or coercion . . . in . . . concerted activities for . . . mutual aid or protection." 29 U.S.C. § 102. Significantly, the Act further established that "any . . . undertaking or promise in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States," and is unenforceable in court. 29 U.S.C. § 103.

The Supreme Court, in *Lincoln Union v. Northwestern Iron Metal Co.*, 335 U.S. 525, 534 (1949), explained the history of the pernicious "yellow dog contract" that employers used to prohibit concerted activity for mutual aid or protection before the passage of the Norris-LaGuardia Act:

> There was a period in which labor union members who wanted to get and hold jobs were the victims of widespread employer discrimination practices. Contracts between employers and their employees were used by employers to accomplish this anti-union employment discrimination. Before hiring workers, employers required them to sign agreements stating that the workers were not and would not become labor union members. Such anti-union practices were so obnoxious to workers that they gave these required agreements the name of "yellow dog contracts." This hostility of workers also prompted passage of state and federal laws to ban employer discrimination against union members and to outlaw yellow dog contracts.

While this regrettable period in our nation's history has been laid to rest by federal labor laws like the Norris-LaGuardia Act and the NLRA, another variation on the "yellow dog" contract – the forced arbitration agreement that prohibits joint, class, or collective actions – has emerged in non-union employment, which accounts for over 93% of the private-sector American workforce.[4] In 2007, an expert estimated that 15-25% of American employers had adopted forced arbitration policies. Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 Emp. Rts. & Emp. Pol'y J. 405, 411 (2007). This represents over thirty million employees, or one-fourth of non-union workers. Fair Arbitration Now, *Employment Arbitration*, *available at* http://www.fairarbitrationnow.org/content/employment-arbitration (last visited April 19, 2012). This proportion is even higher in major corporations.[5] In the absence of a labor union, workers often engage in concerted activity by participating in collective legal action. Recognizing this, in an effort to exculpate themselves from liability, employers increasingly require their potential and new hires as well as current employees to sign agreements stating that they will not participate in the concerted activity of class or collective actions.

[4] *See* Bureau of Labor Statistics, Economic News Release, Union Members Summary, Union Members – 2011, *available at* http://www.bls.gov/news.release/union2.nr0.htm (last visited on April 19, 2012).

[5] *See* Amalia Wessler, Stuck in Arbitration, N.Y. TIMES, Mar. 6, 2012.

In addition to violating the NLRA, this variation on the yellow dog contract violates the Norris-LaGuardia Act. The statute provides that "*any* . . . undertaking or promise" in conflict with the policy against restraint on concerted activity is "contrary to the public policy of the United States," not only traditional "yellow dog contracts." *D.R. Horton*, 2012 WL 36274, at *7 (emphasis added). Thus, the Norris-LaGuardia Act prohibits not only the anti-union agreement, but also "a broad array of 'yellow dog'-like contracts," including an agreement prohibiting collective actions. *Id.* Accordingly, collective action bans imposed as a condition of employment are unenforceable and cannot prevent workers from pursuing employment-related collective actions in court. *Id.*, at *8; 29 U.S.C. § 103. Thus, the court below reached the proper result in finding the collective action prohibition in Citi's arbitration agreement unenforceable.

3. The Board's Holding in *D.R. Horton* Does Not Conflict With the Federal Arbitration Act.

The Board in *D.R. Horton* cogently explained why its holding that collective action prohibitions imposed as a condition of employment violate the NLRA, and by implication the Norris-LaGuardia Act, does not conflict with the Federal Arbitration Act ("FAA"), 9 U.S.C. §1, *et seq.*, which encourages the enforcement of consensual arbitration agreements.

First, the holding does not "treat[] arbitration agreements less favorably than other private contracts." 2012 WL 36274, at *11. The fact that the collective

action prohibition is contained in an arbitration agreement is immaterial to the violation – it would violate the NLRA (and the Norris-LaGuardia Act) even if it were contained in an agreement that said nothing about arbitration. The Board's holding did "not rest on 'defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Id.* (quoting *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1746 (2011)).

Second, the Board's holding is consistent with the principle that, under the FAA, an employee who signs an agreement to arbitrate a statutory claim does not "forego the substantive rights afforded by the statute." *See Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). The Board explained that "[t]he right to engage in collective action – including collective *legal* action – is the core substantive right protected by the NLRA [and Norris-LaGuardia Act] and is the foundation on which [it] and Federal labor policy rest." *D.R. Horton*, 2012 WL 36274, at *12. Thus, the collective action prohibition "*does* amount to a requirement that employees forego the NLRA's substantive protections." *Id.*, at *13.

