

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

CHESAPEAKE ENERGY CORPORATION,  
and its wholly owned subsidiary  
CHESAPEAKE OPERATING, INC.

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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## **STATEMENT REGARDING ORAL ARGUMENT**

Oral argument in this case is not necessary.

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**UNITED STATES COURT OF APPEALS  
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**No. 15-60326**

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**CHESAPEAKE ENERGY CORPORATION,  
and its wholly owned subsidiary  
CHESAPEAKE OPERATING, INC.**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of Chesapeake Energy Corp., and its wholly owned subsidiary Chesapeake Operating, Inc. (collectively “Chesapeake”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Order issued on April 30, 2015, and reported at 362 NLRB No. 80. The Board had jurisdiction over the

proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“NLRA”). 29 U.S.C. § 160(a). The Court has jurisdiction over this appeal because the Board’s Order is final under Section 10(e) and (f) of the NLRA. 29 U.S.C. § 160(e) and (f). The petition and application were both timely, as the NLRA provides no time limits for such filings. Venue is proper because Chesapeake transacts business in this circuit.

### **STATEMENT OF ISSUES**

I. Should the Court summarily enforce the portion of the Board’s Order related to its uncontested finding that Chesapeake violated Section 8(a)(1) of the NLRA by maintaining a policy that employees would construe as prohibiting them from filing unfair-labor-practice charges with the Board?

II. Did the Board reasonably find that Chesapeake violated Section 8(a)(1) by imposing, as a condition of employment, a policy barring employees from concerted pursuing work-related legal claims in any forum?

## STATEMENT OF THE CASE

### **I. The Board's Findings of Fact**

Chesapeake is an energy company headquartered in Oklahoma City, Oklahoma that produces natural gas, natural gas liquids, and oil. (R 163; R 22.)<sup>1</sup> As a mandatory condition of employment, Chesapeake employees must sign an Arbitration Agreement and Dispute Resolution Policy (“Agreement”) that “requires binding arbitration to resolve all disputes between the Employee and the Company including any such disputes which may arise out of or relate to employment.” (R 159; R 23, 34.) The Agreement further provides that employees “have no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action” and “must pursue any claims that they may have solely on an individual basis through arbitration.” (R 159; R 35.) Among the matters that the Agreement expressly covers are “claims under . . . the National Labor Relations Act.” (R 159; R 34.)

### **II. The Board's Decision and Order**

On April 30, 2015, the Board issued a Decision and Order finding that, by maintaining the Agreement, Chesapeake violated Section 8(a)(1) of the NLRA in two separate ways. First, relying on settled law, the Board found that the

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<sup>1</sup> “R” cites in this brief are to the Record. References preceding a semicolon are to the Board’s findings; cites following a semicolon are to supporting evidence. “Br.” cites are to Chesapeake’s opening brief to the Court.

Agreement was unlawful because employees would construe it as barring them from filing unfair-labor-practice charges with the Board. Second, the Board held that the Agreement was unlawful because it categorically prohibits employees from pursuing work-related legal claims concertedly.

Regarding the second violation, the Board applied its previous holdings in *D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274 (2012), *enforcement denied in part*, 737 F.3d 344 (5th Cir. 2013), *reh'g denied*, No. 12-60031 (April 16, 2014), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (2014), *petition for review pending*, 5th Cir. Case No. 14-60800 (oral argument held Aug. 31, 2015).

In those decisions, the Board held that employees' right under Section 7 of the NLRA "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection," 29 U.S.C. § 157, includes the right to pursue work-related legal claims concertedly. *Murphy Oil*, 2014 WL 5465454, at \*1, 6; *D.R. Horton*, 2012 WL 36274, at \*2-4. It cited Board and court precedent holding that Section 7 protects "'resort to . . . judicial forums'" and other forms of concerted legal action. *Murphy Oil*, 2014 WL 5465454, at \*1, 6 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978)); *D.R. Horton*, 2012 WL 36274, at \*2-4 & n.4 (citing *Brady v. Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011); *Mohave Elec. Co-Op, Inc. v. NLRB*, 206 F.3d 1183, 1188 (D.C. Cir. 2000)). In so holding, the Board

