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**No. 14-60800**

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**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**MURPHY OIL USA, INC.**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**SHEILA M. HOBSON**

**Intervenor**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR  
ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT REGARDING ORAL ARGUMENT**

The Board believes that oral argument would assist the Court in evaluating the important legal issues presented in this case.

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## STATEMENT OF JURISDICTION

This case is before the Court on the petition of Murphy Oil USA, Inc. for review, and the cross-application of the National Labor Relations Board for enforcement, of a Board Order issued against Murphy Oil. The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (“NLRA,” 29 U.S.C. § 151, 160(a)). The Board’s Decision and Order, reported at 361 NLRB No. 72 (Oct. 28, 2014) (D&O 1-59),<sup>1</sup> is final under Section 10(e) and (f) of the NLRA, 29 U.S.C. § 160(e) and (f). The Court has jurisdiction pursuant to Section 10(e) and (f) because Murphy Oil transacts business in Louisiana. The petition and cross-application were timely because the NLRA imposes no time limit on such filings.

## STATEMENT OF ISSUES

1. Did the Board reasonably find that Murphy Oil violated Section 8(a)(1) of the NLRA by imposing, as a condition of employment, arbitration agreements barring employees from concertedly pursuing work-related claims in any forum, arbitral or judicial?

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<sup>1</sup> “D&O” refers to the Board’s Decision and Order, located at R.319-77; “R.” refers to the administrative record, filed on January 6, 2015. References preceding a semicolon are to Board findings; those following, to supporting evidence.

2. Did the Board reasonably find that Murphy Oil violated Section 8(a)(1) by seeking enforcement of an unlawful arbitration agreement?

3. Did the Board reasonably find that Murphy Oil violated Section 8(a)(1) by maintaining an arbitration agreement that employees would reasonably construe as prohibiting unfair-labor-practice charges?

4. May the Board administer a national law on a national basis while seeking to bring about a Supreme Court test of adverse circuit court decisions?

5. Does the Court lack jurisdiction to consider Murphy Oil's collateral-estoppel and time-bar arguments?

## STATEMENT OF THE CASE

### I. BACKGROUND: THE COURT'S DECISION IN *D.R. HORTON*

In the Decision and Order on review, the Board carefully reexamined and reaffirmed the reasoning of its 2012 decision in *D.R. Horton, Inc.*, which held that an employer violates the NLRA “when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial.”

(D&O 1 (quoting *D.R. Horton*, 357 NLRB No. 184, 2012 WL 36274, at \*1).) The Board acknowledged that this Court had denied enforcement of that portion of the Board's order in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), *petition*

*for reh'g en banc denied*, 5th Cir. No. 12-60031 (April 16, 2014), as incompatible with the Federal Arbitration Act (“FAA,” 9 U.S.C. § 1, et seq.). The Board explained its disagreement with the Court’s rationale. In so doing, it acted as it has in numerous prior cases where circuit courts have rejected its legal positions: in subsequent cases involving different parties, the Board has sought to persuade those courts to reconsider, and other circuits (and eventually the Supreme Court) to endorse, the Board’s position. As explained below (Part IV), the Board’s approach is a practical necessity under a statutory scheme where the Board applies NLRA principles uniformly nationwide, but parties aggrieved by Board orders may seek review in multiple circuits. The Board has, concurrent with the filing of this brief, filed a petition for a hearing en banc.

## **II. PROCEDURAL HISTORY**

Acting on charges filed by intervenor Sheila Hobson, a former Murphy Oil employee, the Board’s General Counsel issued an amended complaint alleging that Murphy Oil had violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by maintaining and enforcing an arbitration agreement that unlawfully prohibits employees from engaging in activity protected by Section 7 of the NLRA, 29 U.S.C. § 157, and that employees would reasonably understand as barring unfair-labor-practice charges. The parties waived a hearing and submitted the case to the

Board on a stipulated record. (D&O 3 n.20; R.39-61.) The Board issued a Decision and Order on October 28, 2014, finding the violations alleged.

### **III. FINDINGS OF FACT**

Murphy Oil operates fueling stations in 21 states. Prior to March 6, 2012, it required all job applicants and current employees to sign a “Binding Arbitration Agreement and Waiver of Jury Trial (Applicant)” (“Agreement”). (D&O 3; R.42-43,31-32.) Hobson worked for Murphy Oil from November 2008 until September 2010, and signed the Agreement when she applied for employment. (D&O 3; R.42,44-45.)

The Agreement provides that Murphy Oil and the signatory employee “agree to resolve any and all disputes or claims each may have against the other ... by binding arbitration.” (D&O 3; R.31.) That encompasses “claims or charges based upon federal or state statutes, including, but not limited to, ... the Fair Labor Standards Act” (“FLSA,” 29 U.S.C. § 201, et seq.), but “exclud[es] claims which must, by statute or other law, be resolved in other forums.” (D&O 3; R.31.)

Finally, the Agreement provides that the employee and Murphy Oil:

waive their right to commence, be a party to, or act as a class member in, any case or collective action in any court action against the other party relating to employment issues. Further, the parties waive their right to commence or be a party to any group, class or collective action claim in arbitration or any other forum. The parties agree that any claim by or against [the employee] or the Company shall be heard without consolidation of such claim with any other person or entity’s claim.

(D&O 3; R.32,43.)

In June 2010, Hobson and three other employees filed a representative collective action under the FLSA in the United States District Court for the Northern District of Alabama. They alleged that Murphy Oil failed to pay overtime and for certain off-the-clock work. (D&O 3; R.45,70-81.)

In July, Murphy Oil moved to compel Hobson and her co-plaintiffs to arbitrate their claims individually, and to dismiss the lawsuit pursuant to the Agreement. It continued to seek enforcement of the Agreement in numerous filings between September 2010 and February 2012. (D&O 3-4; R.45-47,95-214.) On September 18, 2012, the court granted the motion to compel and dismiss, rejecting the plaintiffs' reliance on the Board's *D.R. Horton* decision. The plaintiffs did not appeal, and Murphy Oil refused to arbitrate their claims collectively. (D&O 4; R.47,215-18.)

Around March 6, 2012, Murphy Oil revised the Agreement by inserting the following paragraph:

Notwithstanding the group, class or collective action waiver set forth in the preceding paragraph, [employee] and Company agree that [employee] is not waiving his or her right under Section 7 of the [NLRA] to file a group, class or collective action in court and that [employee] will not be disciplined or threatened with discipline for doing so. The Company, however, may lawfully seek enforcement of the group, class or collective action waiver in this Agreement under the Federal Arbitration Act and seek dismissal of any such class or collective claims. Both parties further agree that nothing in this Agreement precludes [employee] or the Company from participating in proceedings to adjudicate unfair labor practices charges before the National

Labor Relations Board (“NLRB”), including, but not limited to, charges addressing the enforcement of the group, class or collective action waiver set forth in the preceding paragraph.

(D&O 4; R.68.) Since then, Murphy Oil has maintained and enforced that “Revised Agreement” as a condition of employment. (D&O 4; R.44.)

#### **IV. THE BOARD’S CONCLUSIONS AND ORDER**

On October 28, 2014, the Board (Chairman Pearce and Members Hirozawa and Schiffer; Members Miscimarra and Johnson, dissenting in part) issued a Decision and Order finding that Murphy Oil had violated Section 8(a)(1) by maintaining and enforcing arbitration agreements under which employees are compelled, as a condition of employment, to waive the right to maintain joint, class, or collective employment-related actions in any forum, arbitral or judicial. (D&O 21.) The Board also found that Murphy Oil violated Section 8(a)(1) by maintaining an arbitration agreement that employees would reasonably construe as restricting their right to file charges with the Board. (D&O 21.)

The Board ordered Murphy Oil to cease and desist from the unfair labor practices found and from any like or related interference with employees’ Section 7 rights. (D&O 21.) Affirmatively, the Board ordered Murphy Oil to rescind or revise the Agreements to make clear that they do not restrict Section 7 rights; notify all applicants and employees who signed the Agreements, and the district court, of the change; inform the court that it no longer opposes the FLSA action on

the basis of the Agreement; reimburse plaintiffs for any reasonable attorneys' fees and litigation expenses incurred opposing the motion to dismiss the lawsuit and compel arbitration; and post a remedial notice. (D&O 21-22.)

### **SUMMARY OF ARGUMENT**

This case arises at the intersection of two federal statutes: the NLRA and the FAA. The principal issue is whether the FAA permits employers to condition employment on individual arbitration agreements prospectively waiving employees' core substantive NLRA right—the right to band together to collectively seek to enforce their work-related statutory claims. When the Court considered that question in *D.R. Horton*, it rejected the Board's statutory interpretation as inconsistent with FAA policy. That decision was based on a misapprehension of Supreme Court FAA jurisprudence and failed to give proper deference to the Board's authoritative interpretation of its governing statute.

There is no dispute that Murphy Oil's Agreements require its employees to pursue all work-related claims in individual arbitration, categorically barring all forms of concerted legal activity in all forums, arbitral or judicial. The Board reasonably determined, in the exercise of its expertise, that such a comprehensive ban extinguishes important Section 7 rights in violation of Section 8(a)(1) of the NLRA. The original Agreement also unlawfully interferes with employees' Section 7 right to file Board charges.

Under controlling FAA caselaw, an arbitration agreement is unenforceable if it extinguishes a specific, substantive federal right. Because the determination of whether a right is “substantive” for FAA purposes depends on whether it is critical to the statute creating it; because the Board’s determination that collective legal activity to ameliorate working conditions is a Section 7 right is entitled to deference; and because Congress enacted the NLRA expressly to protect such concerted activity, the Agreements are unlawful.

