

**Nos. 15-1620 & 1860**

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

**CELLULAR SALES OF MISSOURI, LLC**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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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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## **SUMMARY OF THE CASE**

The National Labor Relations Board (“the Board”) seeks enforcement of its Order against Cellular Sales of Missouri, LLC (“the Company”). The Company imposed on employees, as a condition of employment, an arbitration agreement requiring them to resolve all employment-related disputes through individual arbitration. The Board found that the Company’s maintenance and enforcement of the agreement was unlawful because it precluded employees from exercising their well-established right, guaranteed by Section 7 of the National Labor Relations Act, as amended (“NLRA,” 29 U.S.C. §§ 151, 157) to pursue work-related legal claims concertedly, and because employees would reasonably understand the agreement as barring Board charges. The Board further found that the liberal federal policy favoring arbitration, reflected in the Federal Arbitration Act (“FAA,” 9 U.S.C. § 1, et seq.), did not dictate a different result.

The Board believes that oral argument would assist the Court in evaluating the important legal issues presented in this case and that 20 minutes per side would suffice.

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## **STATEMENT OF JURISDICTION**

This case is before the Court on the petition of the Company for review, and the cross-application of the Board for enforcement, of a Board Order issued against the Company. The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) of the NLRA, 29 U.S.C. § 160(a). The Board’s Decision and Order, reported at 362 NLRB No. 27, 2015 WL 1205241 (March 16, 2015) (Add.1-12),<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 the Company transacts business in Missouri. 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 the Company violated Section 8(a)(1) of the NLRA by imposing, as a condition of employment, an arbitration agreement barring employees from concertedly pursuing work-related claims in any forum, arbitral or judicial?

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<sup>1</sup> “Add.” refers to the Addendum to the Company’s brief. “JA” refers to the Joint Appendix. References preceding a semicolon are to Board findings; those following, to supporting evidence.

- *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), *appeal pending*, 5th Cir. Case No. 14-60800 (oral argument held Aug. 31, 2015);
- *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013);
- *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978);
- 29 U.S.C. § 157.

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

- *Murphy Oil*, 2014 WL 5465454;
- *Bill Johnson's Rests. v. NLRB*, 461 U.S. 731 (1983);
- *Wright Elec., Inc. v. NLRB*, 200 F.3d 1162 (8th Cir. 2000);
- 29 U.S.C. § 158(a)(1).

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

- *Murphy Oil*, 2014 WL 5465454;
- 29 U.S.C. §158(a)(1).

## STATEMENT OF THE CASE

### I. BACKGROUND: THE COURT'S DECISION IN *OWEN* v. *BRISTOL CARE, INC.*

In the Decision and Order on review, the Board applied its previous holding 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.” *Murphy Oil*, 2014 WL 5465454, at \*2 (quoting *D.R. Horton*, 357 NLRB No. 184, 2012 WL 36274, *enf. denied in part*, 737 F.3d 344 (5th Cir. 2013), *reh’g denied*, No. 12-60031 (April 16, 2014)). The Board acknowledges that this Court, in *Owen*, a non-Board case, rejected the plaintiff’s argument that a mandatory agreement requiring individual arbitration of work-related claims was unenforceable pursuant to the Board’s *D.R. Horton* decision. 702 F.3d at 1052-54. Because the Court would have to overrule that holding to enforce the Board’s decision here, the Board has, concurrent with the filing of this brief, petitioned the Court to hear this case en banc.

The Board’s decision to reaffirm *D.R. Horton* in *Murphy Oil*, and to pursue enforcement here despite the Court’s holding in *Owen*, is consistent with its approach in numerous cases in which the Board has sought to persuade courts that have previously rejected its legal position to reconsider, and other circuits (and

eventually the Supreme Court) to endorse it. *See, e.g., Ford Motor Co. v. NLRB*, 441 U.S. 488, 493 n.6 (1979); *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”). That approach is a practical necessity, for 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). And it is particularly appropriate here because the Board has never presented its own rationale to the Court—indeed, *Owen* did not address the core of the Board’s argument, that the FAA does not require enforcement of an arbitration agreement that requires employees to forfeit their substantive NLRA right to engage in concerted legal activity. Moreover, the *Owen* panel did not have the benefit of the analysis in the subsequent *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013), and *Murphy Oil*, 2014 WL 5465454, decisions.

## **II. PROCEDURAL HISTORY**

Pursuant to charges filed by John Bauer, the Board’s Acting General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by maintaining and enforcing an arbitration agreement that 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 waiving or limiting their rights to file Board charges or to access the Board's processes. Following a hearing, an administrative law judge issued a decision finding that the Company violated the NLRA as alleged.

On March 16, 2015, the Board (Chairman Pearce and Member McFerran; Member Johnson, dissenting in part), issued a Decision and Order affirming the administrative law judge's rulings, findings, and conclusions, and adopting the judge's remedy, as modified. (Add.1-12.)

### **III. THE BOARD'S FINDINGS OF FACT**

The Company operates retail stores in Missouri and Kansas. (Add.7; JA 95.) Since about January 1, 2012, the Company has promulgated, maintained, and enforced individual agreements—entitled Compensation Schedule (“the Agreement”)—with its current and former sales representatives that include the following provision:

All claims, disputes or controversies arising out of, or in relation to this document or Employee's employment with Company shall be decided by arbitration.... Employee hereby agrees to arbitrate any such claims, disputes, or controversies only in an individual capacity and not as a plaintiff or class member in any purported class, collective action, or representative proceeding.... The parties agree that no arbitrator has the authority to ... order consolidation, class arbitration or collective arbitration.... The right to arbitrate shall survive the termination of Employee's employment with Company.

(Add.7; JA 19-20.) The Company requires its sales representatives to sign the Agreement as a condition of employment. (Add.7; JA 85.)

John Bauer began working for the Company as an independent contractor in November 2010. (Add.8; JA 69.) At a December 2011 meeting, the Company informed its sales representatives, including Bauer, that they would be converted to “employee status” but had to sign the Agreement to be hired. (Add.8; JA 70, 84-85.) Bauer and other sales representatives signed the Agreement. (Add.7, 8 & n.6; JA 70-71, 92.) Bauer’s employment ended in May 2012. (Add.8; JA 67.)

On approximately November 9, 2012, Bauer filed a complaint against the Company in the U.S. District Court for the Western District of Missouri, Case No. 12-cv-5111, alleging that the Company’s pay practices and policies violate the Fair Labor Standards Act (“FLSA,” 29 U.S.C. § 201, et seq.) and state law. (Add.7-8; JA 26-39.) On January 11, 2013, the Company filed a motion to dismiss the case and compel arbitration based on the Agreement, which the District Court granted on September 30, 2013. (Add.3 n.2, 8; JA 40-42.)

