

**Nos. 16-1099, 16-1159**

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

**AT&T MOBILITY SERVICES, LLC**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**EUDORA BROOKS, JUAN FIGUEROE**

**Intervenors**

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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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**KIRA DELLINGER VOL**  
*Supervisory Attorney*

**JOEL A. HELLER**  
*Attorney*

*National Labor Relations Board*  
**1015 Half Street SE**  
**Washington, DC 20570**  
**(202) 273-0656**  
**(202) 273-1042**

**RICHARD F. GRIFFIN, JR.**  
*General Counsel*

**JENNIFER ABRUZZO**  
*Deputy General Counsel*

**JOHN H. FERGUSON**  
*Associate General Counsel*

**LINDA DREEBEN**  
*Deputy Associate General Counsel*

**National Labor Relations Board**

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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of AT&T Mobility Services, LLC (“AT&T”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order issued on January 21, 2016, and reported at 363 NLRB No. 99. 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 proceeding 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 AT&T transacts business in this circuit.

### **STATEMENT OF THE ISSUE**

Did the Board reasonably find that AT&T violated Section 8(a)(1) of the NLRA by maintaining a policy barring employees from concertedly pursuing work-related legal claims in any forum?

### **STATEMENT OF THE CASE**

#### **I. THE BOARD’S FINDINGS OF FACT**

AT&T provides wireless voice and data communications services nationwide. (JA 82; JA 24.)<sup>1</sup> In 2011, AT&T implemented a Management Arbitration Agreement (“the Agreement”). (JA 83; JA 19-22, 40.) Under the Agreement, “disputes regarding the employment relationship” (with certain enumerated exceptions) are decided in binding arbitration rather than court litigation. (JA 83; JA 19-20.) The Agreement further provides that “[a]ny

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<sup>1</sup> “JA” cites are to the Joint Appendix. References preceding a semicolon are to the Board’s findings; cites following a semicolon are to supporting evidence. “Br.” cites are to AT&T’s opening brief to the Court, and “Chamber Br.” cites are to the brief of amicus curiae Chamber of Commerce.

arbitration under this Agreement will take place on an individual basis,” and an employee “waive[s] any right to bring on behalf of persons other than yourself, or to otherwise participate with other persons in: any class action; collective action; or representative action.” (JA 83; JA 19-20.)

In November 2011, AT&T emailed a link to the Agreement to 24,000 of its employees, including national retail account representatives like charging parties Eudora Brooks and Juan Figuereo, who were instructed to read the Agreement and click “Review Completed.” (JA 83; JA 18-19, 40.) Questions about the policy were directed to a hotline operated by the human-resources department. (JA 83, 86; JA 19, 64-65.) AT&T informed employees that they would be deemed to have consented to the Agreement and would be bound to participate in its arbitration program unless they opted out by midnight on February 6, 2012. (JA 83; JA 19.) In order to opt out, an employee had to log in to the company intranet with her unique employee user name and electronically register her decision. (JA 83; JA 19, 61.) AT&T monitored responses, and sent reminder emails in December 2011 and January 2012 to employees who had not yet clicked the “Review Completed” button. Brooks and Figuereo reviewed the Agreement, but did not opt out by the deadline. (JA 83-84; JA 41, 54.)

In June 2013, AT&T employees Brooks, Nikki Amari, and Lisa LoCurto filed a putative class-action lawsuit in federal district court alleging that AT&T

failed to pay overtime to its national retail account representatives in violation of the Fair Labor Standards Act and New York and New Jersey state law. AT&T told Brooks and Amari that they were bound by the Agreement because they had not opted out, and thus had to pursue their claims individually through arbitration. Brooks and Amari thereafter dismissed their suit. LoCurto, who had opted out of the Agreement, proceeded with her suit against AT&T. The district court subsequently granted conditional certification to the collective action, excluding employees who had not opted out of the Agreement. (JA 84-85; JA 23-39.)

## **II. PROCEDURAL HISTORY**

Acting on unfair-labor-practice charges filed by Brooks and Figuereo, the Board's General Counsel issued a complaint alleging that AT&T violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by maintaining a policy under which employees waived their right to engage in concerted legal action in any forum. The case was heard before an administrative law judge, who issued a decision and recommended order finding a violation as alleged.<sup>2</sup>

## **III. THE BOARD'S CONCLUSIONS AND ORDER**

On January 21, 2016, the Board (Chairman Pearce and Member McFerran; Member Miscimarra, dissenting) issued a Decision and Order affirming the judge's

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<sup>2</sup> The complaint also alleged that AT&T violated Section 8(a)(1) by enforcing the Agreement to compel individual arbitration, but the General Counsel limited his briefing to the maintenance violation. (JA 79 n.1.)

rulings and conclusions and adopting the judge's recommended order, as modified. The Board found that AT&T violated Section 8(a)(1) by maintaining the Agreement with its waiver of the right to engage in concerted legal action in all forums. The Board's Order requires AT&T to cease and desist from maintaining such a policy. Affirmatively, AT&T must rescind or revise the Agreement, notify current and former employees who were bound by the Agreement of the change, and post a remedial notice.

### STANDARD OF REVIEW

In enacting the NLRA, Congress established the Board and charged it with the primary authority to interpret and apply the statute. *Garner v. Teamsters, Chauffeurs & Helpers Local 776*, 346 U.S. 485, 490 (1953). Accordingly, “if the Board’s construction of the National Labor Relations Act is defensible,’ it is entitled to considerable deference.” *Bonnell/Tredegar Indus., Inc. v. NLRB*, 46 F.3d 339, 343 (4th Cir. 1995) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)); *see also City of Arlington v. FCC*, 133 S. Ct. 1863, 1870-71 (2013) (to reject agency interpretation of statute within its expertise requires showing that “the statutory text forecloses” agency’s interpretation). Specifically, the Court will “uphold the Board’s legal interpretations if they are rational and consistent with the [NLRA].” *Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267, 273 (4th Cir. 2003)

(internal quotations omitted). Questions of law regarding other statutes are reviewed de novo. *Bonnell/Tredegart Indus.*, 46 F.3d at 343.

### SUMMARY OF ARGUMENT

This case arises at the intersection of two federal statutes: the NLRA and the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (“FAA”). To the extent possible, both must be given effect. Applying its decisions in *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), *petition for reh’g en banc denied*, 5th Cir. No. 12-60031 (April 16, 2014), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (2014), *enforcement denied in relevant part*, 808 F. 3d 1013 (5th Cir. 2015), *petition for reh’g en banc denied*, 5th Cir. No. 14-60800 (May 13, 2016), the Board reasonably held that AT&T’s Agreement violates the NLRA, and correctly found that its unfair-labor-practice finding does not offend the FAA’s general mandate to enforce arbitration agreements according to their terms.

Longstanding Supreme Court and Board precedent establish that Section 7 of the NLRA protects employees’ right to pursue work-related legal claims concertedly. It also makes clear that individual agreements that prospectively waive Section 7 rights are unlawful. Such waivers violate Section 8(a)(1), which bars interference with Section 7 rights. Accordingly, AT&T’s maintenance of an agreement that requires employees to arbitrate all employment-related disputes

individually violates the NLRA. The presence of an opt-out procedure does not save the Agreement, as the impact on Section 7 rights remains in place, and the opt-out requirement imposes its own burdens on those rights.