In light of the Board’s reasonable conclusions of law, its congressionally designated responsibility to define federal labor policy, its national jurisdiction, and the unpredictable venue for judicial review in any given case, the Board did not acquiesce in this Court’s *D.R. Horton* decision. Accordingly, the Board respectfully requests, in this brief and in a simultaneously filed petition for hearing en banc, that the Court reexamine the issues presented and enforce the Board’s Order.

### **STANDARD OF REVIEW**

In enacting the NLRA, Congress established the Board and charged it with the primary authority to interpret and apply the statute. *See Garner v. Teamsters Chauffeurs & Helpers Local 776*, 346 U.S. 485, 490 (1953). Accordingly, the Board’s reasonable interpretation of the NLRA is entitled to affirmance. *See City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1868-71 (2013) (to reject agency

interpretation of statute within its expertise requires showing that “the statutory text forecloses” agency’s interpretation) (reaffirming *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996) (Board “need not show that its construction is the *best* way to read the statute”). Recognizing “the Board’s expertise in labor law,” this Court will defer to the Board’s plausible inferences, its findings of fact, and its application of the statute. *D.R. Horton, Inc.*, 737 F.3d at 349, 356. More specifically, “the task of defining the scope of [Section] 7 ‘is for the Board to perform in the first instance as it considers the wide variety of cases that come before it....’” *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978)); accord *D.R. Horton, Inc.*, 737 F.3d at 356; *Reef Indus., Inc. v. NLRB*, 952 F.2d 830, 838 (5th Cir. 1991). The Court does not defer to the Board’s interpretation of statutes other than the NLRA. See *Roundy’s Inc. v. NLRB*, 674 F.3d 638, 646 (7th Cir. 2012).

## ARGUMENT

### **I. MURPHY OIL VIOLATED SECTION 8(a)(1) OF THE NLRA BY MAINTAINING AGREEMENTS THAT PROHIBIT EMPLOYEES FROM PURSUING EMPLOYMENT-RELATED CLAIMS CONCERTEDLY**

#### **A. Introduction**

As the Board forcefully reaffirmed and explained in its decision, “[t]he core objective of the [NLRA] is the protection of workers’ ability to act in concert, in support of one another.” (D&O 1.) That follows from Congress’ declaration, in the NLRA’s opening provision, that it is “the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce” by encouraging collective bargaining and “by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing” for negotiating with their employer, or for “mutual aid or protection.” 29 U.S.C. § 151. Congress implemented that policy by enacting Section 7, which expressly guarantees employees’ right to act concertedly for “mutual aid or protection.” 29 U.S.C. § 157.

Decades of Board and Supreme Court precedent establish that Section 7’s broad guarantee reaches beyond immediate workplace disputes to encompass employees’ efforts “to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.” *Eastex*, 437 U.S. at 565-66 & n.15. Specifically,

Section 7 protects employees' joint, class, or collective employment-related legal actions. *See id.* at 565-66. Due to the scope and nature of Section 7, detailed below (Part I.B), the NLRA is "unique among workplace statutes" (D&O 1), which typically create defined individual rights.

In enacting Section 8(a)(1), Congress protected the broad right to concerted activity for mutual protection by prohibiting employers from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of" Section 7 rights.

29 U.S.C. § 158(a)(1). As this Court has recognized, an employer violates Section 8(a)(1) by maintaining a rule that either explicitly restricts concerted protected activity or that "employees would reasonably construe" as doing so. *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 208-09 (5th Cir. 2014) (quotation omitted). Similarly, as discussed below (Part I.C), it has long been established that an employer cannot lawfully impose agreements on employees that restrict Section 7 rights. *See Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 361 (1940).

The Board is entitled to "considerable deference," *City Disposal*, 465 U.S. at 829-30, regarding its finding that the concerted-action waivers in Murphy Oil's Agreements violated the NLRA by requiring that its employees pursue all employment-related disputes individually. The Board does not claim deference as to whether that unfair-labor-practice finding comports with the FAA, which "reflects both a liberal federal policy favoring arbitration, ... and the fundamental

principle that arbitration is a matter of contract,” *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011). But, as explained below (Part I.D), its analysis accommodates the overriding federal goals embodied in both statutes by evaluating the Agreements’ restriction of Section 7 rights through the lens of Supreme Court FAA jurisprudence, which has identified certain limits to the FAA’s enforcement mandate.

Briefly, the Supreme Court has repeatedly cautioned that an arbitration agreement is unenforceable if it requires a party to forgo substantive rights afforded by a federal statute. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013). Such rights are identified, for purposes of that exception, by examining whether they are central to the statute creating them—as Section 7 is to the NLRA. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991). In this case, moreover, the Agreements’ violation of Section 8(a)(1) triggers the FAA’s “savings clause,” which provides that arbitration agreements may be revoked “upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. Finally, the Supreme Court has held that FAA-mandated enforcement may be overridden by a “contrary congressional command.” *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). Here, such a command is evident both in the text of the NLRA, and in the inherent

conflict between Section 7 rights and the Agreements' categorical prohibition of concerted work-related legal claims.

**B. Section 7 Guarantees Employees the Right To Pursue Employment-Related Claims Concertedly**

The Board's finding that Hobson and her co-plaintiffs were protected by Section 7 when they filed their lawsuit comports with well-established labor-law principles and falls squarely within its area of expertise and responsibility for delineating federal labor law. The subject of their lawsuit, wages, is undeniably a term of employment. *See Eastex*, 437 U.S. at 569. Their chosen method to redress their grievances, concerted legal action, falls within Section 7's literal definition of protected activity and advances the congressional purposes underlying the NLRA.

Section 7 protects employees' rights to "engage in ... concerted activities for the purposes of collective bargaining or other mutual aid or protection," and to "refrain from any or all of such activities." 29 U.S.C. §157; *NLRB v. McEver Eng'g*, 784 F.2d 634, 639 (5th Cir. 1986). Concerted employee efforts to improve the terms and conditions of their employment are thus protected. *Eastex*, 437 U.S. at 565; *accord McEver Eng'g*, 784 F.2d at 639. The Board has construed Section 7's guarantee broadly, recognizing that "there is no indication that Congress intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way." *City Disposal*, 465 U.S. at 835; *Eastex*, 437 U.S. at 565-66 & n.15 (same); *accord*

*D.R. Horton*, 737 F.3d at 356. Protected activity extends beyond the workplace and, as the Supreme Court has stated, specifically includes efforts “to improve working conditions through resort to administrative and judicial forums....”

*Eastex*, 437 U.S. at 566.

Legal activity is no less deserving of Section 7 protection than other concerted activity. To the contrary, as the Board explained, the NLRA protects concerted legal activity, like other activity for mutual aid or protection, to “avert[] industrial strife and unrest and restor[e] equality of bargaining power between employers and employees.” (D&O 1 (quoting 29 U.S.C. § 151).) Protecting employees’ ability to join together to resolve workplace disputes in an adjudicatory forum has far less potential for economic disruption, as the Board emphasized (D&O 5, 7-8), than many indisputably protected concerted activities, like strikes and boycotts.

Consistent with the NLRA’s text and declaration of national labor policy, the Board has for decades, with court approval, held that Section 7 protects concerted legal activity. That line of cases dates back to *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-50 (1942), where the Board found that three employees were protected in filing an FLSA suit seeking overtime wages. It continues,

unbroken, through modern NLRA jurisprudence.<sup>2</sup> Indeed, in *D.R. Horton*, this Court acknowledged the reasonableness of the Board’s Section 7 interpretation. 737 F.3d at 356-57 (recognizing breadth of Section 7; acknowledging authority for finding collective lawsuits and grievances protected). *Murphy Oil* (Br. 31) does not seriously contend otherwise.<sup>3</sup> In sum, collective pursuit of legal claims enjoys a long history of Section 7 protection, avoids the precise harm Congress enacted

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<sup>2</sup> See, e.g., *Brady v. Nat’l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) (“lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is ‘concerted activity’ under [Section] 7”); *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188 (D.C. Cir. 2000) (concerted petitions for injunctions against workplace harassment); *Altex Ready Mixed Concrete Corp. v. NLRB.*, 542 F.2d 295, 297 (5th Cir. 1976) (“filing by employees of a labor related civil action is protected activity under [S]ection 7 of the NLRA unless the employees acted in bad faith”); *Harco Trucking, LLC*, 344 NLRB 478, 478-79 (2005) (wage-related class action); *Le Madri Rest.*, 331 NLRB 269, 275 (2000) (concerted lawsuit alleging unlawful pay policies); *United Parcel Serv., Inc.*, 252 NLRB 1015, 1018, 1026 & n.26 (1980) (wage-related class action), *enforced*, 677 F.2d 421 (6th Cir. 1982); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975) (concerted lawsuit for contract violation and unpaid wages), *enforced mem.*, 567 F.2d 391 (7th Cir. 1977); *Moss Planing Mill Co.*, 103 NLRB 414, 418 (1953) (concerted wage claim), *enforced*, 206 F.2d 557 (4th Cir. 1953).

<sup>3</sup> *Murphy Oil* erroneously claims (Br. 32-33) that the Supreme Court’s discussion of protected legal activity in *Eastex* is inapposite because the Court cited cases involving employer *retaliation* for protected activity. Section 7 defines protected activity. Whether an employer violates Section 8 by retaliating against employees for Section 7 activity or by prospectively prohibiting it (which implicitly threatens retaliatory consequences for disregard of the ban) does not affect the scope of protection. In fact, the employer in *Eastex*, like *Murphy Oil*, violated Section 8(a)(1) by prospectively barring Section 7 activity. 437 U.S. at 559-62 (unlawfully banning distribution of protected literature).

the NLRA to address, and ensures the unfettered freedom of association Congress judged necessary to do so.