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

In its Decision and Order, the Board found that the Company violated Section 8(a)(1) by maintaining and enforcing the Agreement, which waives employees’ right to maintain collective actions in all forums, arbitral and judicial. (Add.3.) It also found that the Agreement unlawfully interferes with employees’ right to file Board charges. (Add.3 & n.4.)

To remedy those violations, the Board ordered the Company to cease and desist from the unfair labor practices found and from any like or related interference with employees' Section 7 rights. (Add.4.) Affirmatively, the Board ordered the Company to rescind or revise the Agreement to make clear that it does not restrict Section 7 rights; notify all current and former employees who signed the Agreement of the change; notify the District Court of the change and inform the court that it no longer opposes the FLSA action on the basis of the Agreement; reimburse Bauer for any reasonable attorneys' fees and expenses incurred opposing the motion to dismiss the lawsuit and compel individual arbitration; and post a remedial notice. (Add.4.)

### **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.

There is no dispute that the Company's Agreement requires 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 that this comprehensive ban extinguishes important

Section 7 rights in violation of Section 8(a)(1) of the NLRA. The 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 Agreement is unlawful.

### **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 construction of the NLRA is "entitled to considerable deference, and must be upheld if it is reasonable and consistent with the policies of the Act." *St. John's Mercy Health Sys. v. NLRB*, 436 F.3d 843, 846 (8th Cir. 2006) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495, 497 (1979)). *See also City of Arlington 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. Nat. 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”). “[T]he 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)). The Court does not, however, defer to the Board’s interpretation of statutes other than the NLRA. *See Owen*, 702 F.3d at 1050.

## ARGUMENT

### **I. THE COMPANY VIOLATED SECTION 8(a)(1) OF THE NLRA BY MAINTAINING AN AGREEMENT THAT BARS EMPLOYEES FROM PURSUING WORK-RELATED CLAIMS CONCERTEDLY**

#### **A. Introduction**

As the Board explained in its decision in *Murphy Oil*, “[t]he core objective of the [NLRA] is the protection of workers’ ability to act in concert, in support of one another.” 2014 WL 5465454, at \*1. That follows from Congress’ declaration 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 “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, as this Court has recognized, Section 7 protects employees' joint, class, or collective employment-related legal actions. *See Brady v. Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011); *see also Eastex*, 437 U.S. at 565-66. Due to the scope and nature of Section 7, detailed below (Part I.B), the NLRA is "unique among workplace statutes," which typically create defined individual rights. *Murphy Oil*, 2014 WL 5465454, at \*1.

In enacting Section 8(a)(1), Congress prohibited 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). Accordingly, 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. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). Similarly, as

discussed below (Part I.C), 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 waiver in the Agreement violates the NLRA by requiring that 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 “reflect[s] 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) (internal citations omitted). But, as explained below (Part I.D), the Supreme Court’s FAA jurisprudence has identified certain limits on the FAA’s proper scope and the Board’s analysis is consistent with those limits.

Briefly, the Supreme Court has cautioned that an arbitration agreement is unenforceable if it requires a party to forgo substantive rights afforded by a federal statute. *See Italian Colors Rest.*, 133 S. Ct. at 2310. 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 Agreement’s 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 in the NLRA’s text which, as shown, commands employers not to interfere with their employees’ right to engage in concerted activity for mutual aid or protection. As this Court has recognized, that NLRA right includes the right to pursue collective employment-related legal actions. *See Brady*, 644 F.3d at 673.

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

The Board’s finding that employees’ concerted legal activity to redress work-related claims, like Bauer’s FLSA lawsuit, is protected by Section 7 comports with well-established labor-law principles and falls squarely within its area of expertise and responsibility for delineating federal labor law. Section 7 guarantees employees’ right 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. The mutual-protection clause encompasses efforts to improve terms and conditions of employment, which undeniably include wages, the subject of Bauer’s lawsuit. *See Eastex*, 437 U.S. at 567, 569. And, as described below, concerted legal action, which Bauer chose to

redress those wage-related claims, satisfies Section 7's concert requirement and advances the congressional purposes underlying the NLRA.

The Supreme Court has consistently affirmed the Board's broad construction of Section 7, 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; *see also Eastex*, 437 U.S. at 565-66 & n.15 (same). It has further recognized that protected activity extends beyond the workplace, and specifically includes efforts "to improve working conditions through resort to administrative and judicial forums...." *Eastex*, 437 U.S. at 566.

**1. The Section 7 guarantee includes the right to engage in concerted legal activity**

Concerted legal activity is no less deserving of Section 7 protection than other forms of concerted activity. To the contrary, the NLRA protects concerted legal activity, like other activity undertaken for mutual aid or protection, to "avert[] 'industrial strife and unrest' and 'restor[e] equality of bargaining power between employers and employees.'" *Murphy Oil*, 2014 WL 5465454, at \*1 (quoting 29 U.S.C. § 151). Protecting employees' ability to collectively resolve workplace disputes in an adjudicatory forum has far less potential for economic disruption than many indisputably protected concerted activities, like strikes and boycotts. *Id.* at \*10-11. Conversely, denying employees the safety valve of concerted litigation

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).

A foundational concerted-activity case, *Salt River Valley Water Users' Association v. NLRB*, 206 F.2d 325 (9th Cir. 1953), aptly illustrates those principles. There, 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 work-related claims through resort to legal processes.

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 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. It continues, unbroken, through modern NLRA jurisprudence, and includes *Brady*, where this Court explained that "a 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...." 644 F.3d at

673 (citing *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188 (D.C. Cir. 2000) (concerted petitions for injunctions against workplace harassment); *see also 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”); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (same)).<sup>2</sup> And the Company does not seriously contend that the filing of a concerted lawsuit is not protected under the NLRA.<sup>3</sup>

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<sup>2</sup> *See also 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). Most recently, the Fifth Circuit acknowledged the reasonableness of the Board’s Section 7 interpretation and the existence of Board and court authority supporting it. *See D.R. Horton*, 737 F.3d at 356-57 (denying enforcement of decision finding mandatory arbitration agreement unlawful based on FAA jurisprudence).

<sup>3</sup> The Company erroneously claims (Br. 35-36) that the cases cited by the Board as establishing Section 7 protection of legal activity are inapposite because they involved *retaliation*. Whether an employer violates Section 8 by retaliating against employees for engaging in 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. For example, the employer in *Eastex*, like the Company, violated Section 8(a)(1) by prospectively barring Section 7 activity. 437 U.S. at 559-62 (unlawfully banning distribution of protected literature).