Third, the FAA itself explicitly provides that arbitration agreements may be held invalid based any "grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. An unlawful contract term, such as the collective action prohibition at issue in *D.R. Horton* and here, may thus be held invalid

consistent with the FAA. Indeed, as set forth above, such a term is unenforceable as a matter of federal law. *See Kaiser Steel*, 455 U.S. at 86; 29 U.S.C. § 103.

Finally, the Board explained that, even if there were a conflict with the FAA, the FAA would have to yield to both the NLRA and the Norris-LaGuardia Act because they were enacted *after* the FAA. *D.R. Horton*, 2012 WL 36274, at *12 & n.26. Indeed, the Norris-LaGuardia Act specifically repeals all prior acts that conflict with it, which includes the FAA. *Id.*

B. Collective Action Prohibitions Subvert the Congressional Policies Underlying the FLSA and Impede its Effective Enforcement.

1. Congress Aimed the FLSA and its Collective Action Provision at Eliminating Substandard Labor Conditions.

Congress enacted the FLSA in 1938 to "address[] the economic struggles of the Great Depression." The Fair Labor Standards Act 1-2 – 1-3 (Ellen C. Kearns et al. eds., BNA Books 2d ed. 2010). In the FLSA, Congress set minimum national standards that seek to remedy "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers…." 29 U.S.C. § 202(a). It specifically found that deplorable labor conditions are "spread and perpetuate[d]" through the channels of commerce "among the workers of several States"; "burden[] commerce and the free flow of goods in commerce"; "constitute[] an unfair method of competition in commerce;" "lead[] to labor disputes burdening and obstructing . . . the free flow of goods in

commerce"; and "interfere[] with the orderly and fair marketing of goods in commerce." 29 U.S.C. § 202(a). Congress declared it the policy of the FLSA "to correct and as rapidly as practicable *eliminate* the[se] conditions . . . ." 29 U.S.C. § 202(b) (emphasis added); *see Jacobs v. N.Y. Foundling Hosp.*, 577 F.3d 93, 96 n.2 (2nd Cir. 2009).

Upon these findings, Congress set forth a "comprehensive remedial scheme" designed to effectuate this important national policy. *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 144 (2d Cir. 1999). Congress provided certain rights, including the right to earn minimum wages and overtime premium pay. *See* 29 U.S.C. §§ 206, 207. It provided for both public and private enforcement, including enforcement actions brought by the Secretary of Labor (29 U.S.C. § 216(c)) and the right of workers bring their own private actions, including joining together to enforce the statute in a collective action (29 U.S.C. § 216(b) ("Section 16(b)").

The collective action provision is integral to FLSA's comprehensive remedial scheme and a statutory right in and of itself. *See Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 60 (1st Cir. 2007) (the FLSA "statutorily created [an] interest in [collective] actions"). The Supreme Court emphasized that, by "expressly authoriz[ing] employees to bring collective . . . actions . . . . Congress has stated its policy that [Section 16(b)] plaintiffs should have the opportunity to

proceed collectively." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989).[6]

Section 16(b) initially allowed third parties, such as labor unions, to file FLSA actions on behalf of unnamed workers, and no written consent to join the case was required. *Hoffmann-La Roche*, 493 U.S. at 173. In response "to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome, the representative action by plaintiffs not themselves possessing claims," Congress removed that provision in the Portal-to-Portal Act of 1947 and instead required interested "party plaintiffs" to affirmatively opt into the litigation, while leaving in place the "similarly situated" language providing for collective actions. *Id.*; 29 U.S.C. § 216(b). In replacing "representative actions" with opt-in collective actions, Congress struck a balance between "lower individual costs to vindicate rights by the pooling of resources" that come with multiple plaintiffs pursuing their claims jointly and limiting the litigation to "party plaintiffs" who have an actual stake in the claims and affirmatively consent to pursuing them. *See Hoffmann-La Roche*, 493 U.S. at 170, 173. Significantly, in the statute itself, Congress vested each potential opt-in plaintiff with "the right to be present in court to advance his

[6] *Hoffmann-La Roche* involved a collective action brought under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*, which incorporates the FLSA's collective action provision in 29 U.S.C. § 626(b). Courts have looked to *Hoffmann-La Roche* for guidance on interpretation of the FLSA, particularly since the Court's opinion contains an extended discussion of the FLSA collective action provision.

or her own claim." Charles Alan Wright, et al., 78 Fed. Prac. & Proc. Civ. § 1807, n.14 (3d ed. 2012).