observed that such concerted activity was ““an effective weapon for obtaining that to which [employees], as individuals, are already legally entitled.”” *D.R. Horton*, 2012 WL 36274, at \*2 n.3 (quoting *Salt River Valley Water Users Ass’n v. NLRB*, 206 F.2d 325, 328 (9th Cir. 1953)). It also noted that “concerted legal activity would seem . . . to be a *favored* form of concerted activity” as it takes a less disruptive form than strikes or boycotts. *Murphy Oil*, 2014 WL 5465454, at \*10.

The Board further found that an employer violates Section 8(a)(1) of the NLRA, which bars employers from interfering with Section 7 rights, 29 U.S.C. § 158(a)(1), by requiring employees to arbitrate individually all workplace disputes. *Murphy Oil*, 2014 WL 5465454, at \*2, 6; *D.R. Horton*, 2012 WL 36274, at \*1, 5-6. In support of that finding, the Board cited the principle that a workplace rule that explicitly restricts Section 7 activity violates Section 8(a)(1). *D.R. Horton*, 2012 WL 36274, at \*5 (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)). It also relied on cases holding that individual contracts cannot require an employee to waive Section 7 rights as a condition of employment. *Murphy Oil*, 2014 WL 5465454, at \*2, 6 (citing *Nat’l Licorice Co. v. NLRB*, 309 U.S. 350, 360 (1940); *NLRB v. Stone*, 125 F.2d 752 (7th Cir. 1942)); *D.R. Horton*, 2012 WL 36274, at \*1, 5-6. The Board concluded that a policy requiring *individual* arbitration restricts employees’ exercise of their right to engage in *concerted* activity.

After finding a violation, the Board detailed why its decision did not conflict with the Federal Arbitration Act (“FAA”). It explained that the policy in favor of arbitration has limits, and that those limits enable accommodation of the FAA and other federal statutes like the NLRA. *Murphy Oil*, 2014 WL 5465454, at \*7, 9-13; *D.R. Horton*, 2012 WL 36274, at \*10-16. Examining statutory text, policy, and caselaw, the Board determined that concerted activity under Section 7 was the foundational right of the NLRA. It then invoked the principle that the FAA does not sanction the prospective waiver of such substantive rights. *Murphy Oil*, 2014 WL 5465454, at \*6, 10-11; *D.R. Horton*, 2012 WL 36274, at \*11-12. Noting that the FAA’s savings clause preserves general contract defenses, the Board emphasized that its reason for finding agreements requiring individual arbitration unlawful would apply equally to any type of contract that restricts Section 7 rights. *Murphy Oil*, 2014 WL 5465454, at \*6, 11; *D.R. Horton*, 2012 WL 36274, at \*11, 14-15. Finally, it found that the text and policy of the NLRA constitute a contrary command precluding the enforcement of arbitration agreements that waive NLRA rights. *Murphy Oil*, 2014 WL 5465454, at \*12-13; *D.R. Horton*, 2012 WL 36274, at \*13-15.

### **III. The Court’s Decision in *D.R. Horton***

A divided panel of the Court (Judges King and Southwick; Judge Graves, dissenting) held in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 357-61 (5th Cir.

2013), that the FAA mandated enforcement of agreements requiring individual arbitration. The Court recognized that precedent supported the Board’s finding that concerted legal action is a protected Section 7 right. *Id.* at 356-57.

Nonetheless, it rejected the Board’s holding that the concerted pursuit of legal claims was a substantive right that could not be waived. *Id.* at 357, 361. For support, the Court relied on cases enforcing agreements requiring individual arbitration in the context of statutes other than the NLRA, including the Age Discrimination in Employment Act (“ADEA”) and the Fair Labor Standards Act (“FLSA”). *Id.* at 357-58, 361 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (ADEA), and *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (FLSA)). In holding that the FAA’s savings clause did not support the Board’s finding, 737 F.3d at 359-60, the Court relied solely on *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Judge Graves dissented, and would have adopted the Board’s rationale. 737 F.3d at 364-65.