The Board also correctly found that the FAA does not mandate enforcement of the Agreement. Because the Agreement violates the NLRA, it fits within the FAA's savings clause, which exempts from enforcement arbitration agreements subject to general contract defenses such as illegality. As the Board found, the Agreement violates the NLRA for reasons unrelated to arbitration, and which have consistently been applied to various types of individual contracts. The Supreme Court's FAA jurisprudence does not compel a different result. The Court has enforced agreements requiring individual arbitration in other contexts, but has never held that the FAA mandates enforcement of an arbitration agreement that directly violates another federal statute. Such a result would run counter to the longstanding principle that when two co-equal statutes can be harmonized, courts should give effect to both.

## ARGUMENT

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

#### **A. Section 7 of the NLRA Protects Concerted Legal Activity for Mutual Protection**

Section 7 guarantees employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other concerted activities* for the purpose of collective bargaining or other *mutual aid or protection*, and ... to refrain from any or all of such activities.” 29 U.S.C. § 157 (emphasis added). As explained below, courts have long upheld the Board’s construction of Section 7 as protecting concerted pursuit of work-related legal claims, consistent with the language and purposes of the NLRA. That construction falls squarely within the Board’s expertise and its responsibility for delineating federal labor law generally, and Section 7 in particular. *See NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (noting that “the task of defining the scope of [Section] 7 ‘is for the Board to perform in the first instance as it considers the wide variety of cases that come before it’”) (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978)); accord *Monongahela Power Co. v. NLRB*, 62 F.3d 1415 (4th Cir. 1995).

Central to this case is the Board’s holding that the right of employees to engage in concerted activity for mutual aid or protection – the “basic premise”

upon which our national labor policy has been built, *Murphy Oil*, 2014 WL 5465454, at \*1 – includes concerted *legal* activity. The reasonableness of the Board’s view was confirmed by the Supreme Court in *Eastex*, 437 U.S. at 565-66 & nn.15-16. In that case, the Court recognized 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,” including “through resort to administrative and judicial forums.” *Id.* at 565-66.<sup>3</sup>

Indeed, as *Eastex* notes, the Board has protected concerted legal activity for decades. *Id.* at 565-66 & n.15. That line of cases dates back to *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-50 (1942), in which the Board found protected three employees’ joint lawsuit filed under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, et seq. It continues, unbroken and with court approval, through

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<sup>3</sup> AT&T erroneously claims (Br. 29 n.8) that *Eastex* concerned only employer *retaliation* for protected activity. The NLRA protects employees from all kinds of interference, restraint, and coercion, not just retaliation. Whether an employer violates Section 8 by retaliating against employees for Section 7 activity or by prospectively prohibiting it (which implicitly threatens retaliatory consequences for disregard of the ban) does not affect the scope of protection. Moreover, the prerequisite for a finding that employers cannot retaliate against employees for certain activity is that employees have a right to engage in that activity. And *Eastex* was not, in fact, a case about retaliation; like AT&T, the employer in *Eastex* violated Section 8(a)(1) by prospectively barring Section 7 activity. *See* 437 U.S. at 559-62 (unlawfully banning distribution of protected literature).

modern NLRA jurisprudence. *See, e.g., Lewis v. Epic Sys. Corp.*, ---F.3d---, 2016 WL 3029646, at \*2 (7th Cir. 2016) (“[F]iling a collective or class action suit constitutes ‘concerted activit[y]’ under Section 7.”); *Brady v. Nat’l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) (“[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 ....”); *Moss Planing Mill Co.*, 103 NLRB 414, 419 (1953) (employees “acted in concert for their mutual aid and protection in prosecuting their wage claims under the wage and hour law”), *enforced*, 206 F.2d 557 (4th Cir. 1953).<sup>4</sup>

Section 7’s protection of legal activity for mutual aid or protection advances the objectives of the NLRA. The NLRA protects 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).

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<sup>4</sup> *Accord Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188-89 (D.C. Cir. 2000) (concerted petitions for injunctions against workplace harassment protected by Section 7); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) (“Generally, filing by employees of a labor related civil action is protected activity under section 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); *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).

Protecting employees' ability to resolve workplace disputes collectively in an adjudicatory forum effectively serves that purpose because collective lawsuits are an alternative to strikes and other disruptive protests. *D.R. Horton*, 357 NLRB at 2279-80. Conversely, denying employees access to concerted litigation "would only tend to frustrate the policy of the [NLRA] to protect the right of workers to act together to better their working conditions." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

*Salt River Valley Water Users' Association v. NLRB* aptly illustrates how concerted legal activity functions as a safety valve when a labor dispute arises. 206 F.2d 325 (9th Cir. 1953). In that case, unrest over the employer's wage policies prompted an employee to circulate a petition among co-workers designating him as their agent to seek back wages under the FLSA. Recognizing that concerted activity "is often an effective weapon for obtaining [benefits] to which [employees] ... are already 'legally' entitled," *id.* at 328, the court upheld the Board's holding that Section 7 protected the employees' effort to exert group pressure on the employer to redress their work-related claims through resort to legal processes.

Protecting employees' concerted pursuit of legal claims also advances the congressional objective of "restoring equality of bargaining power between employers and employees." 29 U.S.C. § 151; *accord Murphy Oil*, 2014 WL

5465454, at \*1. Recognizing the strength in numbers, statutory employees have long exercised their Section 7 right to band together to take advantage of the evolving body of laws and procedures that legislatures have provided to redress their grievances. *See supra* pp. 9-10. Such collective legal action seeks to unite workers generally and to lay a foundation for more effective collective bargaining. *See Eastex*, 437 U.S. at 569-70. That result, in turn, furthers the NLRA's objective of enabling employees, through collective action, to increase their economic well-being. *See Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 753-54 (1985) (noting Congress's intention to remedy "the widening gap between wages and profits") (quoting 79 Cong. Rec. 2371 (1935)).<sup>5</sup>

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<sup>5</sup> As the Board has emphasized, what Section 7 protects in this context is the employees' right to act in concert "to pursue joint, class, or collective claims *if and as available*, without the interference of an employer-imposed restraint." *Murphy Oil*, 2014 WL 5465454, at \*2 (second emphasis added). The Board's position thus is not impaired by recognizing that Federal Rule of Civil Procedure 23, which governs class actions, does not "establish an entitlement to class proceedings for the vindication of statutory rights." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

Nor, contrary to AT&T's assertion (Br. 29-30), does it matter that modern class-action procedures were not available to employees in 1935 when the NLRA was enacted. Joint and collective claims of various forms long predate Rule 23, *Lewis*, 2016 WL 3029646, at \*3-4, as do the Board's earliest decisions finding that Section 7 protects the collective legal pursuit of work-related claims. *See supra* pp. 9-10. In any event, the NLRA was drafted to allow the Board to respond to new developments. *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (recognizing Board's "responsibility to adapt the [NLRA] to changing patterns of industrial life"). The relevant point is that when class-action procedures became available, the NLRA barred employers from interfering with their employees'

In sum, the Board has reasonably construed Section 7 as guaranteeing employees the option of resorting to concerted pursuit of legal claims to advance work-related concerns. That construction is supported by longstanding Board and court precedent. It also reflects the Board's sound judgment that concerted legal activity is a particularly effective means to advance Congress's goal of avoiding labor strife and economic disruptions. And that judgment falls squarely within the Board's area of expertise and responsibility. *City Disposal*, 465 U.S. at 829.