**C. The Agreements’ Concerted-Action Waiver Violates Section 8(a)(1) of the NLRA**

Employer conduct violates Section 8(a)(1) if it “reasonably tends to interfere” with employees’ Section 7 rights. A workplace rule that either explicitly restricts concerted protected activity, or that employees would “reasonably construe” as doing so, is unlawful. *Flex Frac*, 746 F.3d at 208-09 (quoting *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004)). It does not matter whether the employer has applied or enforced the rule—mere maintenance constitutes an unfair labor practice. *See id.* at 209. Here, because Murphy Oil imposed the Agreements on all employees as a condition of employment, the Board appropriately applied the work-rule standard. *See D.R. Horton*, 2012 WL 36274, at \*5, 10 (agreement executed as condition of employment carries “implicit threat” that failure to comply will result in loss of employment).<sup>4</sup> Applying that

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<sup>4</sup> Murphy Oil argues (Br. 36-37) that this case raises “the more difficult question” the Board reserved in *D.R. Horton*, 2012 WL 36274, at \*16 n.28, of whether employee arbitration agreements that are not a condition of employment violate the NLRA. The Court lacks jurisdiction to consider that argument, which Murphy Oil did not raise before the Board. Section 10(e) of the NLRA states that “[n]o objection that has not been urged before the Board ... shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e); *see Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (10(e) bar is jurisdictional); *accord NLRB v. Houston Bldg. Servs., Inc.*, 128 F.3d 860, 863 (5th Cir. 1997)

standard, the Board reasonably found that the Agreements' absolute prohibition of every form of concerted pursuit of work-related legal claims violates Section 8(a)(1).

**1. Both Agreements unlawfully restrict Section 7 activity**

By requiring that employees individually arbitrate workplace claims, the Agreements explicitly restrict employees from exercising the right, set forth in *Eastex*, to pursue such claims collectively. Specifically, as the Board noted (D&O 3), the original Agreement prescribes that employees not “commence, be a party to, or act as a class member in, any case or collective action in any court action against the other party relating to employment issues,” and imposes a near-identical restriction on claims in arbitral “or any other” forums. (R.32,43.) That categorical prohibition bars one of the most basic forms of Section 7 activity, joining together—as Hobson and her colleagues did in filing their FLSA suit—to seek to improve wages, and therefore violates Section 8(a)(1).

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(10(e) bar is “mandatory, not discretionary”). That bar is particularly apposite here, where Murphy Oil challenges the Board’s application of its own precedent, and has not suggested any circumstances to excuse its failure to argue the issue to the Board. In any event, there is no merit to Murphy Oil’s argument that because Hobson was an applicant, not an employee, when she signed the Agreement, this case is not covered by the Board’s holding in *D.R. Horton*. The arbitration agreement in *D.R. Horton*, like Murphy Oil’s Agreements, was “imposed on all employees as a condition of *hiring* or continued employment.” 2012 WL 36274, at \*4 (emphasis added).

The Revised Agreement likewise restricts Section 7 rights, despite an added paragraph (R.68) stating that employees do not waive their right “to file” a collective action, and that Murphy Oil will not retaliate against them for doing so. As the Board explained (D&O 19), the Revised Agreement “leaves intact” the restrictive language from the original Agreement. And the new paragraph, while clarifying that Murphy Oil will not retaliate against employees for filing a concerted action, explicitly permits Murphy Oil to seek enforcement of the agreement and the dismissal of any collective action. Employees would thus reasonably construe the Revised Agreement, like the original, as prospectively waiving their NLRA right to join forces to enforce statutes benefitting them as employees.

**2. The Board has long held that individual employer-employee contracts cannot restrict Section 7 rights**

The Board’s finding that the Agreements violate Section 8(a)(1) is consistent with longstanding precedent holding that individual agreements between employers and employees cannot restrict Section 7 rights. In *National Licorice Co. v. NLRB*, the Supreme Court held that individual contracts, in which employees relinquished their rights to strike and negotiate closed-shop agreements, amounted to a “renunciation by the employees of rights guaranteed by the [NLRA], and were a continuing means of thwarting the policy of the [NLRA].” 309 U.S. 350, 361 (1940). The Court further explained that “employers cannot set

at naught the [NLRA] by inducing their workmen to agree not to demand performance of the duties which [the statute] imposes.” *Id.* at 364. And in *NLRB v. Stone*, the Seventh Circuit, agreeing with the Board, held that individual contracts requiring employees to adjust their grievances with their employer individually “constitute[] a violation of the [NLRA] per se,” even when “entered into without coercion.” 125 F.2d 752, 756 (7th Cir. 1942); *see also J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) (individual contracts conflicting with Board’s function of preventing unfair labor practices “obviously must yield or the [NLRA] would be reduced to a futility”); *NLRB v. Port Gibson Veneer & Box Co.*, 167 F.2d 144, 146 (5th Cir. 1948) (Employers “may not require individual employees to sign employment contracts which, though not unlawful in their terms, are used to deter self-organization.”).<sup>5</sup>

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<sup>5</sup> Consistent with the principle that an employee cannot individually waive Section 7 rights, the Board has regularly set aside settlement agreements that require an employee, as a condition of reinstatement, to prospectively waive the right to engage in concerted activity. *See, e.g., Bon Harbor Nursing & Rehab. Ctr.*, 348 NLRB 1062, 1073, 1078 (2006) (employer unlawfully conditioned employees’ reinstatement, after dismissal for non-union concerted protected protest, on agreement not to engage in further similar protests); *Bethany Med. Ctr.*, 328 NLRB 1094, 1005-06 (1999) (same); *cf. Ishikawa Gasket Am., Inc.*, 337 NLRB 175, 175-76 (2001) (employer unlawfully conditioned discharged employee’s severance payments on agreement not to help other employees in disputes against employer or to act “contrary to the [employer’s] interests in remaining union-free”), *enforced*, 354 F.3d 534 (6th Cir. 2004).

Murphy Oil is incorrect when it argues (Br. 33-34) that individual waivers can be enforced unless they “impede[] union organizing” or are “used as a weapon in collective bargaining.” A contract that interferes with Section 7 rights violates Section 8(a)(1) regardless of whether the employer intended, or used, it to deter concerted activity. *See Mobil Exploration & Producing U.S. v. NLRB*, 200 F.3d 230, 239 (5th Cir. 1999) (good faith not defense to Section 8(a)(1) violation if conduct tends to interfere with Section 7 rights); *Reef Indus., Inc. v. NLRB*, 952 F.2d 830, 836 (5th Cir. 1991) (union animus unnecessary for Section 8(a)(1) violation where adverse action motivated by concerted protected activity). Such contracts violate Section 8(a)(1) “no matter what the circumstances that justify their execution or what their terms.” *J.I. Case*, 321 U.S. at 337; *see also Nat’l Licorice*, 309 U.S. at 360 (individual contract violated Section 8(a)(1) because it had “[t]he effect of” discouraging employees from presenting grievance through union); *Stone*, *supra* p.19. The Supreme Court’s recognition, in *J.I. Case*, that an employer “may be free to enter into individual contracts” with its employees in limited instances, 321 U.S. at 337, does not support Murphy Oil’s claim (Br. 34) that such contracts may prospectively waive employees’ Section 7 rights. As the Court explained, employees can enter into “any contract provided it is not inconsistent with a collective agreement or does not amount to ... an unfair labor practice.” *Id.* at 339.

Finally, the history of federal labor policy supports the Board's and courts' longstanding interpretation of the NLRA as prohibiting employers from using private contracts to avoid their obligation not to interfere with employees' Section 7 rights. In the 1932 Norris-LaGuardia Act, 29 U.S.C. § 101, et seq., Congress declared unenforceable "any undertaking or promise" in conflict with the federal policy of protecting employees' freedom (among others) to act concertedly for mutual aid or protection, 29 U.S.C. § 102, 103. It also barred judicial restraint of concerted litigation "involving or growing out of any labor dispute" based on employer-employee agreements. 29 U.S.C. § 104.

**3. The Agreements impair employees' statutorily protected freedom to engage in, or refrain from, concerted activity**

Section 7 protects employees' right to "engage in" *or* to "refrain from" concerted activity for mutual protection. The Board's invalidation of the Agreements preserves employees' freedom of choice. As the Board explained, "prohibiting *employers* from requiring employees to pursue their workplace claims individually ... does not compel *employees* to pursue their claims concertedly." (D&O 18.) By contrast, the Agreements' prospective, categorical waiver of the right to concertedly pursue workplace claims extinguishes that right. The Agreements strip employees of any right to decide, under the particular circumstances presented, whether to participate—or not—in collective legal action with respect to often-heated workplace disputes. Denying employees the safety

valve of concerted litigation, as opposed to other forms of concerted protest, is contrary to Congress' policy of protecting collective rights "not for their own sake but as an instrument of the national labor policy of minimizing industrial strife." *Emporium Capwell Co. v W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975). In the NLRA context, the alternative to concerted litigation is not simply individual arbitration but also strikes, picketing, boycotts, and other disruptions of commerce.

A foundational concerted-activity case, *Salt River Valley Water Users' Association v. NLRB*, 206 F.2d 325 (9th Cir. 1953), aptly illustrates those principles. In that case, unrest over the employer's wage policies prompted an employee to circulate a petition among co-workers designating him as their agent to seek back wages under the FLSA. The Ninth Circuit, recognizing that concerted activity "is often an effective weapon for obtaining [benefits] to which [employees] ... are already 'legally' entitled," *id.* at 328, upheld the Board's view that the NLRA protected the employees' effort to exert group pressure on the employer to redress their legal claims. The court also held that a single employee's right to remove his name from the petition, which he had previously signed, was a voluntary exercise of his right to refrain from Section 7 activity. *Id.* at 328, 329. If the employees involved in the *Salt River* dispute had been subject to the Agreements, by contrast, those individual waivers—extracted as a condition of employment prior to the advent of any wage disputes—would have deprived them

of the option to support the proposed collective litigation, potentially exacerbating the employees' grievances.