## **SUMMARY OF ARGUMENT**

Chesapeake’s maintenance of the Agreement violates the NLRA in two separate ways. Initially, settled law supports the Board’s finding of a Section 8(a)(1) violation on the ground that employees would reasonably believe that the Agreement forbids them from filing unfair-labor-practice charges with the Board.

Because the Board's finding of that violation is uncontested, its Order remedying the violation should be summarily enforced.

The Board also found the Agreement violated Section 8(a)(1) of the NLRA because it bars employees from concertedly pursuing work-related legal claims in any forum. The Board does not dispute Chesapeake's claim that this Court rejected a similar Board finding in *D.R. Horton*, but continues to urge the Court to reconsider that decision. Contrary to the Court's holding in *D.R. Horton*, the FAA does not require that the Court uphold Chesapeake's categorical prohibition on the Section 7 right to pursue work-related legal claims concertedly simply because it is contained in an arbitration agreement. *D.R. Horton* relied on inapposite caselaw involving statutes materially distinct from the NLRA, and failed to take account of the status of Section 7 concerted activity as the foundational right at the core of the NLRA—the type of right for which the FAA does not sanction waiver. The substantive NLRA provisions that *D.R. Horton* ignored also trigger the FAA's savings clause and constitute a contrary congressional command precluding enforcement of the Agreement under the FAA.

## **ARGUMENT**

Chesapeake's Agreement violates Section 8(a)(1) of the NLRA in two ways. First, employees would reasonably believe that it forbids them from filing charges with the Board, and, second, it bars employees from concertedly pursuing work-

related legal claims in any forum. The first violation is uncontested and the Board's Order remedying it should be summarily enforced. As to the second violation, the Board acknowledges that *D.R. Horton* is contrary circuit law and that the Court denied the Board's petition for initial hearing en banc to reconsider that controlling precedent in *Murphy Oil USA, Inc. v. NLRB*. As the Court set this case for briefing, however, the Board respectfully reiterates the reasons for its disagreement with *D.R. Horton*.<sup>2</sup> Moreover, the Board requests that the panel suggest to the full Court the appropriateness of en banc review to reconsider circuit law. *See* 5th Cir. IOP 35.

**I. The Board's Order Precluding the Maintenance of the Agreement Because Employees Reasonably Would Construe It as Barring Unfair-Labor-Practice Charges Should Be Summarily Enforced**

An employer violates Section 8(a)(1) by maintaining a policy that prohibits employees from filing unfair-labor-practice charges with the Board, or that employees reasonably would construe as prohibiting them from doing so. *D.R. Horton*, 737 F.3d at 363-64; *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), *enforced mem.*, 255 F. App'x 527 (D.C. Cir. 2007). Substantial evidence supports the Board's finding that employees reasonably would construe the Agreement as prohibiting them from filing such charges. The Agreement's

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<sup>2</sup> On June 12, the Court denied both the Board's motion to place this case in abeyance pending the Court's decision in *Murphy Oil*, and Chesapeake's motion for summary reversal.

requirement that employees pursue “any . . . disputes which may arise out of or relate to employment” through binding arbitration expressly includes “claims under . . . the National Labor Relations Act.” (R 34.)

Chesapeake does not object (Br. 5 n.1) to enforcement of the Board’s Order instructing it to revise the Agreement to make clear to employees that the Agreement does not restrict their right to file charges with the Board. Accordingly, that portion of the Board’s Order should be summarily enforced. *Sara Lee Bakery Group, Inc. v. NLRB*, 514 F.3d 422, 429 (5th Cir. 2008).

## **II. The Agreement Prohibits Employees from Concertedly Pursuing Work-Related Legal Claims in Violation of the NLRA, and the FAA Does Not Mandate Its Enforcement**

Because employees’ right to pursue work-related legal claims concertedly is protected by Section 7 of the NLRA, Chesapeake’s categorical prohibition on the exercise of that right as a condition of employment violates Section 8(a)(1).