**B. The Agreement's Waiver of Employees' Right To Engage in Concerted Action Violates Section 8(a)(1) of the NLRA**

By prospectively waiving employees' Section 7 right to engage in concerted legal action, the Agreement violates Section 8(a)(1) of the NLRA. The presence of an opt-out procedure does not render the Agreement lawful, as it does not alleviate the underlying impact on Section 7 rights and imposes its own burden on employees' exercise of those rights.

**1. Individual agreements that prospectively waive employees' Section 7 rights violate Section 8(a)(1)**

An employer violates Section 8(a)(1) of the NLRA by "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in

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Section 7 right to use those new procedures for their mutual aid or protection. No more availing is AT&T's assertion (Br. 30-31) that Rule 23 is a "procedural device." It is the NLRA, not Rule 23, that creates the right to engage in concerted legal action; Rule 23 is just one mechanism for exercising a Section 7 right, akin to a picket sign or a handbill.

section 7.” 29 U.S.C. § 158(a)(1). Employer conduct is thus unlawful if it “may reasonably tend to coerce or intimidate employees” in the exercise of their Section 7 rights. *NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1044 (4th Cir. 1997); *see also Sunrise Senior Living, Inc. v. NLRB*, 183 F. App’x 326, 337 (4th Cir. 2006) (conduct violates Section 8(a)(1) that “reasonably ... tends to interfere with the free exercise of employee rights under the Act” (internal quotations omitted)). Because employees subject to the Agreement must bring work-related claims “on an individual basis” and “waive any right to bring on behalf of persons other than yourself, or to otherwise participate with other persons in: any class action; collective action; or representative action” (JA 19-20), the Agreement explicitly restricts Section 7 activity. Therefore, as the Board found (JA 79, 85), it violates Section 8(a)(1). *See Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004) (facial restrictions on Section 7 activity unlawful).

Moreover, as the Board explained in *D.R. Horton*, 357 NLRB at 2280-81, and *Murphy Oil*, 2014 WL 5465454, at \*1, 6, longstanding Board and court precedent establish that restrictions on Section 7 rights are unlawful even if they take the form of agreements between employers and employees. In *National Licorice Co. v. NLRB*, the Supreme Court held that individual contracts in which employees prospectively relinquish their right to present grievances “in any way except personally” or otherwise “stipulate[] for the renunciation ... of rights

guaranteed by the [NLRA]” are unenforceable, and are “a continuing means of thwarting the policy of the [NLRA].” 309 U.S. 350, 360-61 (1940). As the Court explained, “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. Similarly, in *NLRB v. Stone*, the Seventh Circuit held that individual contracts requiring employees to adjust their grievances with their employer individually violate the NLRA, even when “entered into without coercion.” 125 F.2d 752, 756 (7th Cir. 1942); *accord Lewis*, 2016 WL 3029646, at \*4; *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”).

Applying that principle, the Board has found unlawful a variety of individual agreements under which employees or job applicants forfeit their Section 7 rights. *See, e.g., First Legal Support Servs., LLC*, 342 NLRB 350, 362-63 (2004) (unlawful to have employees sign contracts stripping them of right to organize); *Eddyleon Chocolate Co.*, 301 NLRB 887, 887 (1991) (unlawful to ask job applicant to agree not to join union). It has also regularly set aside settlement agreements that require such waivers as conditions of reinstatement. *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 protest, on agreement not to engage in further similar protests); *Bethany Med. Ctr.*, 328 NLRB 1094, 1105-06 (1999) (same); *cf. Ishikawa Gasket America, Inc.*, 337 NLRB 175, 175-76 (2001) (employer unlawfully conditioned employee's severance payments on agreement not to help other employees in workplace disputes or act "contrary to the [employer's] interests in remaining union-free"), *enforced*, 354 F.3d 534 (6th Cir. 2004). And it has found unlawful agreements in which employees have prospectively waived their Section 7 right to access the Board's processes. *See, e.g., McKesson Drug Co.*, 337 NLRB 935, 938 (2002) (unlawful to condition return from suspension on waiver of present and future rights to invoke Board's processes for alleged unfair labor practices); *Reichhold Chems., Inc.*, 288 NLRB 69, 71 (1988) (explaining "in futuro waiver" of right to access Board's processes is contrary to NLRA).

The principle that individual prospective waivers of Section 7 rights are unlawful applies even if those waivers are "not a condition of employment," such that "the status of individual employees [is not] affected by reason of signing or failing to sign." *J.I. Case*, 321 U.S. at 333; *accord Stone*, 125 F.2d at 756; *On Assignment Staffing Servs., Inc.*, 362 NLRB No. 189, 2015 WL 5113231, at \*5-11 (2015), *petition for review filed*, 5th Cir. No. 15-60642. Accordingly, an employee's Section 7 rights cannot prospectively be "traded away" through an individual agreement with her employer, even if the employee herself was

“responsible for instigating” the agreement. *Mandel Sec. Bureau, Inc.*, 202 NLRB 117, 119 (1973). Indeed, courts have recognized that an employee “can be coerced and restrained by a condition voluntarily accepted when compliance with that condition would interfere with ... exercise of his section 7 rights.” *NLRB v. Local 73, Sheet Metal Workers’ Int’l Ass’n*, 840 F.2d 501, 506 (7th Cir. 1988) (emphasis omitted); accord *United Mine Workers*, 305 NLRB 516, 520 (1991) (rejecting argument that when employees “voluntarily undertake a contractual commitment[,] ... holding them to that promise cannot be considered ‘restraint or coercion’” of Section 7 rights). In *NLRB v. Bratten Pontiac Corp.*, 406 F.2d 349, 350-51 (4th Cir. 1969), for example, this Court found that an employer violated Section 8(a)(1) by offering employees a “pay plan” that they could choose whether or not to accept, because the plan included an agreement not to engage in concerted activity. See also *Eddyleon Chocolate Co.*, 301 NLRB at 887 (employer violated Section 8(a)(1) by “request[ing]” that job applicant agree not to join union).<sup>6</sup>

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<sup>6</sup> Individual agreements that wholly foreclose one avenue of Section 7 activity violate Section 8(a)(1) regardless of whether employees can engage in other types of Section 7 activity. See *Serendipity-Un-Ltd.*, 263 NLRB 768, 775 (1982) (employees have the right “to engage in concerted activity which they decide is appropriate,” even if “alternative methods of solving the problems” are available (internal quotations omitted)). The ability of employees to take other concerted actions thus does not, as AT&T suggests (Br. 35), somehow save an agreement that prospectively bars pursuit of concerted legal claims. For the same reason, employees’ ability to collaborate before filing legal claims (Br. 35) does not obviate the Agreement’s explicit infringement of their Section 7 right to pursue those claims concertedly.