In sum, the collective pursuit of legal claims enjoys a long history of Section 7 protection, avoids the precise harm Congress enacted the NLRA to address, and ensures the unfettered freedom of association Congress judged necessary to do so.

**2. Bauer’s lawsuit, seeking improved wages for himself and others, sought to initiate collective action and was thus concerted within the meaning of Section 7**

The Company’s insistence (Br. 55-58) that Bauer’s wage-related lawsuit was not “concerted” because he filed it as a single plaintiff on behalf of similarly situated employees is without merit. Section 7’s protection is not limited to situations in which two or more employees seek to improve terms and conditions of employment together. *City Disposal Sys.*, 465 U.S. at 831. A lone employee’s conduct may be concerted under many circumstances, including when the employee attempts to induce concerted action, whether or not the attempt is successful. *Id.*; *Meyers Indus.*, 281 NLRB 882, 887 (1986) (concerted activity “encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action...”), *enforced sub nom., Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987); *accord NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 790 (8th Cir. 2013) (same). As the Board found (Add.10), that Bauer

alone filed the complaint does not preclude a finding of concert. *See Meyers Indus.*, 281 NLRB at 885, 887.<sup>4</sup>

To the contrary, protecting such conduct in its infancy ensures that concerted activity can develop in the first place. *See Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1347 (3d Cir.1969) (“[t]o protect concerted activities in full bloom, protection must necessarily be extended to intended, contemplated or even referred to group action, lest employer retaliation destroy the bud of employee initiative aimed at bettering terms of employment and working conditions”); *accord NLRB v. Caval Tool Div.*, 262 F.3d 184, 188 (2d Cir. 2001); *NLRB v. United Union of Roofers, Waterproofers & Allied Workers Union No. 81*, 915 F.2d 508, 512 (9th Cir. 1990). By filing his lawsuit as a putative collective action, Bauer signaled his intent to proceed collectively, and sought to induce participation of similarly situated employees.<sup>5</sup> The complaint was not the isolated conduct of a single employee, but rather the infant stages of concerted activity.

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<sup>4</sup> In *Rockwell International Corp. v. NLRB*, 814 F.2d 1530, 1534 (11th Cir. 1987), the court stated, as the Company points out (Br. 55-56), that to be concerted under Section 7, activity must be undertaken “with or on the authority of other employees,” but the court was quoting from *Meyers Industries*, 281 NLRB at 887, where the Board “clarif[ied]” that this “encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action ....”

<sup>5</sup> That Bauer did not take *further* steps to establish his intent before the Company moved to dismiss his lawsuit pursuant to the Agreement does not, as the Company

**C. The Agreement’s 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. *NLRB v. Hitchiner Mfg. Co.*, 634 F.2d 1110, 1113 (8th Cir. 1980). It is well established that a workplace rule that either explicitly restricts concerted protected activity, or that employees would “reasonably construe” as doing so, is unlawful. *Lutheran Heritage*, 343 NLRB at 646; *accord Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 208-09 (5th Cir. 2014); *Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007). It does not matter whether the employer has applied or enforced the rule—mere maintenance constitutes an unfair labor practice. *See Flex Frac*, 746 F.3d at 209; *Cintas*, 482 F.3d at 467-68; *NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 481-82 (1st Cir. 2011). Here, because the Company imposed the Agreement on all employees as a condition of employment (Add.7), which carries an “implicit threat” that failure to comply will result in loss of employment, the Board appropriately applied the work-rule standard. *D.R. Horton*, 2012 WL 36274, at \*5, 10; *see also D.R. Horton*, 737 F.3d at 363 (applying work-rule standard to assess arbitration agreement’s interference with right to file Board charges); *Ne. Land Servs.*, 645 F.3d at 478, 481-83 (applying to employment contract); *U-Haul Co.*, 347 NLRB

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suggests (Br. 56), obviate his stated intent to proceed in concert with other employees.

375, 377-78 (2006) (same), *enforced*, 255 F. App'x 527 (D.C. Cir. 2007).

Applying that standard, the Board reasonably found (Add.3) that the Agreement's absolute prohibition of every form of concerted work-related legal claim violates Section 8(a)(1).

### **1. The Agreement unlawfully restricts Section 7 activity**

By requiring that employees individually arbitrate workplace claims, the Agreement explicitly restricts employees from exercising their long recognized right concertedly to enforce employment laws. *See Eastex*, 437 U.S. at 565-66 & n.15 (NLRA protects concerted “resort to . . . judicial forums”). Specifically, the Agreement requires that employees arbitrate all employment-related claims “only in an individual capacity and not as a plaintiff or class member in any purported class, collective action, or representative proceeding.” (Add.7, 14.) That categorical prohibition bars employees from engaging in one of the most basic forms of Section 7 activity—joining together and seeking to improve wages—by filing a FLSA collective suit. Therefore, it violates Section 8(a)(1).

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

The Board's finding that the Agreement violates Section 8(a)(1) is, as the Board reiterated in *Murphy Oil*, 2014 WL 5465454, \*11, 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 NLRA violations “obviously must yield or the [NLRA] would be reduced to a futility”); *Adel Clay Prods. Co.*, 44 NLRB 386, 396-97 (1942) (requiring employees, as a condition of employment, to sign individual contracts to deter organizing and collective bargaining, interfered with Section 7 rights), *enforced*, 134 F.2d 342 (8th Cir. 1942); *see also On Assignment Staffing Servs., Inc.*, 362 NLRB No. 189, 2015 WL 5113231, at \*1 (Aug. 27, 2015) (voluntary agreement to arbitrate work-related claims individually would violate NLRA by prospectively waiving Section 7 right to engage in concerted activity).

The Company is incorrect when it argues (Br. 36-37) that individual waivers must be enforced unless they are so-called “‘yellow-dog’ contracts intended or used to impede well-recognized Section 7 rights, namely, active union organization.” A contract that interferes with concerted activity protected by Section 7 violates Section 8(a)(1) regardless of whether the employer actually intended, or deliberately used the contract to achieve, that result. *See Miss. Transp., Inc. v. NLRB*, 33 F.3d 972, 977 (8th Cir. 1994) (Board’s inquiry under 8(a)(1) is an objective one). Moreover, it is irrelevant whether the Section 7 right the contract impairs is “active union organization,” because unrepresented employees and represented employees alike share the right to engage in Section 7-protected conduct. *See Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1508 (8th Cir. 1993); *NLRB v. Schwartz*, 146 F.2d 773, 774 (5th Cir. 1945) (“[T]he ... right of employees lawfully to engage in concerted activities for the purpose of mutual aid, outside of a union, is specified by the Act.”). As the Ninth Circuit early recognized, concerted activity by unorganized employees seeking to enforce their wage claims “is often an effective weapon for obtaining [benefits] to which [employees] ... are already ‘legally’ entitled.” *Salt River Valley*, 206 F.2d at 328. The Agreement impairs that right by requiring employees to prospectively waive their NLRA right to pursue concerted legal action.