For those reasons, Murphy Oil is quite wrong in suggesting (Br. 31-32) that *Salt River* supports its argument. The choice the *Salt River* employees made in deciding whether to join or refrain from ongoing concerted activity was not analogous to the decision Murphy Oil's employees faced when it conditioned their employment on the blanket waiver of their right to engage in concerted activity well before any concrete dispute.

**4. The Board's invalidation of the Agreements is consistent with NLRA policies permitting collective and individual waivers**

Barring employers from requiring individual employees to waive their NLRA right to engage in concerted activity in future disputes is consistent with the well-established legal principle that a union can prospectively waive some of a represented employee's substantive rights, such as the right to engage in an economic strike. *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 705-06 (1983); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280-83 (1956). The validity of those waivers is premised on their negotiation by a collective-bargaining representative freely chosen by the employees and subject to the duty of fair representation. *Metropolitan Edison*, 460 U.S. at 705; *Vincennes Steel Corp.*, 17 NLRB 825, 832 (1939), *enforced*, 117 F.2d 169 (7th Cir. 1941).

These same considerations explain why the Supreme Court's decision in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 274 (2009), is of no aid to Murphy Oil. *Pyett* upheld the legality of a procedural waiver, negotiated by a union on behalf of its member employees, that required the employees to submit employment-discrimination claims to binding arbitration. The Court emphasized that the agreement was the result of a "bargained-for exchange," which "stem[med] from an exercise of Section 7 rights: the collective-bargaining process." *Id.* at 248. For that reason, the collective waiver upheld in *Pyett* stands on an entirely different footing from the Agreements, which were imposed on individual employees by the employer as a condition of employment. *See Stone*, 125 F.2d at 756 (rejecting employer's attempt to analogize individual arbitration agreements waiving Section 7 rights, which "thereafter impose[] a restraint upon collective action," to collectively bargained agreements waiving such rights).

Although the Supreme Court stated in *Pyett* that "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative," 556 U.S. at 258, the Court was not suggesting that individual employees can prospectively waive Section 7 rights in the same manner as unions. Rather, it was responding to an argument that unions lack authority to agree to procedural waivers requiring employees to arbitrate statutory rights. *Id.* at 256 n.5, 259. Because the Court

reaffirmed the principle that “a substantive waiver of federally protected civil rights will not be upheld,” *id.* at 273 (remanding for determination of whether agreement violated that principle), *Pyett* provides no support for Murphy Oil’s claim (Br. 36) that the Agreements permissibly conditioned employment on individual employees’ prospective waiver of their freedom to act in concert with others to enforce their statutory employment rights.

Finally, the Board’s unfair-labor-practice finding does not interfere with Section 9(a) of the NLRA, 29 U.S.C. § 159(a), as Murphy Oil contends (Br. 35). As the Board explained (D&O 17), Section 9(a) confers on a union the status of exclusive-bargaining representative “[p]rovided” that employees “shall have the right at any time to present grievances to the employer and to have such grievances adjusted....” *Id.* The proviso guarantees that employees can present grievances, and that employers can entertain them, free from allegations of direct dealing with union-represented employees in violation of Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5). *See Emporium Capwell*, 420 U.S. at 62 n.12 (citation to legislative history omitted). Section 9(a) does not create a distinct employee right: while employers *may* entertain individual grievances from union-represented employees, their refusal to do so is not an unfair labor practice. *Id.* In short, the Section 9(a) proviso merely carves out an exception to the provision’s rule of union exclusivity. (D&O 17 n.95 (citing *Black-Clawson Co. v. Int’l Ass’n of*

*Machinists Lodge 355*, 313 F.2d 179, 185 (2d Cir. 1962) (“This construction ... best comports with the structure of the section. ‘The office of a proviso is seldom to create substantive rights and obligations; it carves exceptions out of what goes before.’”) (quoting Archibald Cox, *Rights Under A Labor Agreement*, 69 HARV.L.REV. 601, 624 (1956)).)

In sum, the text of the NLRA and longstanding jurisprudence, as well as the nature of employees’ Section 7 rights and broader federal labor policy, support the Board’s finding that the Agreements’ concerted-action waiver violates Section 8(a)(1). That Murphy Oil used the particular vehicle of an arbitration agreement to impose that prospective bar on employees’ concerted pursuit of workplace-related claims does not excuse its restriction of Section 7 rights.

**D. The Board’s Invalidation of the Agreements’ Concerted-Action Waiver Does Not Conflict with the FAA**

After interpreting the NLRA as protecting employees’ right to engage in the concerted pursuit of legal claims, and determining that the Agreements unlawfully interfered with that right, the Board properly asked whether its interpretation of the NLRA conflicts with the FAA. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147-50 (2002) (Board must ensure remedies for NLRA violations do not “trench[] upon a federal statute or policy outside the Board’s competence to administer”). Following a careful examination of the Supreme Court’s FAA jurisprudence, which draws a clear line between permissible procedural or forum

waivers and impermissible prospective waivers of substantive federal rights, the Board found no such conflict. Although that finding lies outside of the Board's expertise, and is therefore not entitled to deference, it appropriately accommodates the interests protected by the FAA and the NLRA and maximizes the reach of both statutes.

As the Supreme Court recently summarized in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011), Congress enacted the FAA in 1925 “in response to widespread judicial hostility to arbitration agreements.” Section 2 of the FAA provides 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.” 9 U.S.C. § 2. Described as the “primary substantive provision of the Act,” Section 2 reflects “both a liberal federal policy favoring arbitration, ... and the fundamental principle that arbitration is a matter of contract.” *Concepcion*, 131 S. Ct. at 1745 (internal quotations omitted). Accordingly, “courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms.” *Id.* That is equally true with respect to arbitration agreements governing statutory claims, including the FLSA. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (Age Discrimination in Employment Act, (“ADEA”), 29 U.S.C. § 621, et seq.); *Carter v. Countrywide Credit Indus.*, 362 F.3d 294, 298 (5th Cir. 2004) (FLSA).

As the Supreme Court has made clear, however, federal policy favoring arbitration has its limits. The Court has repeatedly emphasized that it will not sanction the enforcement of arbitration agreements that prospectively waive substantive federal rights. *See, e.g., Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013); *Pyett*, 556 U.S. at 273; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985); *see also Garrett v. Circuit City Stores*, 449 F.3d 672, 675 (5th Cir. 2006) (explaining “difference between substantive rights conferred by Congress, such as the prohibition of age discrimination, which must be preserved, even in the arbitral forum, and procedural rights, which include choice of forum and may be waived without running afoul of the substantive intent of Congress”). Accordingly, a mandatory arbitration agreement is unenforceable under governing FAA jurisprudence when—like Murphy Oil’s Agreements—it violates Section 8(a)(1) of the NLRA by prospectively restricting employees’ Section 7 rights.

Moreover, as the Board recognized (D&O 9-10), both the Supreme Court and this Court have identified two additional ways an arbitration agreement may be unenforceable, consistent with the FAA. First, under the FAA’s savings clause, an arbitration agreement is invalid on the same grounds as exist to revoke any contract. *See* 9 U.S.C. § 2; *see also D.R. Horton*, 737 F.3d at 358 (citing *Concepcion*, 131 S. Ct. at 1746). Second, enforcement of an arbitration agreement

may be precluded by a statute's contrary congressional command. *See D.R. Horton*, 737 F.3d at 358 (citing *CompuCredit*, 132 S. Ct. at 669). Murphy Oil's Agreements are unenforceable pursuant to both of those exceptions to the FAA.

**1. Enforcement of the Agreements would impermissibly deprive employees of their substantive right to engage in the concerted pursuit of legal claims to address workplace concerns**

**a. The FAA does not mandate enforcement of an agreement that operates to waive rights at the core of another federal statute**

The Supreme Court has made clear that “a substantive waiver of federally protected civil rights will not be upheld.” *Pyett*, 556 U.S. at 273. It reaffirmed that principle recently in *Italian Colors*, emphasizing the crucial distinction between judicial-forum waivers that are enforceable under the FAA and prospective waivers of substantive rights that are not. It explained the importance of “prevent[ing] ‘prospective waiver of a party’s *right to pursue* statutory remedies,’ ... [which] would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights.” *Italian Colors*, 133 S. Ct. at 2310 (quoting *Mitsubishi Motors*, 473 U.S. at 637 n.19). The Court’s analysis, and an examination of FAA jurisprudence generally, demonstrate that the question of whether a right is considered “substantive” depends *not* on the FAA or federal arbitration policy, but on an examination of the statute creating the right.

In *Gilmer*, for example, the Court looked to the ADEA's animating purpose in determining that an arbitration agreement could be enforced despite the existence of the ADEA's judicial-forum provision and a provision creating an optional collective-litigation procedure. 500 U.S. at 27-28. As the first step in its analysis, the Court determined that Congress' purpose in enacting the ADEA was "to prohibit arbitrary age discrimination in employment" and address related issues. *Id.* at 27. The Court then rejected the challenge to arbitration based on the statute's judicial-forum provision because it found that Congress did not "intend[] the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum...." 500 U.S. at 29 (quoting *Mitsubishi*, 473 U.S. at 628); *see also Pyett*, 556 U.S. at 267 n.9, 275 ("[I]t [was] the [*Gilmer*] Court's fidelity to the ADEA's text" that led to its decision that the ADEA permitted waiver of a judicial forum.). The Court similarly rejected the argument that arbitration would conflict with the collective-action provision, finding that although the ADEA provided the possibility of proceeding collectively, it did not limit the right of employees to agree to resolve their individual claims on an individual basis. *Id.* at 32 (noting, also, that the applicable arbitration scheme provided for collective proceedings).