Relying on FAA decisions of the Supreme Court that did not address the NLRA at all, the Court nonetheless held in *D.R. Horton* that the FAA mandates enforcement of such agreements. If it had properly applied the Supreme Court’s FAA precedent, the Court would have found that the FAA does not authorize enforcement of an arbitration agreement that requires a prospective waiver of substantive rights afforded by federal statutes. Because the Supreme Court has instructed that lower courts are not to treat its decisions as authoritative on issues

of law that it did not decide, *D.R. Horton*'s overreading of the Supreme Court's FAA jurisprudence constitutes error. See *UFCW, Local 1036 v. NLRB*, 307 F.3d 760, 774 (9th Cir. 2002) (en banc) (citing *Alexander v. Sandoval*, 532 U.S. 275, (2001)).

**A. No Supreme Court Case Has Addressed How the Unique NLRA Right To Engage in Concerted Activity Affects the Legality of Agreements That Require Individual Arbitration**

In finding that the FAA mandates enforcement of arbitration agreements that waive the right to pursue work-related claims concertedly, *D.R. Horton* relied on cases dealing with such agreements in the context of federal statutes other than the NLRA. 737 F.3d at 357-58, 361. Specifically, the Court cited *Gilmer*, which addressed the arbitration of ADEA claims, 500 U.S. at 32, and *Carter*, which concerned the FLSA, 362 F.3d at 298. None of the cases that *D.R. Horton* cites, and none of the Supreme Court's FAA cases, have considered the effect of the NLRA on the legality of agreements requiring employees to arbitrate all disputes individually. The absence of that analysis is critical, as the NLRA is a distinctive statute that provides additional, and materially different, rights.

The NLRA is unique among employment statutes in that it affords employees a statutory right to engage in concerted activity for mutual aid or protection. 29 U.S.C. § 157. Under the FLSA or the ADEA, a party “does not forgo [a] substantive right” by agreeing to individual arbitration. *Gilmer*, 500

U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); *see also Carter*, 362 F.3d at 298-300. Although those individual-rights statutes contain provisions that refer to collective legal action, those ancillary procedures are in service of the ultimate substantive goal of wage-and-hour protections or freedom from age discrimination. Under the NLRA, by contrast, concerted activity is not merely a procedural means of vindicating a statutory right; rather, it is itself a core statutory right. For employees covered by the NLRA, an agreement precluding the concerted pursuit of work-related claims in any forum is thus akin to a contract that requires employees to agree, as a condition of employment, that they will not be paid the minimum wage or can be fired on the basis of age.

Because a different right is at stake here than in cases like *Gilmer* or *Carter*, a different result is unsurprising. Mandatory waivers of concerted legal action are unlawful under the NLRA even if they do not offend the ADEA, FLSA, or other statutes granting individual work-related rights. Just because an employer's action is not prohibited by one statute "does not mean that [it] is immune from attack on other statutory grounds in an appropriate case." *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 71-72 (1975); *see also New York Shipping Ass'n, Inc. v. Fed. Mar. 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.”).

In short, the difference in outcome is warranted given that employees covered by the NLRA have an additional right that other employees do not have. Even in cases brought to vindicate individual workplace rights under other statutes, employees covered by the NLRA carry into court not only those individual rights but also the separate Section 7 right to act concertedly. Those employees thus may properly be entitled to more relief than plaintiffs who either do not enjoy or fail to assert that additional right.

*D.R. Horton*'s failure to recognize the novel nature of the issue before it led to its flawed conclusion that FAA precedent required enforcement of the arbitration agreement. That conclusion is not dictated by prior decisions, however, and, as described below, is inconsistent with FAA principles.

**B. *D.R. Horton* Failed To Analyze the Issues Presented in Accordance with Supreme Court FAA Precedent**

Had *D.R. Horton* properly applied the Supreme Court's FAA precedent to the novel legal issue it confronted, it would have examined the NLRA and determined whether the arbitration agreement required a waiver of the substantive rights that statute affords. That is the analytical approach sanctioned by the Supreme Court's FAA cases. As the Supreme Court reiterated in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013), the FAA

does not authorize the prospective waiver of substantive federal rights.