For these reasons, contracts that impede union organization and those that impede other forms of protected activity are equally unlawful under the NLRA. All 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. Indeed, the Board has regularly set aside settlement agreements that require employees, 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 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).

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. *See Murphy Oil*, 2014 WL 5465454, \*1. In the Norris-LaGuardia Act (29 U.S.C. § 101, et seq.), enacted three years before the NLRA, 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. That statutory prohibition is not limited, as the Company mistakenly contends (Br. 38), to “yellow-dog” contracts barring membership in labor organizations. It also bars 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 Board’s unfair-labor-practice finding is consistent with NLRA policies permitting collective waivers**

As the Board explained in *Murphy Oil*, 2014 WL 5465454, \*13, barring employers from requiring that individual employees 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. *Metro. Edison*, 460 U.S. at 705; *Vincennes Steel Corp.*, 17 NLRB 825, 832 (1939), *enforced*, 117 F.2d 169 (7th Cir. 1941).

Those 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 the Company. *Pyett* upheld the legality of a procedural waiver, negotiated by a union on behalf of its member-employees, requiring that employees submit employment-discrimination claims to binding arbitration. But as the Board explained in *D.R. Horton*, the agreement in *Pyett* was the result of a bargained-for exchange, which “stem[med] from an *exercise* of Section 7 rights: the collective-bargaining process.” 2012 WL 36274, at \*13. For that reason, the collective waiver upheld in *Pyett* stands on an entirely different footing from the Agreement, which the Company imposed 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).

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 Agreement’s concerted-action waiver violates Section 8(a)(1). That the Company used the particular vehicle of an arbitration agreement to impose a prospective bar on employees’ concerted pursuit of workplace-related claims does not excuse its restriction of Section 7 rights.

#### 4. The charge was not time-barred

The Company's argument (Br. 50-55) that Bauer failed to meet the 6-month time limitation for filing unfair-labor-practice charges in Section 10(b) of the NLRA, 29 U.S.C. § 160(b), lacks merit.<sup>6</sup> Although the Company promulgated the Agreement in January 2012 and Bauer did not file his charge until December 2012, that time frame is irrelevant. Bauer did not challenge the Agreement's formation, but rather the Company's continued maintenance of and attempt to enforce the Agreement, so his charge of that ongoing conduct was timely, as the Board found (Add.4 & n.7). That finding comports with the Board's and courts' treatment of other contracts and work rules. *See Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 423 (1960) (validity of contract's execution cannot be challenged outside 10(b) period; lawfulness of 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 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). And the Company's suggestion (Br. 52-54) that the Agreement is not analogous to other unilaterally imposed workplace rules is, as detailed above (Part I.C), unavailing.

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<sup>6</sup> Section 10(b), in relevant part, states "[t]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board ...."

Nor does the Board's finding render Section 10(b) meaningless, as the Company suggests (Br. 55). To challenge the formation of an agreement, a party must do so within 6 months of formation. To challenge an employer's decision to maintain a facially invalid agreement, it must do so while the agreement is maintained or within 6 months thereafter. And to challenge an employer's enforcement efforts, the party must do so within 6 months from the date of enforcement. Permitting employees to challenge a rule that an employer is actively maintaining is consistent with the policies underlying Section 10(b): "to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused ....'" *Local Lodge No. 1424*, 362 U.S. at 419 (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 40); *accord NLRB v. Colonial Press, Inc.*, 509 F.2d 850, 854 (8th Cir. 1975).

**D. The Board's Finding that the Agreement's Concerted-Action Waiver Violates the NLRA Does Not Conflict with the FAA**

As shown above, the Board's determinations that the NLRA protects employees' right to undertake concerted legal activity, and that the Agreement unlawfully interfered with that right, lie at the core of the Board's expertise and are entitled to deference. The Board's determination that its interpretation of the NLRA does not conflict with the FAA, however, is not. Nevertheless, the Board's finding that there is no conflict is reasonable and properly effectuates 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 Supreme Court explained in *AT&T Mobility LLC v. Concepcion*, that Congress enacted the FAA “in response to widespread judicial hostility to arbitration agreements.” 131 S. Ct. 1740, 1745 (2011). 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 [FAA],” 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. *See 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 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). Accordingly, a mandatory arbitration agreement is unenforceable under governing FAA jurisprudence when—like the Agreement here—it violates Section 8(a)(1) of the NLRA by prospectively restricting employees’ Section 7 rights.

Moreover, the Supreme Court has 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; *Concepcion*, 131 S. Ct. at 1746. Second, enforcement of an arbitration agreement may be precluded by a statute’s contrary congressional command. *See Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013) (citing *CompuCredit*, 132 S. Ct. at 669). The Agreement is unenforceable pursuant to each of these exceptions to the FAA.

**1. Enforcement of the Agreement would impermissibly deprive employees of their substantive right to pursue work-related legal claims concertedlly**

**a. The FAA does not mandate enforcement of an agreement that waives 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.” 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 decision that the ADEA permitted waiver of a judicial forum.). The Court similarly rejected the argument that arbitration would impermissibly conflict with the statute’s 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).

In other FAA decisions, the Supreme Court has repeatedly rejected challenges to the enforcement of arbitration agreements based on statutory provisions that are ancillary to the congressional goals of the statutes in question (*e.g.*, providing a judicial forum, describing venue, creating collective-action procedures).<sup>7</sup> But the Supreme Court has never enforced an arbitration agreement

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<sup>7</sup> *See, e.g., CompuCredit*, 132 S. Ct. at 671 (judicial-forum provision not “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 and other courts have followed suit. *See Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475, 478 (8th Cir. 1988) (under ERISA’s structure, arbitration agreement waiving judicial forum “does not carry with it the waiver of any substantive duties or liabilities” created by the statute); *Carter v. Countrywide Credit Indus.*, 362 F.3d 294, 298 (5th Cir. 2004) (FLSA judicial-forum, collective-action, and attorneys-fee provisions not substantive according to reasoning in *Gilmer*).

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 a judicial, forum.” *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

**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 Agreement requires employees to pursue all work-related 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 “principal” (*see* p. 31 n.7) right that Congress enacted the NLRA to protect. As described above (Part I.B.1), 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 considerable deference. *See* pp. 9-10.<sup>8</sup> Accordingly, the Agreement is unenforceable because it extinguishes a substantive federal right.