Indeed, the Supreme Court has repeatedly rejected challenges to the enforcement of arbitration agreements based on statutory provisions ancillary to

the congressional goals of the statutes in question (*e.g.*, setting judicial forum, describing venue, creating collective-action procedures).<sup>6</sup> But the Supreme Court has never enforced an arbitration agreement that extinguishes a right core to the statute creating that right. As the Court has explained repeatedly, “[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.” *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628); *accord Carter*, 362 F.3d at 297.

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<sup>6</sup> *See, e.g., CompuCredit*, 132 S. Ct. at 671 (judicial-forum provision not a “principal substantive provision[]” of Credit Repair Organizations Act); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989) (judicial-forum and venue provisions in Securities Act not “so critical that they cannot be waived”); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 235-36 (1987) (Exchange Act provision not intended to bar regulation when “chief aim” was to preserve exchanges’ power to self-regulate). This court has followed suit. *See, e.g., Garrett*, 449 F.3d at 676-77 (judicial-forum provision not substantive term of Uniformed Services Employment and Reemployment Act, which guarantees right to be free of discrimination in employment based on military service); *Carter*, 362 F.3d at 298 (FLSA judicial-forum, collective-action, and attorneys fees provisions not substantive according to reasoning in *Gilmer*); *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 474-76 (5th Cir. 2002). (Warranty Act enacted to make consumer warranties more understandable and enforceable; judicial-forum provision and alternative-dispute-resolution provision not central to that goal).

**b. Because they are the foundation upon which the NLRA and federal labor policy are constructed, Section 7 rights cannot be prospectively waived in an arbitration agreement under the FAA**

The Agreements require Murphy Oil’s employees to pursue all work-related legal claims individually, categorically barring any concerted action, from joinder of claims to class proceedings. To determine whether that prospective ban impairs a substantive federal right within the meaning of *Gilmer*, et al., the Court must look to the source of the asserted right, in this case the NLRA. The inquiry into whether collective legal pursuit of work-related claims is central to federal labor law entails two distinct issues: (1) whether such concerted legal activity is a Section 7 right; and (2) whether Section 7 is the “critical” or “principle” (*see* p.31 n.6) right that Congress enacted the NLRA to protect. As described above (Part I.B), and as this Court acknowledged in *D.R. Horton*, 737 F.3d at 357, the Board’s holding—that concerted legal activity for mutual protection is a core Section 7 right—is consistent with the language and policies of the NLRA and grounded in decades of Board and court precedent. As discussed below, the language, jurisprudence, structure, and history of the NLRA establish that Section 7 is the foundational right underlying the entire architecture of federal labor law and policy. With respect to both issues, the Board’s determination is indisputably entitled to great deference.

See p. 11.<sup>7</sup> Accordingly, the Agreements are unenforceable because they extinguish a substantive federal right.

As the Board explained (D&O 1) in reaffirming its decision in *D.R. Horton*, “[t]he core objective of the [NLRA] is the protection of workers’ ability to act in concert, in support of one another.” That follows from Congress’ express declaration, in the statute’s opening provision, that protecting such concerted activity was “the policy of the United States” and the object of the NLRA. 29 U.S.C. § 151. And it makes the NLRA “unique among workplace statutes,” which typically protect individual rights. (D&O 1).

In upholding the constitutionality of the NLRA, the Supreme Court characterized the Section 7 right as “fundamental.” *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937). The right’s fundamental status is manifest in the structure of the NLRA: Section 7 lies at the statute’s core. In Section 8, Congress prohibited employers and unions alike from restraining or coercing employees in the exercise of Section 7 rights. 29 U.S.C. § 158(a)(1) and (b)(1). Section 9 establishes procedures to implement representational Section 7 rights

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<sup>7</sup> See generally, Note, *Deference and the Federal Arbitration Act: The NLRB’s Determination of Substantive Statutory Rights*, 128 HARV.L.REV. 907 (2015) (because “determining whether a statutory right is substantive or procedural for the purposes of the FAA depends upon an analysis of the statutory scheme creating the right,” the Board’s determination, based on its interpretation of the NLRA, is entitled to *Chevron* deference).

(e.g., elections, exclusive representation). 29 U.S.C. § 159. And, finally, Section 10 empowers the Board to prevent violations of Section 8. 29 U.S.C. § 160. Thus, the NLRA's various provisions all lead back to Section 7's guarantee of employees' right to join together "to improve terms and conditions of employment or otherwise improve their lot as employees ...." *Eastex*, 437 U.S. at 565.<sup>8</sup>

That right to engage in collective action for mutual protection is not only critical to the NLRA but is the "basic premise" of national labor policy (D&O 1), as evidenced by Congress' consistent focus on protecting it, even in earlier labor legislation. In the 1932 Norris-LaGuardia Act, for example, Congress declared it to be the "public policy of the United States" that individual employees are to be free from "interference" or "restraint" by employers when they engage in

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<sup>8</sup> As the Board recognized here (D&O 13-14), while the language of Section 7 protecting the concerted resort to administrative and judicial forums has not changed since 1935, the substantive and procedural avenues available to employees for collective action have expanded. For example, the class-action provisions authorized by Rule 23 of the Federal Rules of Civil Procedure were only added in 1966. The Board emphasized (D&O 16) that its position is not that the NLRA creates any right to pursue joint, class, or collective claims that legislatures have not afforded to others. Rather, its position (D&O 2) is that the NLRA grants employees the right concertedly "to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." For that reason, the Board's legal position is not impaired by recognizing, as the Board does, that Rule 23 does not "establish an entitlement to class proceedings for the vindication of statutory rights." *Italian Colors*, 133 S. Ct. at 2309; *see also D.R. Horton*, 737 F.3d at 357.

“concerted activities for the purpose of ... mutual aid or protection.” 29 U.S.C. § 102.

Once the appropriate deference is given to the Board’s determination that Section 7 is critical to the NLRA and to federal labor policy—i.e., substantive for FAA purposes—it is self-evident that a mandatory agreement requiring employees to individually arbitrate employment-related disputes, which by definition deprives employees of that right, cannot stand. To avoid that ineluctable conclusion in *D.R. Horton*, this Court had to disregard the material difference between the case before it and cases enforcing arbitration agreements that did not impair rights central to a coequal federal statute.

Relying principally on *Gilmer*, 500 U.S. at 24, the Court found “no right to use class procedures under various employment-related statutory frameworks.” 737 F.3d at 357 (also citing *Carter*, 362 F.3d at 297 (applying *Gilmer* to FLSA suit)). On that basis, it incorrectly concluded that “because a substantive right to proceed collectively has been foreclosed ... [t]he end result is that the Board’s decision creates either a right that is hollow or one premised on an already-rejected justification.” *Id.* at 361. As explained above, the Board’s analysis is consistent with *Gilmer* and with FAA jurisprudence generally. In *Gilmer*, specifically, no issue of concerted activity was presented and the Court upheld the arbitration

agreement only because it did not entail the prospective waiver of any right critical to effectuating the core purposes of the ADEA.<sup>9</sup>

In sum, the FAA does not, as interpreted by the Supreme Court, mandate enforcement of the Agreements' waiver of the very rights that Congress enacted the NLRA to protect. As discussed below, the Agreements are also unenforceable pursuant to the alternative framework set forth in this Court's *D.R. Horton* decision, which examined the savings-clause and congressional-command exceptions to the FAA's enforcement mandate.

## **2. Under the FAA's savings clause, invalidation of the Agreements does not conflict with the FAA**

Section 2 of the FAA provides 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.” 9 U.S.C. § 2 (emphasis added). Under that “savings clause,” invalidation of an arbitration agreement does not conflict with the language or policies of the FAA if based on considerations that would serve to nullify any contract, such as a violation of federal law. Conversely, defenses that

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<sup>9</sup> Gilmer filed an individual claim and, in any event, the applicable arbitration procedures allowed for collective proceedings, 500 U.S. at 32. Moreover, it is unclear whether Gilmer himself would qualify as a statutory employee entitled to Section 7 protections, *id.* at 23 (Gilmer was a “Manager of Financial Services”). *See also* 29 U.S.C. § 152(2) (defining employee). Likewise, Carter did not argue, and the Court did not consider, the Section 7 right to concerted activity. *Carter*, 362 F.3d at 296-97.

are only applicable to arbitration agreements conflict with the FAA, as do ostensibly general defenses “that derive their meaning from the fact that an agreement to arbitrate is at issue.” *See Concepcion*, 131 S. Ct. at 1746-47.

As the Supreme Court explained in *Kaiser Steel Corp. v. Mullins*, “[i]t is ... well established ... that a federal court has a duty to determine whether a contract violates federal law before enforcing it.” 455 U.S. 72, 83 (1982). Where private agreements violate the “public policy of the United States as manifested in ... federal statutes, ... it is the obligation of courts to refrain from” enforcement. *Id.* at 83-84. Applying those principles, the Court refused to enforce a contract that required Kaiser to pay a penalty if it bought coal from non-unionized providers, finding that it *effectively* (though indirectly) violated the NLRA’s prohibition on contracts requiring one company to cease doing business with another. *Id.* at 78.

As discussed above (Part I.C.2), the Board and the courts have repeatedly rejected, as contrary to the NLRA, all sorts of private contracts that seek to deprive employees of Section 7 rights. *See Nat’l Licorice Co. v. NLRB*, 309 U.S. 350, 361 (1940); *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942). Those contracts—like the Agreements, which bar all collective legal claims, requiring employees to proceed individually—also violate the public policy announced in the NLRA, thwarting Congress’ intent to protect such activity to facilitate interstate commerce. (D&O 1, 6-8, 10.)