Courts recognize the statutory right to pursue claims jointly in a collective action promotes the broad remedial goals of the FLSA. For example, the Supreme Court, interpreting the ADEA's incorporation of the Section 16(b) collective action, rejected an employer's argument that courts should not be involved in issuing notice to "similarly situated" employees, emphasizing that "[t]he broad remedial goal of the statute should be enforced to the full extent of its terms." *Hoffmann-La Roche*, 493 U.S. at 173. As the Sixth Circuit explained, "the collective action serves an important remedial purpose. Through it, a plaintiff who suffered only small monetary harm can join a larger pool of similarly situated plaintiffs." *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 586 (6th Cir. 2009) (citing *Hoffmann-La Roche, Inc.*, 493 U.S. at 170). Without a collective action provision, plaintiffs may not seek redress for violations of FLSA rights at all where damages amounts are too small to create economic incentives for themselves and their counsel to pursue their claims individually. *See Skirchak*, 508 F.3d at 58 (quotation omitted). Thus, Congress did not design the FLSA merely to provide individuals with a private right of action; it declared it as a national policy to "correct and as rapidly as practicable to *eliminate* the [detrimental labor] conditions" addressed by the statute (29 U.S.C. § 202(b) (emphasis added)) and

gave workers the right to join together collectively to help accomplish this broad remedial goal.

Courts have noted that Section 16(b) collective actions are a vital "supplement" to the enforcement powers of the Department of Labor ("DOL") on behalf of workers under Section 16(c) of the statute. *Ervin v. OS Restaurant Services, Inc.*, 632 F.3d 971, 978 (7th Cir. 2011). Recognizing that the government has limited resources to pursue systemic enforcement, the statute provides for collective actions as another means to accomplish its important remedial goals. For example, the statute itself provides that an employee's right to a collective action "terminate[s] upon the filing of a complaint by the Secretary of Labor" (29 U.S.C. § 216(b)), demonstrating that a collective action stands in for government enforcement when the DOL does not or cannot bring suit. Only through broad enforcement action by the DOL, on behalf of groups of employees, and by opt-in party plaintiffs, through joint litigation in the form of a collective action, can the FLSA's broad remedial purpose to eliminate substandard labor conditions be accomplished.[7]

[7] Section 16(b) is no less integral to the enforcement of other federal statutes that have incorporated its collective action provision, such as the ADEA and the Equal Pay Act of 1963, 29 U.S.C. § 206(d), which is part of the FLSA.

2. Collective Actions Are Essential to Ongoing Enforcement of the FLSA.

Congress's stated policy in the FLSA of eliminating substandard labor conditions remains as necessary today as it was in 1938. Violations of the FLSA continue to be widespread and systemic throughout the United States. For example, the DOL found staggering levels of noncompliance with wage and hour laws across the country in 1999 and 2000. It found that 65% of garment manufacturing firms and 33% of nursing homes and residential care facilities in New York City were violating applicable laws. DOL, Employment Standards Administration, Wage and Hour Division, *1999-2000 Report on Initiatives*, 13, 36 (Feb. 2001), *available at* http://nelp.3cdn.net/a5c00e8d7415a905dd_o4m6ikkkt.pdf (last visited April 19, 2012). In addition, 65% of such facilities in Albany and 40% in Hartford violated applicable laws. *Id.* at 36.

Similarly, a 2008 survey of 1,432 workers in low-wage industries in New York City "found that many employment and labor laws regularly and systematically are violated," including 21% of workers in the sample who were paid less than the legally required minimum wage in the prior workweek and more than 23% who were not paid the legally required overtime rate by their employer. Annette Bernhardt, et al., *Working Without Laws: A Survey of Employment and Labor Law Violations in New York City* 2 (National Employment Law Project

2010) *available at* http://nelp.3cdn.net/990687e422dcf919d3_h6m6bf6ki.pdf (last visited on April 19, 2012).