As the Board explained in *Murphy Oil*, “[t]he core objective of the [NLRA] is the protection of workers’ ability to act in concert, in support of one another.” 2014 WL 5465454, at \*1. That follows from Congress’ declaration 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. *Murphy Oil*, 2014 WL 5465454, at \*1.

In upholding the constitutionality of the NLRA, the Supreme Court characterized the Section 7 right as “fundamental.” *NLRB v. Jones & Laughlin*

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<sup>8</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 NLRA interpretation, is entitled to *Chevron* deference). This Court, in rejecting the plaintiff’s *D.R. Horton*-based argument in *Owen*, stated that it owed the Board’s decision no deference with respect to FAA interpretation, but acknowledged that the Board is entitled to deference in construing the NLRA. 702 F.3d at 1054. In this case, that deference extends to the Board’s definition of the scope of Section 7, its determination that the Agreement restricts Section 7 rights in violation of Section 8(a)(1), *and* its finding that Section 7 rights lie at the core of the NLRA (i.e., are “substantive” within the meaning of FAA jurisprudence).

*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 (e.g., elections, exclusive representation). 29 U.S.C. § 159. And 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>9</sup>

The 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, *Murphy Oil*, 2014 WL 5465454, at \*1, as evidenced by Congress’ consistent focus on

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<sup>9</sup> As the Board recognized in *Murphy Oil*, while the language of Section 7 has not changed since 1935, the procedural avenues available to employees for collective action have expanded. 2014 WL 5465454, at \*19. For example, the class-action provisions of Federal Rule of Civil Procedure 23 were only added in 1966. The Board emphasized 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. *Id.* at \*18. Rather, its position 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.” *Id.* at \*2, 22. 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.

protecting that right, even in earlier labor legislation. In the 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 “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 reach a different conclusion, the Fifth Circuit in *D.R. Horton* had to disregard the material difference between the case before it, which involved not only rights afforded by the FLSA but also the right to engage in concerted activity guaranteed by Section 7, and cases enforcing arbitration agreements that do not include the presence of that additional Section 7 right. 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)). Its error was in failing to recognize that, even in cases brought to vindicate individual rights under the same “employment-related statutory frameworks,” *id.*, plaintiffs who carry into court not only those individual rights but also the separate Section 7 right to act concertedly

may properly be entitled to more relief than plaintiffs (like Gilmer) who either do not enjoy or do not assert that additional right.<sup>10</sup> For that reason, and as explained above (Section D.1.a.), the Board’s analysis of this issue is consistent with *Gilmer* and with FAA jurisprudence generally.<sup>11</sup>

In rejecting the Board’s *D.R. Horton* decision in *Owen*, this Court focused on the plaintiff’s argument that the collective-action provision of *the FLSA* creates a substantive right to pursue representative claims under that statute.<sup>12</sup> 702 F.3d at 1052-54. Citing *Gilmer*, the Company (Br. 32) insists that the inquiry in this case

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<sup>10</sup> Gilmer filed an individual claim and, in any event, his arbitration agreement allowed for collective proceedings. 500 U.S. at 32. Moreover, it is unclear whether Gilmer 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(3) (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.

<sup>11</sup> *See generally New York Shipping Ass’n v. Fed. Maritime Comm’n*, 854 F.2d 1338, 1367 (D.C. Cir. 1988) (“[T]here is no anomaly if conduct privileged under one statute is nonetheless condemned by another; we expect persons in a complex regulatory state to conform their behavior to the dictates of many laws, each serving its own special purpose.”).

<sup>12</sup> The Company notes (Br. 18-19) that other circuits have likewise rejected the Board’s position. But in *Sutherland v. Ernst & Young LLP*, another non-Board case, the court’s decision reflects a similar misunderstanding of the Board’s position. 726 F.3d 290, 296-97 & n.8 (2d Cir. 2013) (per curiam) (finding *FLSA* did not bar enforcement of arbitration agreement; rejecting citation to Board’s *D.R. Horton* decision based on *Owen*, without analysis). And the courts did not reach the NLRA in the other cited cases. *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); *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).

should similarly be limited to whether the Agreement waived substantive rights under the FLSA, not the NLRA. In *Gilmer*, however, no issue of concerted activity was presented. The Court assessed the ADEA, which created the only right Gilmer asserted, and held that Gilmer's agreement did not entail the prospective waiver of any critical right.

In other words, the Court in *Gilmer*, like the Board in *Horton, Murphy*, and here, examined the statutory source of the right impaired by the arbitration agreement. The difference in the statutory rights at issue explains the different outcomes. In *Horton, Murphy*, and this case, the employees were not simply waiving procedural rights as in *Gilmer* but also prospectively waiving a core substantive right, not at issue in *Gilmer*, to engage in concerted activity for mutual aid or protection

The Board has made clear that the right to pursue concerted legal action is grounded in the substantive provisions of the NLRA. See *Murphy Oil*, 2014 WL 5465454, \*1-2. For that reason, the Company's further contentions (Br. 33-34)—that the right to proceed as a class under Federal Rule of Civil Procedure 23, or collectively under the FLSA (29 U.S.C. § 216(b)), is procedural rather than substantive, and that the Rules Enabling Act does not create substantive rights—are inapposite. In *Murphy Oil*, the Board emphasized that Section 7 does not guarantee class certification or create any such procedural advantage. 2014 WL

5465454, at \*18-19. Rather, Section 7, in combination with Section 8(a)(1), shields employees' concerted efforts to use existing, generally available procedures from employer-created *disadvantage*.

In sum, the FAA does not, as interpreted by the Supreme Court, mandate enforcement of the Agreement's waiver of the very rights that Congress enacted the NLRA to protect.

**2. Under the FAA's savings clause, finding the Agreement's concerted-action waiver unlawful 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 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, a variety of private contracts that seek to deprive employees of Section 7 rights. *See Nat’l Licorice Co.*, 309 U.S. at 361; *Stone*, 125 F.2d at 756. Those contracts—like the Agreement, which bars all collective legal claims—also violate the public policy announced in the NLRA, thwarting Congress’ intent to protect such activity to facilitate interstate commerce. *Murphy Oil*, 2014 WL 5465454, at \*1, 6-8, 11. And they demonstrate that illegality under the NLRA has served to invalidate a variety of contracts, not just arbitration agreements, since the statute’s enactment. 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.