Since its enactment, illegality under the NLRA has served to invalidate a variety of contracts, not just arbitration agreements. Because the defense of illegality is unrelated to the fact that an agreement to arbitrate is at issue, it falls comfortably within the FAA's savings clause. In *D.R. Horton*, the Court held that "[t]he saving clause is not a basis for invalidating the waiver of class procedures in the arbitration agreement." 737 F.3d at 358-60. But as the Board noted (D&O 9), the Court did not seek to reconcile its decision with *National Licorice, J.I. Case*, and other cases invalidating individual contracts that purport to extinguish Section 7 rights. Instead, the Court relied exclusively on the Supreme Court's decision in *Concepcion*, which concluded that the savings clause does not preserve contractual defenses that "interfere[] with fundamental attributes of arbitration." 131 S. Ct. at 1748. On that basis, *Concepcion* held that a state law allowing parties to consumer arbitration agreements to demand class arbitration was incompatible with, and preempted by, the FAA. *Id.* at 1750, 1753.

Contrary to this Court's analysis, *Concepcion* does not dictate rejection of the Board's savings-clause analysis, as is clear from an examination of that case and of the Supreme Court's subsequent *Italian Colors* decision, which this Court did not address. *Concepcion* invoked state-law preemption to override a broad judge-made rule intended to protect the ability of consumers to pursue low-value claims collectively, and frequently applied to find arbitration agreements

unconscionable. *Id.* at 1746. The Court found that “manufactured” state rule preempted as inconsistent with the FAA. *Id.* at 1751, 1753.

The Board’s policy is entirely unlike both the rule invalidated in *Concepcion* and a similar court-imposed requirement, intended to ensure an “affordable procedural path” to vindicate antitrust claims, that the Court struck down in *Italian Colors*. 133 S. Ct. at 2309. As described, the Board’s policy protects a *specific* right embodied in, and central to the core objective of, a *federal* statute.<sup>10</sup> The Section 7 right to engage in concerted activity is, in that crucial respect, distinguishable from the policy of “ensuring the prosecution of low-value claims” protected by the rules in those cases, which was not tethered to either the text or the intended purpose of a specific federal statute. *Id.* at 2312 n.5. Thus, as the Board noted here (D&O 9), this case does not present an issue of federal preemption of a broad judge-made rule outside the scope of the savings clause, but instead involves the proper accommodation of two federal statutory schemes.<sup>11</sup>

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<sup>10</sup> The Board is not “dismissing [*Concepcion*] as a case involving preemption.” *Italian Colors*, 133 S. Ct. at 2312 n.5. But, while not dispositive, it is relevant for purposes of a savings-clause analysis that Section 7 is a federal right not subject to preemption by the FAA.

<sup>11</sup> Murphy Oil evinces a fundamental misunderstanding of federal preemption when it argues (Br. 48-51) that the FAA preempts “all state and federal laws and public policies interfering with the enforcement of arbitration agreements...” Preemption is grounded in the Supremacy Clause of the U.S. Constitution, and the case law Murphy Oil invokes involves state policies. *See Marmet Health Care Ctr., Inc. v. Brown* 132 S. Ct. 1201, 1203-04 (2012) (per curiam) (West Virginia’s

The FAA's policy favoring arbitration and the NLRA's specific right to engage in concerted action are "capable of co-existence," D&O 8 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)), and Congress gave no indication that the FAA must trump other statutory rights, including the NLRA. (D&O 9 (citing *Morton*, 417 U.S. at 551 ("courts are not at liberty to pick and choose among congressional enactments").) By enforcing the arbitration agreement in *D.R. Horton*, the Court did not attempt to accommodate those statutory schemes but, instead, elevated the federal policy favoring arbitration over national labor policy, "effectively nullify[ing]" Section 7. (D&O 11.) The Board's decision, by contrast, effectuates the congressional intent animating both the NLRA and the FAA by invalidating arbitration agreements only when they deprive parties of specific federal rights that Congress enacted legislation to protect.<sup>12</sup>

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public policy prohibiting pre-dispute agreements to arbitrate certain personal-injury claims); *Concepcion, supra*. The NLRA and the FAA are both federal statutes. One federal statute cannot preempt another.

<sup>12</sup> Relatively few of the arbitration agreements with concerted-action waivers that courts have thus far enforced would be affected by the Board's rule. Section 7 is not implicated unless the agreement applies to the work-related claims of statutory employees, whereas many arbitration agreements apply to consumer, commercial, or other non-employment-related claims, or involve employees exempt from NLRA coverage. *See, e.g., Gilmer, supra* note 10; *CompuCredit*, 132 S. Ct. at 673 (consumer claims under Credit Repair Organization Act); *Rodriguez*, 490 U.S. at 483 (investor claims under Securities Act).

**3. The NLRA embodies a congressional command overriding the FAA’s mandate to enforce the Agreements’ concerted-action waiver**

Enforcement of an arbitration agreement may be precluded if, “[l]ike any statutory directive, [the FAA’s] mandate [has been] overridden by a contrary congressional command.” *CompuCredit*, 132 S. Ct. at 669 (quoting *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)). Such a command may be explicit, or may be deduced from a statute’s text or legislative history, or from an “inherent conflict” between its provisions and the FAA. *Gilmer*, 500 U.S. at 26; *McMahon*, 482 U.S. at 227. The Board justifiably found that the NLRA embodies—expressly in its text and implicitly in its foundational purpose—a congressional command against enforcement of mandatory agreements prospectively barring concerted pursuit of work-related claims.

As the Board found (D&O 9), the NLRA’s text and longstanding construction establish that Section 7 (as enforced in Section 8(1)) constitutes a contrary congressional command to the extent an arbitration agreement bars concerted pursuit of claims. *See* Part I.B & Part I.C. The absence of explicit language in the NLRA overriding the FAA is of little import, and certainly does not imply congressional approval of concerted-action waivers. As the Board explained (D&O 10), the statutory silence is unsurprising given that, when the NLRA was enacted in 1935, and reenacted in 1947, the courts had never applied

the FAA to individual employment contracts. Indeed, it was not until 2001 that the Supreme Court definitively ruled that the FAA applied to such contracts. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (finding that the exclusion in Section 1 of the FAA, 29 U.S.C. § 1, of certain employment contracts referred only to transportation workers). Long before that, and from shortly after the NLRA's enactment, the Board and the courts construed the statute's text to invalidate agreements restricting Section 7 rights. Moreover, Section 10(a) of the NLRA provides that the Board's authority "shall not be affected by any other means of adjustment." (D&O 9 (quoting 29 U.S.C. § 160(a)).) As the Board explained (D&O 16), that provision does not create a substantive right, but rather manifests Congress' intent not to permit private contracts, like the Agreements, that would supersede Section 7's protections.<sup>13</sup>

In reaching its contrary conclusion that the text of the NLRA does not contain a sufficiently explicit congressional command, the Court in *D.R. Horton*, 737 F.3d at 360, placed undue reliance on *Gilmer* and *CompuCredit*, as does *Murphy Oil* here (Br. 26). In those cases, however, the Supreme Court examined statutes enacted to protect individual rights (e.g., to be free from discrimination or receive certain minimum wage-and-hour protections) and determined that the

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<sup>13</sup> As discussed above (p. 23-24), collectively bargained waivers, like no-strike agreements, do not supersede Section 7 protections as *Murphy Oil* argues (Br. 26 n.5). Rather, they result from the exercise of Section 7 activity.

statutes' textual references to causes of action, court filings, or collective litigation procedures were insufficient to override the FAA.<sup>14</sup> See p. 31 & n.7 (discussing cases including *Gilmer*, *CompuCredit*, and *Carter*). By contrast, the Section 7 right to engage in concerted action, including pursuing collective legal claims, is a core NLRA right. And, as noted, Section 10(a) expressly protects the Board's exclusive authority to protect Section 7 rights. A congressional command against enforcement of arbitration agreements barring the exercise of those rights can thus be deduced from the NLRA's textual provisions.

The Board also found (D&O 10) an inherent conflict between the foundational Section 7 right to engage in concerted activity and FAA enforcement of agreements requiring individual employees to prospectively waive the right concertedly to prosecute their workplace claims in any forum, arbitral or judicial. This Court's contrary holding in *D.R. Horton*, 737 F.3d at 361, which relies on the compatibility of the NLRA and arbitration, misapprehends the Board's policy of deferring to arbitration. As the Board explained (D&O 10), an individual arbitration agreement imposed as a condition of employment "is the antithesis of

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<sup>14</sup> Pursuant to a comparable analysis, the Board has explained that an agreement requiring that all *individual* claims be resolved in an arbitral forum (but not proscribing concerted claims) would not violate the NLRA, because it would not encroach on the distinct right of employees to engage in concerted activity. *D.R. Horton*, 2012 WL 36274, at \*12.

an arbitration agreement providing for union representation in arbitration that was reached through the statutory process of collective bargaining ....” *See* p. 23-24.

In conclusion, the Section 7 right to engage in legal action collectively is grounded in the NLRA’s text and structure, has been approved by the Supreme Court, and furthers national labor policy. The Board’s finding that it is critical to the NLRA—substantive for FAA purposes—is thus a well-established, reasonable interpretation of the NLRA that is entitled to considerable deference. By prohibiting Murphy Oil from contractually depriving employees of this right, the Board’s decision does not offend the liberal federal policy favoring arbitration that is reflected in the FAA, but rather recognizes that the FAA cannot be used to shield employer efforts to abrogate the NLRA.

## **II. MURPHY OIL VIOLATED SECTION 8(a)(1) BY SEEKING ENFORCEMENT OF THE AGREEMENT**

An employer violates Section 8(a)(1) by maintaining or enforcing, as a condition of employment, an agreement that restricts Section 7 rights. *See* p. 16. Murphy Oil enforced the Agreement through its motion to compel individual arbitration pursuant to the Agreement’s terms, and to dismiss Hobson’s and her co-plaintiffs’ lawsuit. Because, as shown, the Agreement restricts Section 7 rights, the Board reasonably found (D&O 19) that Murphy Oil’s efforts to enforce the Agreement violated Section 8(a)(1).