Unlawful underpayment of employees' wages is not limited to the Second Circuit, of course. The Employer Policy Foundation, a business-funded think tank, has estimated that nationwide, employers unlawfully fail to pay $19 billion annually in wages owed to employees. Craig Becker, *A Good Job for Everyone: Fair Labor Standards Act Must Protect Employees in Nation's Growing Service Economy*, Legal Times, Vol. 27, No. 36 (Sept. 6, 2004), *available at* http://www.showusthejobs.org/issues/jobseconomy/overtimepay/upload/FLSA.pdf (last visited April 19, 2012). Earlier this month, DOL announced that its San Francisco Wage and Hour Division office identified FLSA violations at 68% of the more than 500 restaurants it investigated from 2006 to 2011, totaling $2.1 million in minimum wage and overtime back wages owed to nearly 2,500 employees. *WHD Launches Enforcement Initiative to Find Wage Infractions in San Francisco Eateries*, 10 Workplace L. Rpt. 553 (Apr. 6, 2012). DOL also found violations at 72% of restaurants investigated in Los Angeles and 64% in Portland in the past six years, totaling over $5.2 million in minimum and overtime back wages owed to over 3,000 workers. *WHD Launches Enforcement Initiative in Los Angeles and Portland Restaurants*, 10 Workplace L. Rpt. 633 (Apr. 19, 2012).

Low-wage workers are particularly hard hit by violations of wage and hour laws. One study of 4,387 workers in low-wage industries in Los Angeles, New York, and Chicago, found that 26% were paid less than the minimum wage in the previous work week. Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* 2 (2009), *available at* http://www.unprotectedworkers.org/index.php/broken_laws/index (last visited April 19, 2012). Of those surveyed who had worked more than 40 hours in the previous work week, 76% were not paid the overtime rate required by law. *Id.* For low-wage workers who had come to work early or stayed late, 70% were not paid for work they performed outside their scheduled shift. *Id.* at 3. Finding an FLSA collective action ban unenforceable would have its greatest impact on low-wage workers who seek to recover lost wages resulting from such violations.

Despite widespread violations, government agencies are unable to enforce our nation's wage and hour laws alone. Resources allocated to the DOL's Wage and Hour Division are insufficient to meet the demand for workplace investigations and enforcement of federal law. This is demonstrated by the drop in resource allocation over the past seven decades. In 1941, when the FLSA covered 15.5 million American workers, the Division employed 1,769 investigators and launched 48,449 investigations. Kim Bobo, *Wage Theft in America: Why Millions of*

Working Americans Are Not Getting Paid – And What We Can Do About It 121 (2009) (attached hereto as Exhibit 2). By 2007, when 130 million American workers were protected by the FLSA, the Division employed *fewer* investigators – only 750 – and conducted only 24,950 investigations.[8] *Id.* From 1941 to 2009, DOL experienced a thirteen-fold decrease in enforcement capacity. Progressive States Network, *Cracking Down on Wage Theft* at 5 (Apr. 2012) available at http://www.progressivestates.org/sync/pdfs/PSN.CrackingDownonWageTheft.pdf (last visited April 19, 2012).[9]

In addition to a decline in investigations, the total number of enforcement actions pursued by the Wage and Hour Division declined from 47,000 in 1997 to fewer than 30,000 in 2007. U.S. GAO, *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance*, GAO-08-962T, at 5-6 (July 15, 2008), *available at* http://www.gao.gov/assets/130/120636.pdf (last visited April 19, 2012).

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[8] It should be noted that in recent years the DOL had begun hiring additional wage-and-hour investigators. DOL News Release (Nov. 19, 2009), *available at* http://www.dol.gov/opa/media/press/whd/whd20091452.htm (last visited April 19, 2012). This is a welcome development, but it still leaves a great disparity in the number of investigators when compared to earlier years, and is threatened by the ongoing federal budget crisis.

[9] As with the DOL, state agencies charged with enforcing wage and hour laws also have reduced their enforcement activities. *See* National Employment Law Project, *Holding the Wage Floor: Enforcement of Wage and Hour Standards for Low-Wage Workers in an Era of Government Inaction and Employer Unaccountability* 8-9 (Oct. 2006), *available at* http://nelp.3cdn.net/95b39fc0a12a8d8a34_iwm6bhbv2.pdf (last visited April 19, 2012).

This reduction in public enforcement of the wage and hour laws has led employees to rely almost entirely on private enforcement actions. In 2007, for instance, there were 6,825 FLSA cases filed in federal court, but only 138 of these were filed by the DOL. James C. Duff, *Judicial Business of the United States Courts, 2010 Annual Report of the Director* 146 (Table C-2), Administrative Office of the U.S. Courts (2010), available at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinespdfversion.pdf (last visited April 19, 2012).