This Court, in *Owen*, did not consider whether the savings clause provides a basis for invalidating an individual arbitration agreement that is illegal pursuant to the NLRA, despite circuit precedent recognizing that “a 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....” *Brady v. Nat’l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) (citing *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188 (D.C. Cir. 2000) (concerted petitions for injunctions against workplace harassment). And while the Fifth Circuit in *D.R. Horton* rejected the Board’s savings-clause argument, 737 F.3d at 358-60, it did not seek to reconcile its decision with *National Licorice, J.I. Case*, and other cases invalidating individual contracts purporting to extinguish Section 7 rights.

Instead, like the Company here (Br. 20-23), the Fifth Circuit based its savings-clause analysis 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. But *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. *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, which 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>13</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 intended purpose of a specific federal statute. *Id.* at 2312 n.5. Thus, as the Board noted in *Murphy Oil*, 2014 WL 5465454, at \*12, 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.

The FAA’s policy favoring arbitration and the NLRA’s specific right to engage in concerted action are “capable of co-existence,” *id.* at \*8 (quoting *Morton*

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<sup>13</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.

*v. Mancari*, 417 U.S. 535, 551 (1974)), and Congress gave no indication that the FAA must trump other statutory rights, including the NLRA. *Id.* at \*9 (citing *Morton*, 417 U.S. at 551 (“courts are not at liberty to pick and choose among congressional enactments”)). By enforcing the arbitration agreements in *Owen* and *D.R. Horton*, neither this Court nor the Fifth Circuit attempted to reconcile those statutory schemes. Instead, each elevated the federal policy favoring arbitration over national labor policy, “effectively nullif[ying]” Section 7. *See id.* at \*13. 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>14</sup>

**3. The NLRA embodies a congressional command overriding the FAA’s mandate to enforce the Agreement’s 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

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<sup>14</sup> Section 7 is not implicated unless the agreement applies to work-related claims of statutory employees; it would not affect the FAA’s enforcement mandate with respect to arbitration agreements that apply to consumer, commercial, or other non-employment-related claims, or involve employees exempt from NLRA coverage, such as statutory supervisors or managers. *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).

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 either a statute’s text or legislative history or an “inherent conflict” between its provisions and the FAA. *Gilmer*, 500 U.S. at 26; *McMahon*, 482 U.S. at 227. The Board has 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.

**a. The text and history of the NLRA preclude enforcement of arbitration agreements extinguishing Section 7 rights**

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; *see also* *Murphy Oil*, 2014 WL 5465454, at \*12. 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. That 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 employment contracts. *Id.* at \*10. 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 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." *Murphy Oil*, 2014 WL 5465454, at \*9 (quoting 29 U.S.C. § 160(a)). That provision manifests Congress' intent not to permit private contracts, like the Agreement, that would supersede Section 7's protections. *Id.* at \*16.

The Company's argument (Br. 25-27), that Section 7 and Section 10(a) cannot be sufficient to create a congressional command if the explicit references to class actions in cases such as *Gilmer* and *CompuCredit* were not, fails to recognize a crucial distinction. As discussed above (Part D.1.a), the provision of a class mechanism in a statute enacted to protect individual rights cannot be equated to the right to engage in concerted action that lies at the heart of Section 7 and of the NLRA. By definition, the right to engage in concerted action is lost if individual arbitration can be required, whereas the individual rights animating other statutes, as the Supreme Court has repeatedly held, can be adequately protected in arbitration. *See, e.g., CompuCredit*, 132 S. Ct. 671.<sup>15</sup>

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<sup>15</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

In *Owen*, this Court relied on the fact that the FAA was reenacted in 1947—after enactment of the FLSA (1938), NLRA (1935), and Norris-LaGuardia Act (1932)—to reject contrary command arguments based on the NLRA’s legislative history, as well as that of the Norris-LaGuardia Act and the FLSA. The Court gleaned from that sequence of events the “suggest[ion] that Congress intended its arbitration protections to remain intact even in light of the earlier passage of three major labor relations statutes.” 702 F.3d at 1053. The Company repeats (Br. 30-31) that argument here. But as the Board explained in *Murphy Oil*, the reenactment and codification of the FAA had no substantive effect, and “[u]nder established canons of statutory construction, ‘it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.’” 2014 WL 5465454, at \*15 & n.65 (quoting *Finley v. U.S.*, 490 U.S. 545, 554 (1989); and citing *Anderson v. Pac. Coast S.S. Co.*, 225 U.S. 187, 199 (1912); *Bulova Watch Co. v. U.S.*, 365 U.S. 753, 758 (1961) (rejecting argument that particular statute was later enactment when predecessor provision “had long been on the books”)). Neither the statute codifying the FAA, nor its legislative history, suggests a congressional intention to change the FAA’s effect. As the Board reasoned, “[i]t seems inconceivable that legislation

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encroach on the distinct right of employees to engage in concerted activity. *D.R. Horton*, 2012 WL 36274, at \*12.

effectively restricting the scope of the Norris-LaGuardia Act and the NLRA could be enacted without debate or even notice, especially in 1947, when those labor laws were both relatively new and undeniably prominent.” *Murphy Oil*, 2014 WL 5465454, at \*15.

**b. A mandatory individual waiver of prospective Section 7 rights creates an inherent conflict with the NLRA**

As the Board also found, there is 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. *Murphy Oil*, 2014 WL 5465454, at \*13; *D.R. Horton*, 2012 WL 36274, at \*11. In *Owen*, the Court declined to address the Board’s finding of such a conflict. Instead, it found the *D.R. Horton* decision inapposite because the arbitration agreement the *Owen* Court examined, unlike the agreement before the Board in *D.R. Horton*, expressly provided that employees could file complaints with administrative agencies, including the Department of Labor. 702 F.3d 1053. But that distinction is immaterial: even an agreement that allowed concerted administrative charges would, at a minimum, bar concerted pursuit of any work-related claims not within the jurisdiction of an agency. *See, e.g., Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188 (D.C. Cir. 2000) (petitioning court for

injunction against harassment was protected).<sup>16</sup> In any event, here, the Agreement’s comprehensive requirement that employees resolve “[a]ll claims, disputes, or controversies” through individual arbitration (Add.14), contains no exception for proceedings before administrative agencies. *See* Part III.

The Company challenges (Br. 29-30) the Board’s inherent-conflict finding by noting, as did the court in *D.R. Horton*, 737 F.3d at 361, that the Board defers to the arbitration process in different contexts, specifically in cases involving contractual grievance-and-arbitration provisions. The Company acknowledges the Board’s position that an individual arbitration agreement imposed as a condition of employment “is the antithesis of an arbitration agreement providing for union representation in arbitration that was reached through the statutory process of collective bargaining ....” Br. 30 (quoting *Murphy Oil*, 2014 WL 546454, at \*13). In response, it falls back on the Supreme Court’s statement 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. But that statement does not establish that the two types of agreements are on an even footing for all purposes.