As the Board further explained (D&O 20-21), its unfair-labor-practice finding does not violate Murphy Oil's constitutional right to petition the Government for redress of grievances because the Supreme Court has recognized that the First Amendment does not protect petitioning that "has an objective that is illegal under federal law." *Bill Johnson's Rests. v. NLRB*, 461 U.S. 731, 737 n.5 (1983). That is true regardless of the merits of the underlying lawsuit. *See Teamsters Local 776 v. NLRB*, 973 F.2d 230, 236 (3d Cir. 1992).

Under this exception to First Amendment protection, court action only constitutes an unfair labor practice if "[o]n the surface" it "seek[s] objectives which [are] illegal under federal law." *Id.* at 236. As the Board acknowledged (D&O 20), retaliatory motive does not suffice to remove First Amendment protection from a reasonably based lawsuit.<sup>15</sup> *See id.* at 235 (quoting *Bill Johnson's*, 461 U.S. at 743). Under settled law, however, seeking to enforce an unlawful contract provision is an "illegal objective." *See Truck Drivers, Oil Drivers, Filling Station & Platform Workers' Union Local 705 v. NLRB*, 820 F.2d 448, 452 (D.C. Cir. 1987); *see also* D&O 20-21 (and cases cited therein).

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<sup>15</sup> Murphy Oil's contentions (Br. 38-41) that "the Board's theory is that a violation of any section of the [NLRA] ... constitutes an illegal objective," and that the Board disregards the distinction drawn in *Bill Johnson's* between retaliatory motive and an illegal objective, are thus incorrect.

Finally, Murphy Oil's argument (Br. 43-44) that the Board cannot remedy this well-founded violation also fails. The Board's broad remedial discretion includes ordering reimbursement of fees incurred defending an unlawful legal proceeding. *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (broad discretion); *SEIU Local 32B-32J v. NLRB*, 68 F.3d 490, 496 (D.C. Cir. 1995) (attorney's fees); *cf. Bill Johnson's*, 461 U.S. at 747 (permitting award of cost of defending baseless, retaliatory lawsuit found to be unfair labor practice).<sup>16</sup>

### **III. THE AGREEMENT VIOLATES SECTION 8(a)(1) BECAUSE EMPLOYEES WOULD REASONABLY CONSTRUE IT AS BARRING UNFAIR-LABOR-PRACTICE CHARGES**

Employees have an unquestionable Section 7 right to file and pursue charges before the Board. *See Util. Vault Co.*, 345 NLRB 79, 82 (2005). Accordingly, as detailed above (p. 16-17), even the mere maintenance of an arbitration agreement that employees reasonably would construe to prohibit filing Board charges violates Section 8(a)(1). *See D.R. Horton*, 737 F.3d at 363.

Murphy Oil does not seriously contest the Board's finding (D&O 18-19 & n.98) that employees would reasonably construe the Agreement as creating such a

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<sup>16</sup> Because the Board's order requiring that Murphy Oil reimburse the plaintiffs for expenses and legal fees, and granting additional relief, is unaffected by the culmination of court proceedings, the Board correctly rejected (D&O 5, n.22) Murphy Oil's argument, repeated here (Br. 42-43), that the General Counsel's unlawful-enforcement allegation was moot.

bar. The Agreement specifically obliges employees to arbitrate “any and all disputes” relating to their employment, and Murphy Oil does not even attempt to point the Court to any unambiguous contract language stating that initiating proceedings before the Board is not covered by the Agreement.<sup>17</sup>

Murphy Oil’s argument (Br. 50) that Hobson’s filing of charges in this case “provides solid evidence” disputing the Board’s finding is without merit. The Section 8(a)(1) standard is objective, measuring the reasonable tendency of the employer’s action to restrict or coerce Section 7 rights, not whether a particular employee is actually coerced. *See Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 209 (employees actual interpretation of rule not determinative).

#### **IV. THE BOARD’S UNIFORM ADMINISTRATION OF A FEDERAL LAW, DESPITE ADVERSE CIRCUIT COURT PRECEDENT, PROPERLY FACILITATES SUPREME COURT REVIEW**

The Board fully acknowledges that its decision is contrary to this Court’s decision in *D.R. Horton*. However, from its earliest days, the Board has administered the NLRA on a national basis. When subject to adverse circuit court decisions, the Board maintains its position as it seeks, sometimes for protracted periods, to bring about an appropriate Supreme Court test of its legal positions.

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<sup>17</sup> It argued before the Board (D&O 18) that the exclusion of “claims which must, by statute or other law, be resolved in other forums” allows for administrative claims. As the Board explained (D&O 18-19), however, unfair-labor-practice claims may be resolved in an arbitral forum.

*See, e.g., Ford Motor Co. v. NLRB*, 441 U.S. 488, 493 n.6 (1979) (where the Supreme Court noted, in affirming a decision of the Seventh Circuit, that the Board had adhered to its legal position over a ten-year period despite two adverse Fourth Circuit decisions, one adverse First Circuit decision, and one adverse Seventh Circuit decision.) Murphy Oil’s assertion (Br. 54) that the Board’s decision in this case manifests “an utter disregard for authority that is ‘intolerable if the rule of law is to prevail’” evinces a fundamental misunderstanding of the policy ramifications of strict Board adherence to every adverse court decision.

The NLRA “is federal legislation, administered by a national agency, intended to solve a national problem on a national scale ....” *NLRB v. Natural Gas Util. Dist.*, 402 U.S. 600, 603-04 (1971). While a court may disagree with the Board’s statutory interpretation, an agency of the United States, like other parties, “is entitled to adhere to what it believes to be the correct interpretation of a statute and to reap the benefits of this adherence if it proves to be correct, except where bound to the contrary by a final judgment.” *United States v. Donnelly*, 397 U.S. 286, 294 (1970). And, unlike private parties, an agency of the United States is not precluded from relitigating issues decided adversely to it in prior cases brought by different parties. *See U.S. v. Mendoza*, 464 U.S. 154, 158-163 (1984). If an agency has a reasonable basis for believing that a court of appeals erred, it is no affront to ask that court to distinguish, modify, or overrule its prior precedent. The Supreme

Court itself is willing to reconsider its own precedents. *See Patterson v. McLean Credit Union*, 485 U.S. 617 (1988) (collecting cases); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

The Board's policy of administering the NLRA in accordance with agency precedent until an appropriate test case can be presented to the Supreme Court for resolution has benefits that offset the costs of which Murphy Oil complains. *See E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (noting "wisdom of allowing difficult issues to mature through full consideration by the courts of appeals"). First, the evolution of an issue may lead to a resolution among the circuits without the need to resort to the Supreme Court. Second, it may help establish the recurring nature of the issue and its importance to aggrieved parties who come to the Board for relief of perceived wrongs. And, third, it may create a circuit split, facilitating Supreme Court review. For instance, in *McElrath Poultry Co. v. NLRB*, 494 F.2d 518 (5th Cir. 1974), the Court relied on contrary in-circuit precedent to deny enforcement of an order in which the Board adhered to its position on the scope of the NLRA's agricultural exemption. Because the Board adhered to its position, a circuit conflict arose and, in *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298, 301 (1977), the Supreme Court unanimously approved the Board's position. Those opportunities would be lost were the Board required to abandon its legal position in response to a single contrary court decision.

Likewise, the Board's adherence to its position that paid union organizers can be "employees" within the meaning of the NLRA, despite several contrary courts decisions, created a circuit split that the Supreme Court ultimately resolved in the Board's favor in *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 88 (1995).

The Board's policy not to automatically acquiesce to the decision of a circuit court is also a practical necessity in view of the NLRA's broad venue provision, which permits an aggrieved party to seek review "in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia ...." 29 U.S.C. § 160(f). Implicit in that provision is a congressional judgment that the Board should not be guided by the views of any single circuit when it makes its decisions. *Arvin Auto.*, 285 NLRB 753, 757-58 (1987). Venue uncertainty prevents the Board from predicting which circuit will review a given decision, as this case illustrates. Although the unfair labor practices occurred within the Eleventh Circuit, Murphy Oil chose not to seek review there, or in the D.C. Circuit, but rather in this Court, where it also transacts business. 29 U.S.C. § 160(f). More fundamentally, venue uncertainty means that the Board

is always on notice that, even if it adopts the views of one circuit, it does not enjoy a safe harbor because it must be prepared to defend that new position nationwide.<sup>18</sup>

In arguing that the Court should sanction the Board for reaffirming *D.R. Horton*, *Murphy Oil* (Br. 55-56) takes no account of the foregoing considerations. Instead, it relies on one judge's criticism of the Board in *Yellow Taxi Co. v. NLRB*, 721 F.2d 366 (D.C. Cir. 1983), which the other panel members did not join, *see id.* at 384, 385.<sup>19</sup> Not only did the court decline to sanction the Board, *id.* at 382, but in subsequent decisions that same court has acknowledged that the Board "has every right" to refuse to acquiesce to a court's analysis of a legal issue. *Enloe Med. Ctr. v. NLRB*, 433 F.3d 834, 838 (D.C. Cir. 2005); *see also McKnight v. General Motors Corp.*, 511 U.S. 659 (1994) (vacating \$500 sanction that court of appeals had imposed for appeal deemed "frivolous" in light of controlling circuit law and as to which there was no circuit conflict; noting that where had not ruled on issue, "[f]iling an appeal was the only way petitioner could preserve the issue pending a possible favorable decision by this Court").

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<sup>18</sup> *See, e.g., St. Francis Hosp.*, 271 NLRB 948, 952-54 (1984) (overruling prior Board precedent in light of extensive circuit court criticism and adopting a new policy for nationwide application), *remanded sub nom. IBEW Local 474 v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987) (holding that earlier Board precedent was lawful and Board had erred in finding, in accordance with decisions of other circuits, that statute required different course).