Individual contracts that prospectively waive Section 7 rights thus 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. That proposition flows from the unique characteristics of those rights and the practical circumstances of their exercise. Collective action does not occur in a vacuum, but results from employee interaction with others. *See NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956) (“The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others”); *Harlan Fuel Co.*, 8 NLRB 25, 32 (1938) (the rights guaranteed to employees by Section 7 include “full freedom to receive aid, advice and information from others concerning [their self-organization] rights.”). The concerted activity of unorganized workers in particular often arises spontaneously when employees are presented with actual workplace problems and have to decide among themselves how to respond. *See, e.g., Washington Aluminum Co.*, 370 U.S. at 14-15 (concerted activity spurred by extreme cold in plant); *Salt River Valley*, 206 F.2d at 328 (concerted activity prompted by violations of minimum-wage laws).

As the Board has recognized, an individual employee’s decision whether collectively to walk out of a cold plant or to join with other employees in a lawsuit over wages and hours is materially different from the decision of an individual employee – made in advance of any concrete grievance – to agree to refrain from

any future concerted activity, regardless of the circumstances. *See Nijjar Realty, Inc.*, 363 NLRB No. 38, 2015 WL 7444737, at \*5 (2015) (noting that such waivers are made “at a time when the employees are unlikely to have an awareness of employment issues that may now, or in the future, be best addressed by collective or class action”), *petition for review filed*, 9th Cir. No. 15-73921. When actual workplace issues arise, the NLRA “allows employees to engage in ... concerted activity which they decide is appropriate.” *Plastilite Corp.*, 153 NLRB 180, 183 (1965), *enforced in relevant part*, 375 F.2d 343 (8th Cir. 1967); *see also Serendippity-Un-Ltd.*, 263 NLRB at 775 (same). In this context, prospective individual waivers, like the contract struck down in *National Licorice*, 309 U.S. at 361-62, impair the “full freedom” of the signatory employees to decide for themselves whether to participate in a particular concerted activity.<sup>7</sup>

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<sup>7</sup> For similar reasons, the Board and the courts have held that Section 7 precludes enforcement of individual waivers of an employee’s right to refrain from supporting a strike for its duration. *See NLRB v. Granite State Joint Board, Textile Workers Local 1029*, 409 U.S. 213, 217 (1972) (protecting employee’s right to “change his mind” regarding whether to participate in concerted activity based on “[e]vents occurring after” an initial decision whether to do so). In *Granite State*, the Court upheld the Board’s position that Section 7 preserves the option of an employee who has resigned from a union to decide not to honor a strike he once promised to support, and that a rule preventing him from doing so was unlawful. *Id.* at 214-17. Just as “the vitality of § 7 requires that the [employee] be free to refrain in November from the actions he endorsed in May,” *id.* at 217-18, an employee must be able to decide whether to engage in concerted activity when the opportunity for such activity arises, even after previously deciding not to do so when circumstances were different. *See also Mission Valley Ford Truck Sales*,

Prospective waivers of Section 7 rights are unlawful not only because they impair the rights of the employees who are party to them, but also because they preemptively deprive non-signatory employees of the signatory employees' mutual aid and support at the time that an actual dispute arises. That impairment occurs because, as discussed above, collective action depends on employees having the right to communicate with and appeal to fellow employees to join in such action. *See, e.g., Signature Flight Support*, 333 NLRB 1250, 1260 (2001) (finding employee efforts "to persuade other employees to engage in concerted activities" protected), *enforced mem.*, 31 F. App'x 931 (11th Cir. 2002); *Am. Fed'n of Gov't Emps.*, 278 NLRB 378, 382 (1986) (describing as "indisputable" that one employee "had a Section 7 right to appeal to [another employee] to join" in protected activity). That right includes appeals to employees of other employers as well as to co-workers. *See Eastex*, 437 U.S. at 564-65. Prospective waivers of the right to engage in concerted activity deprive non-signatory employees of any meaningful opportunity to enlist signatory employees in their cause.

Finally, where, as here, the prospective waiver of Section 7 rights operates to bar only concerted *legal* activity, the result is to limit the employees' options to comparatively more disruptive forms of concerted activity at a time when

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*Inc.*, 295 NLRB 889, 892 (1989) (employer could not hold employee to "earlier unconditional promises to refrain from organizational activity").

workplace tensions are high and employees are deciding which, if any, concerted response to pursue. As the Board has explained, *D.R. Horton*, 357 NLRB at 2279-80, the peaceful resolution of labor disputes is a core objective of the NLRA, and that objective is ill-served by individual agreements that prospectively waive the right of employees to consider the option of concerted legal action along with other collective means of advancing their interests as employees. Because agreements like AT&T's thus both violate the express provisions of the NLRA and stand contrary to the policies underlying it, the Board reasonably found them unlawful.

**2. The Agreement's opt-out provision does not render its prospective waiver of Section 7 rights lawful**

The Board reasonably found (JA 79) that an agreement, like AT&T's, that prospectively waives the right to engage in concerted legal action is unlawful regardless of whether employees have an initial opportunity to opt out. *See generally On Assignment*, 2015 WL 5113231, at \*5-11. As explained above, *supra* pp. 16-17, the principles articulated in cases like *National Licorice* and *J.I. Case* are not limited to individual contracts imposed as conditions of employment; the effect on employees' right to choose concerted action and the NLRA's goal of fostering industrial peace is the same regardless of whether the agreement is mandatory or voluntary. As the Board explained in *On Assignment*, "it is the

individual *agreement* itself not to engage in concerted activity that threatens the statutory scheme,” not how the agreement was secured. 2015 WL 5113231, at \*9.<sup>8</sup>

In addition, rather than eliminate the Agreement’s impact on Section 7 rights as AT&T suggests (Br. 43), the opt-out procedure imposes its own burdens on the exercise of those rights. *See On Assignment*, 2015 WL 5113231, at \*5-7. Because employees are required to participate in the Agreement’s arbitration program unless they opt out, AT&T forces employees to take affirmative action to preserve their statutory rights, or else lose them irrevocably. The opt-out requirement thus resembles the type of employer-imposed precondition to engaging in concerted activity that the Board has found to violate Section 8(a)(1). *See Chromalloy Gas Turbine Corp.*, 331 NLRB 858, 858 (2000) (unlawful to require employees to seek permission before engaging in concerted activity), *enforced*, 262 F.3d 184 (2d Cir. 2001); *Savage Gateway Supermarket, Inc.*, 286 NLRB 180, 183 (1987) (unlawful to require employees to notify their employer before engaging in concerted

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<sup>8</sup> AT&T reads (Br. 50-53) *National Licorice* and *J.I. Case* unduly narrowly. *National Licorice* is not, as AT&T would have it (Br. 51), limited to the precise situation in which a contract “prevented discharged employees from obtaining union representation,” but applies to any individual contract that “stipulate[s] for the renunciation by the employees of rights guaranteed by the [NLRA],” 309 U.S. at 361. In addition, AT&T wrongly suggests (Br. 52-53) that *J.I. Case* held individual contracts unlawful only when they conflict with a collective-bargaining agreement or were procured through an unfair labor practice. Instead, the Court made clear that an individual contract also violates the NLRA where the contract itself “amount[s] to” an unfair labor practice. *J.I. Case*, 321 U.S. at 339.

activity), *enforced*, 865 F.2d 1269 (6th Cir. 1989). Even for employees who opt out, the Agreement thus violates Section 8(a)(1) by “interfer[ing]” with Section 7 rights, 29 U.S.C. § 158(a)(1), even if it does not wholly restrict them.<sup>9</sup>

Further, as the Board noted (JA 79 n.3), employees subject to the Agreement’s opt-out requirement must make the choice whether to waive or retain their Section 7 rights with the knowledge that AT&T would be aware of their decision. As a practical matter, in order to give effect to employees’ decisions to opt out, an employer must maintain a record of which employees have done so. Here, employees had to register their decision to opt out of the Agreement on an internal AT&T website, which required them to log on to the site with their unique

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<sup>9</sup> Contrary to AT&T’s assertion (Br. 48-49), the Board’s position is not that every burden on Section 7 rights is unlawful. For example, the Board has long held that work rules that impact Section 7 rights (such as AT&T’s hypothetical confidentiality rule regarding trade secrets (Br. 49)) are valid if the employer presents “legitimate and substantial business justifications” for the rules that outweigh employees’ interest in exercising Section 7 rights. *Caesar’s Palace*, 336 NLRB 271, 272 & n.6 (2001) (upholding confidentiality rule regarding ongoing investigation into criminal behavior in the workplace despite restriction of Section 7 rights).