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<sup>16</sup> Moreover, the Board has not ruled on whether the availability of administrative relief for particular types of claims, or the possibility that a governmental agency could choose to file a representative action, would suffice to protect employees’ Section 7 rights with respect to work-related claims that do have administrative components.

Like the agreements in *Gilmer* and *Italian Colors*—and unlike the Company’s Agreement, the union-negotiated arbitration provision in *Pyett* did not purport to waive a substantive federal right critical to the statute creating it. In stating that union and employee waiver were equally effective, the Court was referring to its holding that unions may agree to procedural waivers of ancillary provisions of federal statutes on behalf of represented employees, just as the employees themselves could agree to those waivers themselves. *See Pyett*, 556 U.S. at 259 (noting that if right at issue were “substantive” within meaning of ADEA, “even a waiver signed by an individual employee would be invalid”). *Pyett* does not suggest that there is no difference between arbitration provisions collectively bargained in the exercise of Section 7 rights and employer-imposed individual arbitration agreements waiving Section 7 rights.

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 the Company 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. THE COMPANY 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* Part I.C. The Company enforced the Agreement through its motion to dismiss the FLSA lawsuit and compel arbitration. Because, as shown, the Agreement restricts Section 7 rights, the Board reasonably found (Add.3) that the Company's efforts to enforce the Agreement violated Section 8(a)(1). The Company's challenges to this violation, and to the remedy the Board ordered, are unavailing.

### **A. Bauer Is an "Employee" Entitled to Protection under the NLRA**

The Company insists (Br. 40-42) that its enforcement efforts were not unlawful because, by the time it filed its motion with the District Court, Bauer was no longer employed and thus not a statutory "employee" protected by the NLRA. That argument ignores long-established law from the Board and Supreme Court interpreting the term "employee" to include former employees.

In Section 2(3) of the Act, Congress declared that "[t]he term 'employee' shall include any employee, and shall not be limited to the employees of a particular employee ...." 29 U.S.C. § 152(3). The Supreme Court has acknowledged that the breadth of the term is "striking," stating that it "squarely

applies to ‘any employee.’” *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). The Board has uniformly interpreted “employee” in the “broad generic sense” to “include members of the working class generally.” *Briggs Mfg. Co.*, 75 NLRB 569, 570-71 (1947) (“This broad definition covers ... employees of another employer, or former employees of a particular employer, or even applicants for employment.”). The Supreme Court took note of this broad interpretation—noting that “employee” includes applicants not hired, hiring hall registrants, and persons who have quit employment or whose employer has gone out of business—in finding that “retirees” are not statutory employees because they have ceased working without expectation of future employment. *Allied Chem. & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971).

Moreover, the Supreme Court has “repeatedly affirmed that the task of determining the contours of the term ‘employee’ has been assigned primarily” to the Board. *Allied Chem.*, 404 U.S. at 176. The Board’s construction of the term “employee” is entitled to “considerable deference” and will be upheld if it is “reasonably defensible.” *Sure-Tan*, 467 U.S. at 891 (additional citations omitted).

Given the breadth of the term “employee,” it was reasonable for the Board to find (Add.3 n.3, 9) that Bauer, as a former employee of the Company, fell within its scope. The Company insists (Br. 41-42) that the Board’s finding is incorrect

based on a clarifying phrase in Section 2(3), which provides that “employee” includes “any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice.” Plainly, however, that phrase was included not to limit the NLRA’s coverage, but to ensure that an employer cannot discharge or otherwise contribute to an employee’s loss of employment, then claim that the employee does not meet the statutory definition because he is not a member of the general working class. *See* S. REP. NO. 73-1184, at 3-4 (1934) (“[w]ithout this provision it is possible that an employer might contend that a worker he had unlawfully discharged had no remedy”). In short, although the Company protests (Br. 42) that there is no support for the Board’s global definition of “employee,” a global definition is precisely what the Act provides.

**B. The Company’s Enforcement of the Agreement Is Not Protected Petitioning under the First Amendment**

The First Amendment right to petition does not, contrary to the Company’s argument (Br. 46), preclude finding enforcement of the Agreement to be an unfair labor practice. *Murphy Oil*, 2014 WL 5465454, at \*27-28. 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). Under that 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; *see Wright Elec., Inc. v. NLRB*, 200 F.3d 1162, 1166-67 (8th Cir. 2000) (holding Board could enjoin employer’s discovery request seeking union-authorization cards in state-court misrepresentation suit, for request interfered with employees’ rights to organize under the NLRA and thus had an illegal objective). 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).<sup>17</sup>

Consequently, under settled law, the Board may restrain litigation that has the illegal objective of enforcing a contract that restricts employees’ Section 7 rights, even if the suit is otherwise meritorious. *Id.* at 236; *Truck Drivers, Oil Drivers, Filling Station & Platform Workers’ Union Local 705 v. NLRB*, 820 F.2d 448, 452 (D.C. Cir. 1987); *see also Murphy Oil*, 2014 WL 5465454, at \*27-28 (and cases cited therein). Because the Company’s motion to dismiss sought to enforce the Agreement, an unlawful contract, the Board reasonably found that it had an illegal objective and thus fell outside the protection of the First Amendment.

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<sup>17</sup> In the absence of an illegal objective, retaliatory motive does not suffice to remove constitutional protection from a reasonably based lawsuit. *See Teamsters Local 776*, 973 F.2d at 235 (quoting *Bill Johnson’s*, 461 U.S. at 743). In retaliatory motive cases, the Board may find a lawsuit unlawful only if it is both objectively baseless *and* subjectively motivated by an unlawful purpose. *BE & K Const. Co. v. NLRB*, 536 U.S. 516, 531 (2002). Although the Company argues that its efforts in the District Court to enforce the Agreement did not meet that standard, the Board never reached the issue, having found an illegal objective.

The Company argues (Br. 47-48) that if enforcing a contract that violates the NLRA constitutes an “illegal objective,” then a case filed to retaliate against an employee would also have an illegal objective, contrary to *Bill Johnson’s* holding that “the filing of a meritorious lawsuit, even for a retaliatory motive, is not an unfair labor practice.” 461 U.S. at 747. But that argument fails to discern the “subtle” distinction between a lawsuit filed with a retaliatory motive and a lawsuit filed with an illegal objective under federal law. *Teamsters Local 776*, 973 F.2d at 236. A party may file a legal action in order to retaliate against an employee, yet pursue a legitimate objective, and thereby be protected under the reasoning in *Bill Johnson’s*. But filing a suit—or in this case a motion to dismiss—that seeks an objective that is illegal under federal law, regardless of whether it is initiated with a retaliatory intent, is subject to restraint.