<sup>19</sup> *Murphy Oil* also relies (Br. 21 n.4) on a case where the Board was criticized for "choos[ing] to ignore the decision as if it had no force or effect," *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980), but the Board has not done that here.

In short, there is no justification for Murphy Oil's claim that the Board's respectful disagreement with this Court's decision in *D.R. Horton* is sanctionable. This Court is the only one to have squarely considered the issues presented in the Board's decision, much less to have ruled against the Board on key aspects of its rationale.<sup>20</sup> The Board not only acknowledged and responded to this Court's decision in the underlying case, but also has, simultaneously with the filing of this brief, petitioned the Court to hear this case en banc in order to reconsider and potentially overrule that earlier adverse decision.

#### **V. THE COURT LACKS JURISDICTION TO CONSIDER MURPHY OIL'S REMAINING ARGUMENTS**

The Court lacks jurisdiction to consider Murphy Oil's arguments that the district court order granting the motion to compel individual arbitration precluded the Board from invalidating the Agreement (Br. 45-48) and that the charge initiating this case was time-barred under Section 10(b) of the NLRA, 29 U.S.C.

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<sup>20</sup> As the Board detailed (D&O 2 & n.14), the other circuits that have rejected the Board's *D.R. Horton* position have done so in non-Board cases in which the Board did not participate and their decisions reflect a misunderstanding of the Board's position. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); accord *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) (per curiam). Murphy Oil also cites (Br. 14 n.3) Ninth and Eleventh Circuit decisions, but neither reached the NLRA issue. See *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1330 (11th Cir. 2014) (rejecting argument that optional FLSA collective-action provision overrides FAA's enforcement mandate; no NLRA-based argument); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 & n.3 (9th Cir. 2013) (holding plaintiff had waived argument based on Board's *D.R. Horton* rationale; citing decisions both rejecting and applying it).

§ 160(b) (Br. 52-54). The parties submitted this case directly to the Board, and their joint statement of issues (R.48) included: “Whether the Amended Complaint is barred, in whole or in part, based on the doctrine(s) of res judicata or collateral estoppel” and “Whether the Amended Complaint is barred, in whole or in part, because the Board failed to timely initiate administrative remedies pursuant to Section 10(b) of the [NLRA]?” Murphy Oil abandoned both issues, however, by failing to mention or argue them in its brief to the Board, and has not suggested that any extraordinary circumstances prevented it from doing so.<sup>21</sup> That failure thwarted Section 10(e)’s “salutary policy” of “affording the Board opportunity to consider on the merits questions to be urged upon review of its order.” *Marshall Field & Co. v. NLRB*, 318 U.S. 253, 256 (1943). Accordingly, under Section 10(e) of the NLRA (*see* p. 16 n.4), the Court is barred from considering them.

**A. In Any Event, a Ruling in a Private Lawsuit Does Not Bind the Board**

In any event, Murphy Oil cannot establish the necessary elements of collateral estoppel, *see Terrell v. DeConna*, 877 F.2d 1267, 1270 (5th Cir. 1989),

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<sup>21</sup> Both the Board and this Court consider issues nominally raised, but not substantively argued, to be waived. *See Justiss Oil Co. v. Kerr-McGee Refining Corp.*, 75 F.3d 1057, 1067 (5th Cir. 1996) (issue raised to court on appeal but not argued in body of brief is waived by abandonment); *Holsum De Puerto Rico, Inc.*, 344 NLRB 694, 694 n.1 (2005) (same, before Board), *enforced*, 456 F.3d 265 (1st Cir. 2006); *see also* 29 C.F.R. § 102.46(c) (requiring that brief to Board “shall contain” argument supporting exceptions).

because the Board was indisputably not a party to the district court litigation. As the Supreme Court reiterated in *Taylor v. Sturgell*, there is a general rule against nonparty issue preclusion, grounded in the “deep-rooted historic tradition that everyone should have his own day in court.” 553 U.S. 880, 892-95 (2008). Only under very limited circumstances may a party defensively invoke collateral estoppel against an entity that was not a party to the earlier proceeding. One is when the nonparty was “adequately represented by someone with the same interests who [wa]s a party” to the earlier case. *Id.* at 894 (quoting *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996)). That requires close alignment of the nonparty’s and putative representative’s interests. *Id.* at 900. It further requires either that the actual party understood itself to be representing the nonparty or that the court deliberately protected the nonparty’s interests. *Id.* (rejecting “broad doctrine of virtual representation”). Neither condition was satisfied in the district court proceeding at issue.

Murphy Oil insists (Br. 47) that the plaintiffs in the district court proceeding met that high bar because both that case and this one involve the private interests of Murphy Oil and its employees, and because the plaintiffs relied on the Board’s decision in *D.R. Horton*. But there is simply no basis for holding that the plaintiffs represented the Board in court (much less had the authority to do so), or that the court protected the Board’s interests.

More fundamentally, “[t]he Board adheres to the general rule that the Government is not precluded from litigating an issue involving enforcement of Federal law that the private party has litigated unsuccessfully, when the Government was not a party to the private litigation.” *Pace Indus.*, 320 NLRB 661, 663 (1996), *enforced*, 118 F.3d 585 (8th Cir. 1997); *see also Field Bridge Assoc.*, 306 NLRB 322, 322-23 (1992), *enforced sub nom. SEIU Local 32B-32J v. NLRB*, 982 F.2d 845 (2d Cir. 1993). Private litigation cannot preclude the Board from fulfilling its responsibility to protect employees’ NLRA rights. *See* p. 42-43 (discussing Section 10(a)); *see also Roadway Express, Inc. v. NLRB*, 427 Fed. App’x. 838, 840 (11th Cir. 2011) (per curiam). As this Court has long recognized, the interests of the charging party (Hobson) and the Board are not identical in unfair-labor-practice proceedings: “[a]lthough the charge sets the machinery in motion, once the complaint is issued the Board proceeding takes on a public character in which remedies are devised to vindicate the policies of the Labor Act, not afford private relief to employees.” *New Orleans Typographical Union No. 17 v. NLRB*, 368 F.2d 755, 766 (5th Cir. 1966) (citation omitted); *cf. NLRB v. Fant Milling Co.*, 360 U.S. 301, 307-08 (1959) (Board frames issues, not charging party, because Board advances public interest not private rights).

Ignoring that controlling caselaw, Murphy Oil relies (Br. 45-47) exclusively on the First Circuit’s decision in *NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31

(1st Cir. 1987). In *Donna-Lee*, the court held that the Board was collaterally estopped by a district court finding as to the threshold issue that no contract existed between the employer and the union.<sup>22</sup> *Id.* at 33. In barring relitigation of that fact-bound issue, the court specifically stated that “no broad policy question is implicated in the determination that no contract exists. Nor is any precedent established by that determination which would have wide ranging effect on labor relations.” *Id.* at 35.

By contrast, the issues here have significant policy implications. The application of estoppel would impair the Board’s authority, exercised in the public interest, both to prevent specific violations and to interpret the NLRA and define the contours of federal labor policy. As a result, it would “impose an onerous and extensive burden upon the United States to monitor private litigation.” *EEOC v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1294 (11th Cir. 2004).

**B. In Any Event, the Section 10(b) Bar Does Not Apply**

Murphy Oil’s argument that Hobson’s charge was time-barred by Section 10(b) also lacks merit. Hobson did not attack the formation of the Agreement but, rather, alleged that its maintenance and enforcement violated the NLRA. *See Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 423 (1960) (validity of contract’s

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<sup>22</sup> Contrary to Murphy Oil’s misleading alteration of the court’s language (Br. 47), the issue in *Donna Lee* was *not* whether a private agreement was valid.

execution cannot be challenged outside the 10(b) period; lawfulness of employer later enforcing facially invalid agreement can be); *Control Servs*, 305 NLRB 435, 435 n.2, 442 (1991) (maintenance or enforcement of unlawful rule timely alleged, even if rule was promulgated outside 10(b) period), *enforced mem.*, 961 F.2d 1568 (3d Cir. 1992); *see also Guard Publ'g Co.*, 351 NLRB 1110, 1110 n.2 (2007) (same), *enforced*, 571 F.3d 53, 59 (D.C. Cir. 2009). Regardless of whether Hobson's charges were filed within 6 months of the motion to compel arbitration, Murphy Oil actively pursued enforcement of the Agreement through multiple court filings during the relevant period.

Murphy Oil's reliance (Br. 53-54) on *Albertson's, LLC*, 361 NLRB No. 71, 2014 WL 5426264 (2014), *affirming and incorporating by reference* 359 NLRB No. 147, 2013 WL 3346170 (2013), is unavailing. In that case, the Board found that Section 10(b) barred the allegation that a manager's antiunion statements during an employee meeting violated Section 8(a)(1). 2013 WL 3346170 at \*16-17. The Board did not reject the proposition that rules maintained during the statutory period satisfy 10(b), it simply found that the statements in question did not constitute "rules," discrediting contrary testimony. *See id.* at \*17 & n.8 (distinguishing cases involving longstanding, written rules).

**CONCLUSION**

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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National Labor Relations Board  
April 2015

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

MURPHY OIL USA, INC.	*	
	*	
Petitioner/Cross-Respondent	*	No. 14-60800
	*	
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	10-CA-38804
	*	
Respondent/Cross-Petitioner	*	
	*	
and	*	
	*	
SHEILA M. HOBSON	*	
	*	
Intervenor	*	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,992 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, DC  
this 1st day of April, 2015

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	*
Respondent/Cross-Petitioner	*
	*
and	*
	*
SHEILA M. HOBSON	*
	*
Intervenor	*

**CERTIFICATE OF SERVICE**

I hereby certify that on April 1, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

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