Similarly misplaced is AT&T’s assertion (Br. 46 n.17) that opt-out provisions do not restrict Section 7 rights because they are not procedurally unconscionable under contract law. Whether an agreement violates the NLRA is a different question involving a different mode of analysis; as the Board explained in *On Assignment*, an agreement “may amount to an unfair labor practice whether or not it would be condemned by contract law or some other legal regime.” 2015 WL 5113231, at \*11 n.29. The Agreement violates Section 8(a)(1) not because it is procedurally defective but because it imposes substantively unlawful restrictions.

company user names. (JA 61.) And employees who had questions about the Agreement were told to direct their inquiries to an AT&T human-resources hotline. (JA 19, 64-65.) In analogous situations, the Board has held that requiring employees to “make an observable choice that demonstrates their support for or rejection of” concerted activity is unlawful, as it has a coercive impact that reasonably tends to chill such activity. *Allegheny Ludlum Corp.*, 333 NLRB 734, 739 (2001) (internal quotations omitted), *enforced*, 301 F.3d 167 (3d Cir. 2002); *see also Stoner Lumber, Inc.*, 187 NLRB 923, 930 (1971) (“Employees’ right to remain silent ... to protect the secrecy of their concerted activities[] is protected by Section 7 of the Act.”), *enforced*, 1972 WL 3035 (6th Cir. 1972).<sup>10</sup>

AT&T contends (Br. 44-45) that the Agreement is lawful because an employee’s decision not to opt out implicates the Section 7 “right to refrain” from concerted activity. 29 U.S.C. § 157. But AT&T fails to recognize the difference between an employee’s decision not to engage in a particular concerted activity

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<sup>10</sup> The coercive impact in such circumstances stems not, as AT&T suggests (Br. 50), from the employer expressing its own position regarding concerted activity, but from forcing employees to display their sentiments; contrary to AT&T (Br. 50), the Board’s rationale thus does not implicate employers’ right, under Section 8(c) of the NLRA, to express “views, argument, or opinion,” absent “threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(c). *Cf. Allegheny Ludlum*, 301 F.3d at 177 (“[A]n employer, in questioning his employees as to their union sympathies, is not expressing views, argument, or opinion within the meaning of Section 8(c) of the [NLRA], as the purpose of an inquiry is not to express views but to ascertain those of the person questioned.” (internal quotations omitted)).

and the prospective waiver of the right to do so under any circumstances. *See supra* pp. 18-19. Similar to the choice to engage in concerted activity, the right to refrain belongs to the employee to exercise, free from employer interference, in the context of a concrete workplace dispute. Moreover, the Board's position does not, as AT&T suggests (Br. 44-45), impair the right to refrain – employees remain free to choose not to participate in a specific concerted legal action. *See Murphy Oil*, 2014 WL 5465454, at \*24 (“In prohibiting *employers* from requiring employees to pursue their workplace claims individually, *D.R. Horton* does not compel *employees* to pursue their claims concertedly.”). And, further, an *employee's* right to refrain from concerted activity is not license for the *employer* to require that she do so. Here, although AT&T did not force its employees to refrain from concerted activity, it provided the impetus for refraining and the means to do so by promulgating the Agreement and requiring employees to choose whether to consent to its waiver of Section 7 rights.<sup>11</sup>

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<sup>11</sup> In an analogous situation, the Board has held that, although an employee can resign from a union, an employer violates Section 8(a)(1) when, as here, it provides the tools for her to do so and keeps track of who uses those tools. *See, e.g., Mohawk Indus., Inc.*, 334 NLRB 1170, 1170-71 (2001). Such conduct “puts employees in the limelight and on the spot in a manner inconsistent with their basic Section 7 right freely to choose whether to engage in or refrain from union activities.” *Adair Standish Corp.*, 290 NLRB 317, 318 (1988), *enforced in relevant part*, 912 F.2d 854 (6th Cir. 1990).

In addition, given the collective nature of Section 7 rights, *supra* p. 20, even those employees who opt out of the Agreement are affected by its irrevocable waiver. When pursuing her collective action against AT&T for unpaid wages, for example, LoCurto – who opted out of the Agreement – was unable to exercise her “Section 7 right to appeal to” her co-workers who had failed to do so, *Am. Fed’n of Gov’t Emps.*, 278 NLRB at 382, or to “persuade [those] other employees” to join her suit, *Signature Flight Support*, 333 NLRB at 1260. The Agreement thus restricted LoCurto’s Section 7 rights even though she did not choose to refrain.

Finally, AT&T cites the Ninth Circuit’s decision in *Johnmohammadi v. Bloomingdale’s, Inc.*, 755 F.3d 1072, 1075-77 (9th Cir. 2014), which held that an opt-out agreement waiving the right to bring concerted legal claims did not “interfere with, restrain, or coerce” employees within the meaning of Section 8(a)(1). But, as explained above, the Board has reasonably concluded otherwise. The court in *Johnmohammadi* did not have the benefit of the Board’s subsequent decision in *On Assignment*, in which the Board articulated its rationale for finding that prospective bans on concerted legal action violate Section 8(a)(1) even if employees can opt out; at the time of *Johnmohammadi*, the Board had expressly reserved judgment on the issue, *see D.R. Horton*, 357 NLRB at 2289 n.28.<sup>12</sup> The

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<sup>12</sup> As the Seventh Circuit noted in *Lewis*, 2016 WL 3029646, at \*4, *Johnmohammadi* also conflicts with that court’s holding in *Stone*, 125 F.3d at 756,

matter of deference to the Board on that point thus was not before the court.

Further, the Ninth Circuit did not hold that its reading of Section 8(a)(1) was the only permissible one, and “[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation ... displaces a conflicting agency construction” that issues after the court’s decision. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005). Here, unlike in *Johnmohammadi*, this Court is reviewing the Board’s interpretation of Section 8(a)(1), an issue as to which the Board receives significant deference. *Garner*, 346 U.S. at 490.

In sum, the Agreement’s express bar on a key form of concerted activity violates Section 8(a)(1) of the NLRA. And it is no less unlawful for being styled an agreement or providing an opt-out procedure, in light of the longstanding prohibition on individual contracts that prospectively waive Section 7 rights. That AT&T used the particular vehicle of an arbitration agreement subject to the FAA to impose that prospective bar likewise does not excuse its restriction of Section 7 rights; AT&T cannot “attempt ‘to achieve through arbitration what Congress has expressly forbidden’” under the NLRA. *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 676 (4th Cir. 2016) (quoting *Graham Oil v. ARCO Prods. Co.*, 43 F.3d 1244,

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that individual agreements limiting Section 7 rights are per se unlawful even if “entered into without coercion.”