3. Collective Action Prohibitions Imposed as a Condition of Employment Subvert Congressional Policy Underlying the FLSA and its Collective Action Provision.

This Court must construe the FLSA "liberally to apply to the furthest reaches consistent with [C]ongressional direction." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985) (citing *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211, 79 S.Ct. 260, 3 L.Ed.2d 243 (1959)); *Jacobs*, 577 F.3d at 96 n.2. In doing so, it must find that Citi's requirement that its workers forfeit their statutory right to pursue a collective action inherently conflicts with Congress' policy of broadly correcting and eliminating substandard labor conditions, as expressed in 29 U.S.C. §§ 202(a),(b), as well as "its policy that [Section 16(b)] plaintiffs should have the opportunity to proceed collectively." *Hoffmann-La Roche*, 493 U.S. at 170.

C. Collective Actions are Necessary to Allow Employees to Vindicate Their Statutory Rights Under the FLSA.

Collective action prohibitions, if enforced, will prevent workers from vindicating their rights under the FLSA. As noted above, the FAA does not allow enforcement of employment arbitration clauses that deprive workers of their substantive federal statutory rights. *Gilmer*, 500 U.S. at 26. This Court has specifically found a class action waiver contained in an arbitration clause unenforceable where "enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs."[10] *In re Am. Express Merchants' Litig.*, 554 F.3d 300, 304 (2d Cir. 2009) ("*Amex I*").[11] In evaluating whether a class action ban is unenforceable under the vindication of statutory rights doctrine, this Court adopted criteria used by the Eleventh Circuit, including such factors as

> the fairness of the provisions, the cost to any individual plaintiff of vindicating the claim when compared to the plaintiff's potential recovery, the ability to recover attorneys' fees and other costs and thus obtain legal representation to prosecute the underlying claim, the

[10] This includes both federal and state statutory rights. *See Preston v. Ferrer*, 552 U.S. 346, 359 (2008).

[11] *Amex I* was vacated by the Supreme Court and remanded for further consideration in light of its ruling in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); however, this Court reaffirmed the holding of *Amex I* in *In re Am. Express Merchants' Litig.*, 634 F.3d 187, 189 (2d Cir. 2011) (upholding rejection of class waiver in *Amex I*), and in *In re Am. Express Merchants' Litig.*, 667 F.3d 204, 206 (2d Cir. 2012) (*Concepcion* does not alter the analysis of *Amex I*).

> practical affect the waiver will have on a company's ability to engage in unchecked market behavior, and related public policy concerns.

Id. at 321 (citation omitted).

Under the test set forth by this Court in *Amex I*, the collective action prohibition cannot be enforced. While Plaintiffs-Appellees demonstrate in their brief why this is the case in their particular collective action, *Amici* here focus on how these factors will operate generally to preclude large numbers of American workers from vindicating their statutory rights under the FLSA should employers be given license to require workers to submit to collective action prohibitions as a condition of employment.

1. Many FLSA Claims Will Go Without Redress Due to Their Small Value Relative to the Costs and Risks of Individual Arbitration.

Courts have recognized that individual wage and hour claims are often too small to support litigation. *See, e.g., Scholtisek v. The Eldre Corp.*, 229 F.R.D. 381, 394 (W.D.N.Y. 2005); *Chase v. AIMCO Props., L.P.*, 374 F. Supp. 2d 196, 198 (D.D.C. 2005); *Gentry v. Super. Ct.*, 42 Cal. 4th 443, 458 (Cal. 2007). Indeed, workers cheated out of relatively small amounts are unlikely to be "willing to file individual lawsuits and incur the expenses of litigation for such a small award." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 183-84 (W.D.N.Y. 2005). In wage and hour cases of low-wage workers, for example, the individual claims "tend to involve relatively small dollar figures, prohibitively small for a private attorney."

Juliet M. Brodie, *Post-Welfare Lawyering: Clinical Education and a New Poverty Law Agenda*, 20 Wash. U. J.L. & Pol'y 201, 248-49 (2006).