Accordingly, courts will not enforce under the FAA “a provision in an arbitration agreement forbidding the assertion of certain statutory rights.” *Id.*; *see also* *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) (“[A] substantive waiver of federally protected civil rights will not be upheld . . .”). Under that principle, courts have distinguished between a statute’s ancillary procedural provisions, which can be waived in an arbitration agreement, and “the nonwaivable ‘substantive’ right protected by [it].” *Pyett*, 556 U.S. at 256 n.5.

Whether a right is substantive depends on an examination of the statute that created it, and whether it is critical to the purpose and goal of that statute. Thus, the Supreme Court enforced an arbitration provision covering ADEA claims in *Gilmer* because the substantive right protected by that statute was freedom from age discrimination, not the ability to bring such claims in a judicial forum. 500 U.S. at 27-29. The latter was merely ancillary to the animating purpose of the statute. *Id.*; *see also Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989) (Securities Act’s forum provisions are not “essential features” of the statute and thus not “so critical that they cannot be waived”); *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 677-78 (5th Cir. 2006) (enforcing arbitration agreement as to Uniformed Services Employment and Reemployment Rights Act claims because that statute’s “defined substantive rights

relate to compensation and working conditions, not to affording a particular forum for dispute resolution”).

The question of whether Section 7 rights—including the right to pursue work-related legal claims concertedly—are substantive for FAA purposes thus turns on an interpretation of the NLRA. Because the Board is charged with the primary authority to perform that task, its interpretations of the NLRA receive “considerable deference.” *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984). And the Board’s determination that concerted activity under Section 7 is “the core substantive right protected by the NLRA,” *D.R. Horton*, 2012 WL 36274, at \*12; *see also Murphy Oil*, 2014 WL 5465454, at \*9, is supported by text, policy, and caselaw. Indeed, the entire architecture of federal labor law and policy extends from Section 7’s protection of concerted activity. The opening provision of the NLRA declares that protecting concerted activity for mutual aid is “the policy of the United States.” 29 U.S.C. § 151. Section 8 prohibits employers and unions from restraining or coercing employees in the exercise of Section 7 rights. 29 U.S.C. § 158(a), (b). Section 9 establishes procedures to implement the aspects of Section 7 related to representation. 29 U.S.C. § 159. And Section 10 empowers the Board to adjudicate and prevent violations of Section 8. 29 U.S.C. § 160. Moreover, the Supreme Court has called the right to engage in concerted activity “fundamental.” *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

Nonetheless, *D.R. Horton* failed to honor the Board’s reasonable interpretation of that core provision of the NLRA. That analytical error reflected a disregard for the Board’s interpretive role and led the Court to uphold an arbitration agreement waiving a substantive federal right, in contravention of FAA principles.

**C. *D.R. Horton* Erred in Finding the Board’s Position in Conflict with the FAA**

In finding the Board’s legal position in conflict with the FAA, *D.R. Horton* failed properly to apply the Supreme Court’s FAA precedent to the different situation that is presented when an arbitration agreement requires a prospective waiver of a core substantive right under the NLRA.

First, as explained above, the Supreme Court has repeatedly emphasized that it will not sanction the enforcement of arbitration agreements that prospectively waive substantive federal rights. *See Italian Colors Rest.*, 133 S. Ct. at 2310; *Pyett*, 556 U.S. at 256 n.5, 273; *Mitsubishi Motors*, 473 U.S. at 637 n.19. Accordingly, a mandatory arbitration agreement is unenforceable under governing FAA principles when it violates Section 8(a)(1) of the NLRA by prospectively restricting employees’ Section 7 rights.