### **C. The Company’s Challenges to the Remedy Are Unavailing**

Equally deficient is the Company’s argument (Br. 49-50), that the Board exceeded its authority in selecting a remedy for filing a lawsuit with an illegal objective (i.e., ordering the Company to stop asserting the Agreement as a bar to the FLSA lawsuit and to pay Hobson’s associated attorneys’ fees). The Board’s choice of remedy is afforded “special respect by reviewing courts,” which will only be reversed if the Board abused its discretion. *United Food & Commercial Workers Union, Local No. 304A v. NLRB*, 772 F.2d 421, 426-27 (8th Cir. 1985). It

is well within the Board's broad remedial discretion to order 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).

Finally, the Court lacks jurisdiction to consider the Company's argument (Br. 49) that the requirement to notify the District Court that it no longer relies on the Agreement to oppose the FLSA suit is "absurd" because the parties have settled the case. Under Section 10(e) of the NLRA, "[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 also Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (failure to raise issue in exceptions or motion for reconsideration prevents consideration by the courts); *accord NLRB v. Monson Trucking, Inc.*, 204 F.3d 822, 825-26 (8th Cir. 2000). The parties' settlement took place a year before the Board issued its decision. *See Bauer v. Cellular Sales of Missouri, LLC*, Case No. 3:12-cv-05111 (W.D. Mo. Mar. 12, 2014), ECF Nos. 59, 64. Yet the Company never sought to reopen the Board record to present evidence of the settlement, much less make any argument to the Board based on the

settlement. Nor has the Company alleged that extraordinary circumstances prevented it from doing so. The Court thus has no jurisdiction to consider this argument. 29 U.S.C. § 160(e).<sup>18</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 (Part I.C), even the mere maintenance of an arbitration agreement that employees reasonably would construe to prohibit filing Board charges violates Section 8(a)(1).

The Board found (Add.3 n.4) that employees would reasonably construe the Agreement, which broadly requires that “[a]ll claims, disputes, or controversies arising out of” an employee’s employment “shall be decided by arbitration,” as preventing them from filing Board charges. That finding is reasonable and entitled to “considerable deference.” *See NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 790 (8th Cir. 2013).

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<sup>18</sup> The Company’s failure to raise this issue does not necessarily preclude it from arguing, during a subsequent compliance proceeding, that changed circumstances rendered this remedy moot. *Cf. McKenzie Eng’g Co. v. NLRB*, 182 F.3d 622, 629 (8th Cir. 1999) (explaining employer would have full opportunity, in compliance, to litigate appropriateness of Board’s reinstatement order given that the project at which the unlawfully discharged employees had worked subsequently ended).

The Company (Br. 42) challenges this unfair-labor-practice finding by pointing out that the Agreement does not expressly prohibit employees from filing Board charges. But *Lutheran Heritage* provides that maintenance of a rule violates the NLRA if it *either* explicitly restricts concerted protected activity *or* would be “reasonably construed” by employees as doing so. 343 NLRB 646, 646 (2004); *Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007). In light of that objective standard, the Company’s argument (Br. 45) that Bauer’s filing of charges in this case shows that the Agreement does not bar employees from filing Board charges is also irrelevant. The question under Section 8(a)(1) is whether the employer’s action (here, maintenance of the Agreement) has a reasonable tendency 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 (5th Cir. 2014) (employees actual interpretation of rule not determinative).

The Company also insists (Br. 43) that several facts support “the implication” that the Agreement restricts only court proceedings, including the lack of any reference to agency or administrative proceedings, the provision that an arbitration decision is “final, binding and enforceable in any court of competent jurisdiction,” and the reference to discovery-related matters that do not ordinarily apply in Board proceedings. None of those provisions compel the conclusion that it would be unreasonable to construe the broad language of the Agreement—

applicable to “all claims, disputes, or controversies”—as precluding an employee from filing Board charges.

Moreover, the Board has determined that employees may reasonably understand references to court actions as encompassing administrative claims, regardless of the technical meaning a lawyer might attribute to them. Even if the Agreement’s language had referred only to “court” actions, that terminology would not preclude an unfair-labor-practice finding under Board precedent, which recognizes that a reasonable employee does not necessarily understand legal terms of art. In *U-Haul Co. of California*, for example, the Board found a violation where the arbitration agreement covered “all disputes” related to employment, despite clarification that the agreement applied only “to disputes, claims or controversies that a court of law would be authorized to entertain.” 347 NLRB 375, 377 (2006), *enforced*, 255 Fed. App’x. 527 (D.C. Cir. 2007).<sup>19</sup> Similarly, in *Utility Vault Co.*, the Board found an unlawful restriction of employees’ right to file Board charges where an agreement covered “legal claims,” with exceptions not specifically excluding Board charges, and the parties agreed that “such claims shall not be filed or pursued in court, and that [the employee was] forever giving up the

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<sup>19</sup> *Cf. CompuCredit*, 132 S. Ct. at 670-71 (explaining “[i]t is utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action ... in the context of a court suit,” and finding “most consumers would understand” such terms as conveying existence of an enforceable legal right, but not as requiring a judicial forum).

right to have those claims decided by a jury.” 345 NLRB at 81. In any event, as the Board explained in *U-Haul*, Board charges may—as in the present appeal—end up in court. 347 NLRB at 377.

Finally, the requirement in the Board’s Order (Add.5) that the Company remedy this violation by rescinding the Agreement or revising it to make clear that it does not prohibit concerted legal activity in all forums, or the right of employees to file Board charges, was well within the Board’s broad remedial discretion. *See RELCO Locomotives*, 734 F.3d at 790 (Board order requiring that employer rescind unlawful nondisclosure agreement to remedy agreement’s chilling effect on protected activity supported by substantial evidence).<sup>20</sup>

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<sup>20</sup> The Board’s Order does not, as the Company mistakenly suggests (Br. 45), require the Company to “revise the agreement to expressly state that it ‘does not restrict employees’ right to file charges with the [Board]” or otherwise “attempt to dictate the language of” the Agreement. Rather, it broadly requires the Company to rescind or revise the Agreement to remove its unlawful restrictions of employees’ Section 7 rights.

**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  
September 2015

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

CELLULAR SALES OF MISSOURI, LLC	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 15-1620
	)	15-1860
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	14-CA-094714
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,999 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 10th day of September, 2015

**UNITED STATES COURT OF APPEALS  
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**CERTIFICATE OF SERVICE**

I hereby certify that on September 10, 2015, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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