1249 (9th Cir. 1994)). As explained more fully below, such agreements thus are not entitled to enforcement under the FAA.

**C. The FAA Does Not Mandate Enforcement of Arbitration Agreements That Violate the NLRA by Prospectively Waiving Section 7 Rights**

AT&T's principal defense is that the FAA precludes enforcement of the Board's Order barring the prospective waiver of employees' Section 7 right to seek to improve working conditions through collective litigation. But that position contravenes the settled principle that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see also POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236-39 (2014). As demonstrated below, agreements that are unlawful under the NLRA are exempted from enforcement by the FAA's savings clause. There is thus no difficulty in fully enforcing each statute according to its terms.

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). That enforcement mandate, with its savings-clause exception, "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*, 563 U.S. 333, 339

(2011) (internal quotations omitted). “[C]ourts must [therefore] place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms.” *Id.*; see also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (FAA’s purpose is “to make arbitration agreements as enforceable as other contracts, but not more so”).

Pursuant to those core FAA principles, arbitration agreements that violate the NLRA by prospectively barring protected, concerted litigation fit within the savings-clause exception to enforcement. The Board’s holding to that effect in *D.R. Horton* and *Murphy Oil*, applied here, implements both the NLRA and the FAA and is consistent with Supreme Court precedent interpreting both statutes.

**1. Because an employee cannot prospectively waive Section 7 rights in any contract, the Agreement fits within the FAA’s savings-clause exception to enforcement**

The FAA’s savings clause is an express limitation on the FAA’s mandate to enforce arbitration agreements as written and, consequently, on the broad federal policy favoring arbitration. Under the savings clause, general defenses that would serve to nullify any contract also bar enforcement of arbitration agreements.

Conversely, defenses that affect only 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.” *Concepcion*, 563 U.S. at 339.

One well-established general contract defense is illegality. As the Supreme Court explained in *Kaiser Steel Corp. v. Mullins*, “a federal court has a duty to determine whether a contract violates federal law before enforcing it.” 455 U.S. 72, 83-84 (1982). Giving effect to that principle, the Court held that if a contract required an employer to cease doing business with another company in violation of the NLRA, it would be unenforceable. *Id.* at 84-86; *see also 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]”).

As described above, *supra* pp. 14-17, the Board, with court approval, has consistently rejected, as unlawful under the NLRA, a variety of individual contracts that are unrelated to arbitration because they prospectively restrict Section 7 rights. *Nat’l Licorice*, 309 U.S. at 360-61, 364. It has set aside settlement agreements that require employees to agree not to engage in concerted protests, *Bon Harbor Nursing & Rehab. Ctr.*, 348 NLRB at 1078; *Bethany Med. Ctr.*, 328 NLRB at 1105-06, and has found unlawful a separation agreement that was conditioned on the departing employee’s agreement not to help other employees in workplace disputes, *Ishikawa Gasket Am.*, 337 NLRB at 175-76. The Board has also found waivers of an employee’s right to engage in concerted legal action are unlawful in contracts that do not provide for arbitration. *See*

*Convergys Corp.*, 363 NLRB No. 51, 2015 WL 7750753, at \*1 & n.3 (2015) (application for employment), *petition for review filed*, 5th Cir. No. 15-60860; *cf.* *Logisticare Sols., Inc.*, 383 NLRB No. 85, 2015 WL 9460027, at \*1 (2015) (employee handbook), *petition for review filed*, 5th Cir. No. 15-60029. That unbroken line of precedent, dating from shortly after the NLRA's enactment, demonstrates that illegality under the NLRA has consistently served to invalidate a variety of contracts, not just arbitration agreements, and does not derive its meaning from arbitration.

Moreover, unlike the courts, whose hostility to arbitration prompted enactment of the FAA, *Concepcion*, 563 U.S. at 339, the Board harbors no prejudice against arbitration, *see Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 271 (1964) (discussing the Board's policies favoring arbitration as means of peacefully resolving workplace disputes). Nothing in the Board's *D.R. Horton* decision prohibits an employer from requiring arbitration of all *individual* work-related claims; as the Board explained, "[e]mployers remain free to insist that *arbitral* proceedings be conducted on an individual basis." 357 NLRB at 2288. What violates the NLRA is an agreement that prospectively forecloses the concerted pursuit of work-related claims in any forum, arbitral or judicial. Such an agreement unlawfully restricts employees' Section 7 right to decide for themselves,

at the time an actual workplace dispute arises, whether or not to join with others in seeking to enforce their employment rights. *Id.* at 2278-80.

Indeed, consistent with the Board's analysis in *D.R. Horton* and *Murphy Oil*, the Seventh Circuit recently held that arbitration agreements similar to AT&T's "meet[] the criteria of the FAA's savings clause for nonenforcement" because they waive employees' Section 7-protected right to engage in concerted action in violation of Section 8(a)(1). *Lewis*, 2016 WL 3029646, at \*6. In coming to that conclusion, the court agreed with the Board that contracts restricting Section 7 activity are illegal. *Id.* at \*4, 6. It also noted that, rather than embodying hostility, the NLRA "does not disfavor arbitration" as a mechanism of dispute resolution. *Id.* at \*7.

In sum, because the defense that a contract is illegal under the NLRA is unrelated to the fact that an agreement to arbitrate is at issue, that defense falls comfortably within the FAA's savings-clause exception. In other words, the Board's finding that AT&T violated the NLRA by maintaining an agreement that requires arbitration of all work-related claims on an individual basis adheres to the FAA policy of enforcing arbitration agreements on the same terms as other contracts.<sup>13</sup> There is no conflict between either the express statutory requirements,

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<sup>13</sup> Because Section 7 is only implicated when the agreement applies to work-related claims of statutory employees, it poses no impediment to enforcement of arbitration agreements that apply to consumer, commercial, or other non-

or animating policy considerations, of the FAA and NLRA with respect to that unfair labor practice.<sup>14</sup>

**2. The Board's *D.R. Horton* and *Murphy Oil* decisions are consistent with the Supreme Court's FAA jurisprudence**

AT&T is mistaken in its contention (Br. 21, 23) that the Board's position is "foreclosed by Supreme Court precedent" enforcing agreements that require individual arbitration in other contexts. The Supreme Court has never considered whether agreements requiring individual arbitration must be enforced under the FAA despite the NLRA's protection of the right of statutory employees to pursue

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employment-related claims, or that involve employees exempt from NLRA coverage, such as statutory supervisors or managers. *See, e.g., CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 672-73 (2012) (consumer claims under Credit Repair Organization Act); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (age-discrimination claim by manager); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 482-83 (1989) (investor claims under Securities Act).