Second, under the FAA’s savings clause, an arbitration agreement is invalid on the same grounds as exist to revoke any contract. 9 U.S.C. § 2. One such established ground for revocation is illegality of the contract. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-84 (1982) (“[A] federal court has a duty to

determine whether a contract violates federal law before enforcing it.”); *Courier-Citizen Co. v. Boston Electrotypers Union No. 11*, 702 F.2d 273, 276 n.6 (1st Cir. 1983) (explaining that “the federal courts may not enforce a contractual provision that violates section 8 of the [NLRA]”). The defense of illegality applies to agreements that require waiver of the right to pursue work-related claims concerted, as longstanding Board and court precedent holds that individual contracts cannot restrict Section 7 rights as a condition of employment. *Nat’l Licorice*, 309 U.S. at 359-61, 364; *Stone*, 125 F.2d at 756; cf. *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 175-76 (2001), *enforced*, 354 F.3d 534 (6th Cir. 2004). Individual contracts that forbid employees from presenting grievances “in any way except personally” or otherwise “stipulate[] for the renunciation . . . of rights guaranteed by the [NLRA]” are thus unenforceable. *Nat’l Licorice*, 309 U.S. at 360-61. An employer cannot evade that prohibition on contractual renunciation of Section 7 rights by using the particular vehicle of an arbitration agreement. Under the FAA’s savings clause, such agreements are equally illegal and, thus, equally unenforceable.

Rather than addressing *National Licorice* and its progeny, *D.R. Horton’s* savings-clause analysis consisted solely of an analogy to the Supreme Court’s decision in *Concepcion*, another case that did not deal with the NLRA. In *Concepcion*, the Court held that the FAA preempted a state-law, judge-made rule

that often was applied to find agreements requiring individual arbitration unconscionable; the rule was intended to ensure prosecution of low-value claims by enabling consumers to bring them collectively. 131 S. Ct. at 1746; *see also Italian Colors*, 133 S. Ct. at 2312 & n.5. In contrast to that “manufactured” rule, 131 S. Ct. at 1750-51, the Board’s policy protects a specific right embodied in, and central to the principal objective of, a federal statute. Under the NLRA, concerted legal action is not an incentive to pursue other claims but a key substantive right.

Finally, enforcement of an arbitration agreement under the FAA may be precluded by a contrary congressional command in a different statute.

*Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226-27 (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. Here, such a command is evident in the NLRA’s text, which directs employers not to interfere with their employees’ right to engage in concerted activity for mutual aid or protection. 29 U.S.C. § 158(a)(1). An interpretation of the FAA that enables employers to require individual employees to waive Section 7 rights would also present an inherent conflict with the NLRA, given the foundational nature of Section 7 to that statute. Such an interpretation would contravene the principle that, where two federal statutes apply, they both should be accommodated. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974)

("[W]hen two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective."). The FAA cannot be used to shield employer efforts to abrogate the NLRA.

In sum, Chesapeake's categorical prohibition of its employees' exercise of a core substantive right as a condition of employment violates Section 8(a)(1). No Supreme Court case has held that the FAA requires enforcement of such policies, and *D.R. Horton* erred fundamentally in concluding otherwise by relying on cases addressing statutes other than the NLRA that provide materially different rights. As a consequence, it failed to recognize that enforcing a waiver of the NLRA right to engage in concerted activity—including pursuit of legal claims—offends the FAA principle that substantive rights cannot be waived, undermines the general contract defenses that the FAA preserves, and contravenes a contrary congressional command. The NLRA's protection of concerted activity is what distinguishes it from other employment statutes and what renders policies like the Agreement that require *individual* arbitration unlawful under the NLRA and unenforceable under the FAA.

## CONCLUSION

The Board respectfully requests that the Court deny Chesapeake's petition for review and enforce the Board's Order.

Respectfully submitted,

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National Labor Relations Board  
September 2015

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

CHESAPEAKE ENERGY CORPORATION,	)	
and its wholly owned subsidiary	)	
CHESAPEAKE OPERATING, INC.	)	Nos. 15-60326
	)	
Petitioner/Cross-Respondent	)	
	)	Board Case No.
v.	)	14-CA-100530
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 4,370 words of proportionally spaced, 14-point type, and the word-processing system used was Microsoft Word 2010.

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this 30<sup>th</sup> day of September, 2015

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	)	
Respondent/Cross-Petitioner	)	
	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on September 30, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that 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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