One need only visit the DOL's website to see that FLSA claims for unpaid minimum wages and overtime premiums are relatively small. DOL's enforcement statistics for 2008 (the last year published) show that minimum wage claims handled by DOL averaged only $392 per worker, and overtime claims averaged only $676. *See* U.S. Dep't of Labor, Employ't Standards Admin., Wage and Hour Div., *Wage and Hour Collects Over $1.4 Billion in Back Wages for Over 2 Million Employees Since Fiscal Year 2001*, at 2 (2008), *available at* http://www.dol.gov/whd/statistics/2008FiscalYear.pdf (last visited on April 19, 2012).

"[E]mployees and their attorneys must weigh the typically modest recovery, and the typically modest means of the employees bringing overtime lawsuits, with the risk of not prevailing and being saddled with the substantial costs of paying their own attorneys." *See Gentry*, 42 Cal. 4th at 459. The reality is that individual claims on the scale of those collected by DOL for FLSA violations in 2008 are too small for most attorneys to take on as an individual matter.

2. Many Individuals Will Not Know Their Rights are Being Violated Absent Notice of a Collective Action.

A collective action prohibition would eliminate court or arbitrator supervised notice to potential opt-in plaintiffs who may be unaware that their rights are being

violated. Under *Hoffmann-La Roche*, potential opt-in plaintiffs are entitled to notice of the collective action once the named plaintiffs have made a showing that there are "similarly situated" employees. 493 U.S. at 172-73. Without such notice, many aggrieved workers, including those in transient jobs, individuals with limited English abilities, and those who are told by their employers that they are properly classified, may never even realize they may have been wronged. *See Gentry*, 42 Cal. 4th at 459 (citations omitted); *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 86-87 (S.D.N.Y. 2001).

3. Many Aggrieved Workers Will Not Step Forward to Pursue Individual Actions Due to the Fear of Retaliation.

FLSA enforcement depends upon employees stepping forward to complain. *See Kasten v. Saint-Gobain Perf. Plastics, Corp.*, 131 S. Ct. 1325, 1333 (2011). The collective action process allows workers to effectively sue their current employer and have their claims heard as opt-in plaintiffs, without taking a visible role, and without being perceived as the ringleader, which the named plaintiff must do. That is why almost all FLSA cases are brought by former, rather than current employees. Courts have long recognized the very real risks that Plaintiffs endure, not just with their current employer, but even with respect to an industry. Employees have a reasonable fear that sticking their necks out to collect the small sums due for wage and hour violations could ruin their professional careers if it becomes known that they brought litigation against their employer. *See Mitchell v.*

Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960) ("it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions"); *Kasten*, 131 S. Ct. at 1333. *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058 (9th Cir. 2000) (permitting anonymous filings because of risks to FLSA plaintiffs).

The Supreme Court and other federal courts have repeatedly recognized this reality: "Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases held up, and other more subtle forms of influence exerted." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978); *see also Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999) (recognizing that current employees "might be unwilling to sue individually or join a suit for fear of retaliation at their jobs"); *Brock v. Richardson*, 812 F.2d 121, 124 (3d Cir. 1987). Judicial recognition of such intimidation is confirmed by studies that suggest that, despite explicit retaliation protections under wage and hour law, "being fired is widely perceived to be a consequence of exercising certain workplace rights." Weil & Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L & Pol'y J. 59, 83 (Fall 2005).

Empirical data supports these observations. One study has found that 43% of surveyed workers who complained about working conditions or tried to organize

a union experienced illegal retaliation from their employer or supervisor. Bernhardt, *Broken Laws*, *supra*, at 3. "Another 20 percent of workers reported that they did not make a complaint to their employer during the past 12 months, even though they had experienced a serious problem such as dangerous working conditions or not being paid the minimum wage." *Id.* Of the workers who chose not to make a complaint, 50% were afraid of losing their jobs and 10% were afraid their employer would reduce their hours or wages in retaliation. *Id*. Thus, many employees with legitimate claims for back overtime wages may not pursue their remedies for the very real fear of retaliation and coercion if collective action prohibitions are enforced and they are required to proceed individually.

IV. CONCLUSION

For these reasons, the Court should affirm the district court's order denying Defendants-Appellants' motion to compel arbitration of Plaintiffs-Appellees' collective action claims.

Dated: April 20, 2012

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6,962 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point font.