<sup>14</sup> For that reason, it is unnecessary to reach the question, which AT&T spends much of its brief addressing (Br. 26-43), of whether the NLRA clearly contains a "contrary congressional command" overriding the FAA. That inquiry is designed to determine which statutory command controls when another federal statute conflicts with the FAA and the two cannot be reconciled. Here, there is no conflict between the statutes; both can – and should – be given effect. *Morton*, 417 U.S. at 551; *accord Lewis*, 2016 WL 3029646, at \*6 (finding "no conflict between the NLRA and the FAA, let alone an irreconcilable one"). Nevertheless, it is evident that Section 8(a)(1) of the NLRA expressly commands employers not to interfere with their employees' Section 7 right to engage in concerted activity for mutual aid or protection. To the extent an arbitration agreement bars concerted pursuit of claims in any forum, whether arbitral or judicial, its enforcement under the FAA would "inherent[ly] conflict" with those NLRA provisions. *Gilmer*, 500 U.S. at 26.

work-related claims concerted. Nor has the Court found enforceable an arbitration agreement that violates a federal statute – as the Agreement violates Section 8(a)(1). For a court to find that a contract that violates the NLRA does not fit within the FAA’s savings clause would be to fail to give effect to the settled principle that courts should regard two co-equal statutes as effective. *Morton*, 417 U.S. at 551.

None of the Supreme Court FAA cases that AT&T cites (Br. 21, 23, 26) involve arbitration agreements that impair core provisions of another federal statute, much less directly violate such a statute. Instead, the Court has enforced arbitration agreements over challenges based on statutory provisions only where the agreements were consistent with the animating purposes of those particular statutes. For example, in *Gilmer v. Interstate/Johnson Lane Corp.*, which involved a challenge to arbitration of claims under the Age Discrimination in Employment Act (“ADEA”), the Court determined that Congress’ purpose in enacting the ADEA was “to prohibit arbitrary age discrimination in employment.” 500 U.S. 20, 27 (1991) (internal quotations omitted). Because the substantive rights of individual employees to be free of age-based discrimination could be adequately vindicated in individual arbitration, the Court held that an arbitration agreement could be enforced. The Court rejected arguments that ADEA provisions affording a judicial forum and an optional collective-action procedure precluded enforcement

of an arbitration agreement, explaining that Congress did not “‘intend[] the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum.’” *Id.* at 29, 32 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).<sup>15</sup>

Unlike the statutory provisions at issue in the Supreme Court’s FAA cases – where protecting collective action against individual employee waiver is not an objective of the statutes – the NLRA provisions protecting collective action are foundational, underlying the entire architecture of federal labor law and policy. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (characterizing the rights protected by Section 7 as “fundamental”). Under the mode of statutory analysis used in cases like *Gilmer*, that is a crucial distinction. 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; *see also Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739

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<sup>15</sup> The Supreme Court has consistently maintained that same analytical focus on statutory purpose when assessing challenges to the enforcement of arbitration agreements based on provisions in other federal statutes. *See, e.g., CompuCredit*, 132 S. Ct. at 670-71 (judicial-forum provision not “principal substantive provision[]” of Credit Repair Organizations Act); *Rodriguez de Quijas*, 490 U.S. at 481 (judicial-forum and venue provisions in Securities Act not “so critical that they cannot be waived”); *Shearson/Am. 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).

(1981) (describing NLRA as “designed to ... encourag[e] employees to promote their interests *collectively*”).

Consistent with the fundamental status of Section 7 – and of particular relevance to the savings-clause inquiry – Section 8 expressly prohibits restriction of Section 7 rights. 29 U.S.C. § 158(a), (b). And other NLRA provisions further demonstrate the central role Section 7 rights play in federal labor policy and the importance of Section 8’s proscription of interference with those rights. Section 9 establishes procedures, such as elections and exclusive representation, to implement representational Section 7 rights. 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>16</sup>

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<sup>16</sup> The Board’s determination that Section 7 is critical to the NLRA is entitled to considerable deference. *See City Disposal*, 465 U.S. at 829 (Board has prerogative to define Section 7); *Garner*, 346 U.S. at 490 (Board has primary authority to interpret and apply NLRA); *see also City of Arlington*, 133 S. Ct. at 1871 (statutory interpretation within agency’s expertise should be accepted unless “foreclose[d]” by the statutory text); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see generally* Note, *Deference and the Federal Arbitration Act: The NLRB’s Determination of Substantive Statutory Rights*, 128 HARV. L. REV. 907, 919 (2015) (explaining that “[t]h[e] [FAA] context does not alter the conclusion that ... the NLRB’s determination is an interpretation of the statute the agency administers and is thus within *Chevron*’s scope”).

Indeed, the right to engage in collective action for mutual protection is not only critical to the NLRA, but also a “basic premise” of national labor policy generally. *Murphy Oil*, 2014 WL 5465454, at \*1. For example, in the Norris-LaGuardia Act, enacted three years before the NLRA, Congress declared unenforceable “[a]ny undertaking or promise” in conflict with the federal policy of protecting employees’ freedom to act concertedly for mutual aid or protection. 29 U.S.C. § 102, 103. Congress also barred judicial restraint of concerted litigation “involving or growing out of any labor dispute” based on employer-employee agreements. 29 U.S.C. § 104.

In sum, unlike in *Gilmer* and similar cases cited by AT&T, concerted activity under the NLRA is not merely a procedural means of vindicating a statutory right; it is itself a core, substantive statutory right. And Congress expressly protected that right from employer interference in Section 8(a)(1). Therefore, an arbitration agreement that precludes employees covered by the NLRA from engaging in concerted legal action in any forum is not like a waiver of the optional collective-action mechanisms in statutes like the ADEA or FLSA. Rather, it is akin to a contract providing that employees can be fired on the basis of age contrary to the ADEA, or will not be paid the minimum wage dictated by the

FLSA. The Supreme Court has never held that an arbitration agreement may waive such rights or violate the statutes that create and protect them.<sup>17</sup>

AT&T's reliance on *Concepcion* (Br. 24-25) is flawed for similar reasons. Unlike AT&T's Agreement, the arbitration agreement in that case did not directly violate a co-equal federal law. The rule asserted in *Concepcion* as precluding enforcement of an agreement under the FAA's savings clause was a judicial interpretation of state unconscionability principles. It was intended to ensure prosecution of low-value claims arising under other statutes by enabling consumers to bring them collectively. 563 U.S. at 340.<sup>18</sup> That interpretation barred class-action waivers in most arbitration agreements in consumer contracts of adhesion. Employing a preemption analysis, the Court found that the rule "interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA." *Id.* at 344, 346-52. It found, moreover, that the unconscionability law was "applied in a fashion that disfavors arbitration." *Id.* at 341.

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<sup>17</sup> AT&T's discussion (Br. 33-34) of whether Supreme Court FAA cases dealt with arbitration agreements that waived causes of action is misplaced. Because the Agreement violates the NLRA's protection of the right to engage in collective activity, it is unenforceable under the savings clause regardless of whether employees can still bring causes of action under other statutes on an individual basis.

<sup>18</sup> Similarly, in *Italian Colors*, the Supreme Court applied *Concepcion* to strike down a federal-court-imposed requirement that collective litigation must be available when individual arbitration would be prohibitively expensive, ensuring an "affordable procedural path" to vindicate claims. 133 S. Ct. at 2308-09.

By contrast, the Board's rule fits within the savings clause because it bars enforcement of arbitration agreements that violate Section 8(a)(1) of the NLRA, a specific federal statutory proscription. The Board's rule is intended to effectuate the NLRA, not to implement non-statutory policies such as the judicially created policy of facilitating particular claims, low-value or otherwise, brought under other laws. *Cf. Concepcion*, 563 U.S. at 340; *Italian Colors*, 133 S. Ct. 2312 & n.5. That the Supreme Court declined to read the savings clause as protecting such judicially created defenses, which "stand as an obstacle to the accomplishment of the FAA's objectives," *Concepcion*, 563 U.S. at 343, does not suggest that the savings clause does not encompass a defense of contract illegality based on the NLRA, a co-equal federal law.

Nor has the Board taken aim at arbitration. Rather, it has applied a longstanding NLRA interpretation, endorsed by the Supreme Court, to find unlawful *all* individual contracts, including arbitration agreements, that prospectively waive Section 7 rights in violation of Section 8(a)(1). That illegality defense developed outside of the arbitration context and was recognized by the Board and courts well before the advent of agreements mandating individual arbitration of employment disputes.<sup>19</sup> Moreover, the Board has not applied the

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<sup>19</sup> It was not until 2001 that the Supreme Court definitively ruled that the FAA applied to employment contracts. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

statutory ban on restrictions of Section 7 rights in a manner disproportionately impacting arbitration agreements. *Cf. Concepcion*, 563 U.S. at 342; *see also id.* (“[I]t is worth noting that California’s courts have been more likely to hold contracts to arbitrate unconscionable than other contracts.”). Indeed, unlike California courts, the Board has never required that an employer allow employees the opportunity to arbitrate as a class. Rather, as noted above, the Board acknowledges an employer’s right “to insist that *arbitral* proceedings be conducted on an individual basis,” so long as employees remain free to bring concerted actions in another forum. *D.R. Horton*, 357 NLRB at 2288.<sup>20</sup> And, rather than

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<sup>20</sup> There is, accordingly, no basis for amicus Chamber of Commerce’s claim (Chamber Br. 18) that “if forced to choose between class arbitration or no arbitration, most companies would abandon arbitration,” which “would, in turn, harm employees, businesses, and the economy as a whole.”

To the extent AT&T and the Chamber maintain (Br. 45 n.10; Chamber Br. 18-21) that arbitration is a better means of resolving workplace disputes for employees, as well as employers, their assumption of the role of “workers’ champion” may fairly be viewed with “suspicion.” *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996). In any event, nothing in the Board’s rule precludes employees from making that decision for themselves at the time a claim or grievance arises and collective litigation is a real option. In that context, Section 7 gives employees the right to decide whether to pursue individual arbitration or to forego that advantage in order to benefit other employees or to strengthen the cause of employees generally. *See, e.g., United Servs. Auto. Ass’n*, 340 NLRB 784, 792 (2003) (employee opposed employer policy “solely for the benefit of her fellow employees” when she would not personally be affected), *enforced*, 387 F.3d 908 (D.C. Cir. 2004); *Chromalloy Gas Turbine*, 331 NLRB at 862-63 (“[A]n employee who espouses the cause of another employee is engaged in concerted activity, protected by Section 7...”); *accord NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-06 (2d Cir. 1942) (worker solidarity established

being hostile to arbitration as a means of enforcing statutory rights of employees, the Board embraces arbitration as “a central pillar of Federal labor relations policy and in many different contexts ... defers to the arbitration process.” *Id.* at 2289 (citing *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960)).

AT&T thus overreads the Supreme Court’s FAA cases as dispositive of the issue here, and as standing for the broad proposition that the FAA demands enforcement of arbitration agreements that violate a co-equal federal statute. *See Alexander v. Sandoval*, 532 U.S. 275, 282-84 (2001) (instructing parties not to treat Supreme Court decisions as authoritative on issues of law Court did not decide). The Fifth Circuit made a similar error in rejecting the Board’s rationale in *D.R. Horton*. That court cited prior FAA cases like *Gilmer* for the proposition that “there is no substantive right to class procedures under the [ADEA]” or “to proceed collectively under the FLSA.” 737 F.3d at 357. But those cases do not answer the materially different question of whether the NLRA protects such a right. And the Fifth Circuit’s savings-clause analysis relied solely on *Concepcion*, *id.* at 358-60, while failing to recognize the material differences between the

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by employees aiding an aggrieved individual who has the only “immediate stake in the outcome” enlarges the power of employees to secure redress for their grievances and “is ‘mutual aid’ in the most literal sense”).

Board's application of longstanding NLRA principles and the judge-made California rule in that case.<sup>21</sup> The Seventh Circuit, by contrast, held that *Concepcion* does not govern because, unlike the rule in that case, the Board's "general principle" barring the prospective waiver of Section 7 activity "extends far beyond collective litigation or arbitration" and is not hostile to the arbitral process. *Lewis*, 2016 WL 3029646, at \*7.

In sum, because a different right is at stake when a statutory employee asserts his Section 7 rights than in any of the Supreme Court cases that have enforced agreements requiring individual arbitration, a different result is warranted. 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.

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<sup>21</sup> Other circuits' decisions rejecting the Board's *D.R. Horton* position in non-Board cases likewise overread Supreme Court precedent and reflect a misunderstanding of the Board's position. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053-55 (8th Cir. 2013) (finding *Concepcion* resolved savings-clause issue, and FLSA did not contain congressional command barring enforcement of arbitration agreement); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013) (per curiam) (rejecting citation to Board's *D.R. Horton* decision based on *Owen*, without analysis). District court decisions rejecting the Board's position suffer from the same analytical flaws.

Prospective waivers of the right to bring concerted legal action are unlawful under the NLRA even if they do not offend the ADEA or other statutes granting individual 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*, 420 U.S. at 71-72; *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."). The NLRA's protection of, and prohibition on interference with, concerted activity is what distinguishes it from other employment statutes and what renders agreements that require *individual* arbitration unlawful under the NLRA and unenforceable under the FAA.

## CONCLUSION

The Board respectfully requests that the Court deny AT&T's petition for review and enforce the Board's Order in full.

s/ Kira Dellinger Vol  
KIRA DELLINGER VOL  
*Supervisory Attorney*

s/ Joel A. Heller  
JOEL A. HELLER  
*Attorney*

National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570  
(202) 273-0656  
(202) 273-1042

RICHARD F. GRIFFIN, JR.  
*General Counsel*

JENNIFER ABRUZZO  
*Deputy General Counsel*

JOHN H. FERGUSON  
*Associate General Counsel*

LINDA DREEBEN  
*Deputy Associate General Counsel*

National Labor Relations Board  
June 2016

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

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Petitioner/Cross-Respondent	*	Nos. 16-1099
	*	16-1159
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	22-CA-127746
	*	
Respondent/Cross-Petitioner	*	
	*	
EUDORA BROOKS, JUAN FIGUEROE	*	
	*	
Intervenors	*	
	*	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,878 words of proportionally spaced, 14-point type and the word-processing system used was Microsoft Word 2010.

/s/ Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 1st day of June, 2016

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	*	
Intervenors	*	
	*	

**CERTIFICATE OF SERVICE**

I hereby certify that on June 1, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/Linda Dreeben  
 Linda Dreeben  
 Deputy Associate General Counsel  
 National Labor Relations Board  
 1015 Half Street SE  
 Washington, DC 20570  
 (202) 273-2960

Dated at Washington, DC  
this 1st day of June, 2016