Dated: April 20, 2012

s/ Herbert Eisenberg
Herbert Eisenberg

Exhibit 1

EXHIBIT 1

STATEMENT OF AMICI CURIAE

The **National Employment Lawyers Association (NELA)** is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The Employee Rights Advocacy Institute for Law & Policy (The Institute) is a charitable non-profit organization whose mission is to advocate for employee rights by advancing equality and justice in the American workplace. The Institute achieves its mission through a multi-disciplinary approach combining innovative legal strategies, policy development, grassroots advocacy, and public education. In particular, The Institute has sought to eliminate mandatory pre-dispute arbitration of employment claims through its public education work.

The National Employment Law Project ("NELP") is a non-profit legal organization with 40 years of experience advocating for the employment and labor rights of low-wage workers. In partnership with com-munity groups, unions, and state and federal public agencies, NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the basic workplace protections guaranteed in our nation's labor and employment laws. NELP has litigated and participated as amicus in numerous cases addressing the rights of workers under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, as well as other federal workplace rights laws. Depriving workers of their rights to fully enforce their rights to be paid minimum wage and overtime pay by prohibiting collective action in any forum undermines the wage floor and the policies of the FLSA, and rewards unfair competition by employers engaging in wage theft.

Exhibit 2

"One of the most pressing issues facing millions of hardworking Americans."
–SENATOR EDWARD M. KENNEDY

WAGE THEFT IN AMERICA

WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID — AND WHAT WE CAN DO ABOUT IT

KIM BOBO

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Division staff. Second, improvements in technology (e.g., computers, cell phones, cars) and other enhanced enforcement resources make staff much more efficient. According to the Bureau of Labor Statistics' Productivity and Costs Index, nonfarm business productivity, measured on an output per hour basis, increased 373 percent between 1947 and 2007 (no data is available before 1947). On the other hand, the investigators are responsible for enforcing many more laws than they did in 1941, which means that inspections today are broader and much more complicated.

Clearly 750 wage and hour investigators protecting low-wage workers against wage theft is inadequate. So what's the right number?

The best estimate of the number of investigators needed today, in my opinion, must start with the premise that the Wage and Hour Division should attempt to maintain the 1941 ratio of investigators to workers. The division's mission is to protect workers; the number of workplaces does not significantly impact investigator workload. As noted earlier, applying the 1941 ratio of investigators to workers results in 12,500 investigators. Next, applying the 373 percent productivity increase since 1941 tells us that approximately 3350 investigators are needed to maintain worker protection at the 1941 level (12,500×1/ 373%).

If instead of using the 1941 figures for comparison we use the 1962 figures, we find a similar, albeit slightly less dramatic, need for more staff. Using the ratio of investigators to workers covered by wage and hour laws, the Wage and Hour Division would need over seven thousand investigators. Using the 1962 ratio of investigators to workplaces covered, the Wage and Hour Division would need almost ten thousand investigators. Again, if we apply the 247 percent productivity change for the period from 1962 to 2007 to the seven thousand figure (7000×1/247%), we come up with the estimate of 2834 investigators needed. Either calculation suggests that the division needs significantly more staff to be able to stay abreast of its enforcement responsibilities.

Year	1941	1962[21]	2007
Investigators	1769	1544	750
Workers Covered	15.5 million	28 million	130 million
Employers Covered	360,000	1.1 million	7 million
Investigations[22]	48,449	44,115	24,950
Wages Recovered in 2008 dollars	$149,702,127	$243,890,330	$220,613,703

Even the reasonable and defensible position that the Wage and Hour Division should increase its investigative staff from 750 to 3350 (2600 new investigators) or 2834 (2184 new investigators) will be controversial because of the costs involved.

An additional challenge to immediately adding thousands of new investigators is the Wage and Hour Division's capacity to adequately train a large number of new investigators without bringing the agency's work to a halt. Quadrupling the agency's staff would be an overwhelming training challenge. Given the departure over the last few years of many dedicated career staff leaders with decades of experience, perhaps a strong team of retirees could be recruited to oversee the intensive training and mentoring program for new investigators.

Not all the enforcement staff needs to be investigators. The current way investigative staff is trained is very thorough and very costly. Instead, the Wage and Hour Division could more effectively use administrative staff hired with lower salary and training needs. For example, administrative staff could easily handle routine cases (such as late final paychecks) when an employer quickly agrees to pay. Cases could be turned over to an investigator if the employer refuses to pay.

Given the crisis of wage theft in the nation, the huge responsibility for protecting the nation's workers and deterring wage theft, and the critical Wage and Hour Division rebuilding needs, the following is a modest and reasonable recommendation: