

Nos. 15-72839, 15-72931

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

HOOT WINC, LLC and ONTARIO WINGS, LLC

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross Petitioner

and

ALEXIS HANSON, CHANELLE PANITCH, and JAMIE WEST

Intervenors

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition for review of Hoot-Winc, LLC and Ontario Wings, LLC (collectively, the Company), and the National Labor Relations Board's cross-application for enforcement, of a September 15, 2015

Board Order against the Company. The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) of the National Labor Relations Act (the NLRA), 29 U.S.C. §160(a). The Board's Decision and Order is reported at 363 NLRB No. 2 (CER 3-29).¹

The Company filed its petition for review on September 14, 2015, and the Board cross-applied for enforcement on September 24, 2015. The petition for review and cross-application for enforcement are timely because the NLRA imposes no time limit on such filings. Alexis Hanson, Jamie West, and Chanelle Panitch, former employees of the Company and Charging Parties in the Board proceedings, have intervened on behalf of the Board. On March 29, 2016, the Court accepted for filing a brief by the Chamber of Commerce (Amicus) as amicus curiae in support of the Company. This Court has jurisdiction over this appeal because the Board's Order is final under Section 10(e) and (f) of the NLRA. Venue is proper under Section 10(f), because the unfair labor practices occurred in California.

¹ Citations are to Excerpts of Record (CER) filed with the Company's brief and Supplemental Excerpts of Record (SER) filed with this brief. References preceding a semicolon are to Board findings, and references following it are to supporting evidence. "Br." cites are to the Company's opening brief to the Court, and "Amicus" cites are to the brief of amicus curiae Chamber of Commerce.

STATEMENT OF ISSUES

1. Did the Board reasonably find that the Company violated Section 8(a)(1) of the NLRA by maintaining, as a condition of employment, an arbitration agreement barring employees from concertedly pursuing work-related claims in any forum?

2. Did the Board reasonably find that the Company violated Section 8(a)(1) of the NLRA by maintaining, as a condition of employment, an arbitration agreement that employees would reasonably read as restricting their right to file charges with the Board?

RELEVANT STATUTORY PROVISIONS

All relevant statutes are contained in the Statutory Addendum to this brief.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Following an investigation of unfair labor practice charges filed by intervenors Hanson, West, and Panitch, , the Board's General Counsel issued a complaint against the Company alleging, among other things, that the Company's mandatory arbitration agreement violated Section 8(a)(1) of the NLRA. Following a hearing, an administrative law judge issued a decision finding that the Company violated Section 8(a)(1) by maintaining an arbitration agreement that required employees to waive their Section 7 right to engage in concerted legal activity and

by maintaining an agreement that employees would reasonably believe prevents them from filing charges with the Board.² (CER 5-29.) On September 1, 2015, a Board majority adopted the administrative law judge's conclusion that the Company's violated the NLRA by maintaining an arbitration agreement that required employees to waive their right to concerted legal action, and the Board unanimously adopted the administrative law judge's conclusion that the Company violated the NLRA by maintaining an arbitration agreement that employees would reasonably read to prohibit the filing of charges with the Board. (CER 3-5.)

II. THE BOARD'S FINDINGS OF FACT

The Company's employee handbook provides that resolution of "matters, including charges of employment discrimination or harassment, may only be obtained by requesting arbitration under [the Company's] Agreement to Arbitrate," and all employees "will be required to sign an Agreement to Arbitrate as a condition of [their] employment with [the Company]." (CER 20; SER 55.) The Company correspondingly requires all employees to sign an arbitration agreement (the Agreement) with the following provisions:

This Agreement requires you to arbitrate any legal dispute related to your application for employment, the application or interview process, your employment, or the termination of your employment with Hooters of Ontario, LLC[.] By signing this Agreement you and the Company each

² The administrative law judge also resolved several allegations that were subsequently settled and are not at issue here.

agree that all Claims between you and the Company shall be exclusively decided by arbitration[....]

As used above, “claims” mean all disputes arising out of or related to your application for employment, the application and recruitment process, the interview process, the formation of the employment relationship, your employment by the Company, or your separation from employment with the Company. The term “Claims” includes, but is not limited to, any claim whether arising under federal, state, or local law, under a statute such as Title VII of the Civil Rights Act of 1964, under a rule, under a regulation or under the common law, including, but not limited ANY CLAIM OF DISCRIMINATION, SEXUAL OR OTHER TYPE OF HARASSMENT, RETALIATION, WRONGFUL DISCHARGE, ANY CLAIM FOR WAGES, COSTS, INTEREST, ATTORNEYS’ FEES OR PENALTIES. “Claims” does not include any dispute that cannot be arbitrated as a matter of law.

YOU AND THE COMPANY AGREE THAT EACH MAY BRING AND PURSUE CLAIMS AGAINST THE OTHER ONLY IN YOUR/ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF, CLASS MEMBER OR REPRESENTATIVE IN ANY PURPORTED CLASS, REPRESENTATIVE OR COLLECTIVE PROCEEDING. YOU AND THE COMPANY ACKNOWLEDGE AND AGREE THAT AT ALL TIMES YOU HAVE HAD AN AGREEMENT TO ARBITRATE WITH THE COMPANY AND HAVE UNDERSTOOD THAT THE AGREEMENT WAS AN AGREEMENT TO BRING AND PURSUE CLAIMS AGAINST THE OTHER ONLY IN YOUR/ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF, CLASS MEMBER OR REPRESENTATIVE IN ANY PURPORTED CLASS, REPRESENTATIVE OR COLLECTIVE PROCEEDING.

(CER 20; 30 (Emphasis in original).)

The Company also requires all employees to sign an acknowledgement of execution providing that the employee has agreed to bring claims only in the employee’s “individual capacity, and not as a plaintiff, class member, or

representative in any purported class, representative or collective proceeding.”
(CER 20; 33.)

III. THE BOARD’S CONCLUSIONS AND ORDER

In its Decision and Order, the Board (Chairman Pearce and Member Hirozawa, Member Miscimarra, dissenting in part), following its precedent set in *D.R. Horton Inc.*, 357 NLRB 2277 (2012), *enf. denied in relevant part* 737 F.3d 344 (5th Cir. 2013) and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (2014), *enf. denied in relevant part* 808 F.3d 1013 (5th Cir. 2015), found that the Company violated Section 8(a)(1) of the NLRA by maintaining the Agreement, which waives employees’ right to maintain collective actions in all forums, arbitral and judicial. (CER 4.) The Board also found that the Company violated Section 8(a)(1) by maintaining the Agreement because employees’ would reasonably believe that it bars or restricts their right to file Board charges. (CER 3-4.) To remedy those violations, the Board ordered the Company to cease and desist from the unfair labor practices found and from any like or related interference with employees’ Section 7 rights. The Board also ordered the Company to rescind or revise the Agreement, notify all current and former employees that it has rescinded or revised the Agreement, and post a remedial notice. (CER 4-5.)

SUMMARY OF ARGUMENT

This case arises at the intersection of two federal statutes: the NLRA and the Federal Arbitration Act (the FAA, 9 U.S.C. § 1, et. seq.). 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 (Oct. 28, 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 the Company'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 employers may not restrict Section 7 rights through work rules, or induce employees to waive those rights prospectively in individual agreements. Such restrictions or waivers violate Section 8(a)(1), which bars interference with Section 7 rights. Accordingly, the Company's maintenance of a mandatory agreement that requires its employees to arbitrate all employment-related disputes individually violates the NLRA.

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 coequal statutes can be harmonized, courts should give effect to both.

The Company also violated Section 8(a)(1) by maintaining an agreement that employees would reasonably read to restrict their Section 7 right to file charges with the Board. The Board properly found that employees would understand the Agreement's broad statement that all employment-related claims are subject to arbitration as prohibiting employees from filing charges with the Board. Contrary to the Company, the employees' filing of charges in this case does not render the rule lawful. Evidence showing how the employees' actually

interpreted the rule is irrelevant to the analysis because the issue is whether the rule has a reasonable tendency to coerce; actual coercion is unnecessary.

STANDARD OF REVIEW

In enacting the NLRA, Congress established the Board and charged it with the primary authority to interpret and apply the statute. *See Garner v. Teamsters Chauffeurs & Helpers Local 776*, 346 U.S. 485, 490 (1953). Accordingly, the Board's reasonable interpretation of the NLRA is entitled to affirmance. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1868-71 (2013) (to reject agency interpretation of statute within its expertise requires showing that "the statutory text forecloses" agency's interpretation) (reaffirming *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996) (Board "need not show that its construction is the *best* way to read the statute"); *Local Joint Executive Bd. of Las Vegas v. NLRB*, 515 F.3d 942, 945 (9th Cir.2008) (Board's decision is "accorded considerable deference as long as it is rational and consistent with the statute") (internal quotations omitted). Courts do not defer to the Board's interpretation of statutes other than the NLRA. *See United Food & Commercial Workers Intl. Union Local 400 v. NLRB*, 222 F.3d 1030, 1035 (D.C. Cir. 2000).

ARGUMENT

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

A. Section 7 of the NLRA Protects Concerted Legal Activity for Mutual Aid or 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 NLRB v. Calkins*, 187 F. 3d 1080, 1089 (9th Cir. 1999) (“The Board has the responsibility in the first instance to delineate the precise boundaries of Section 7’s mutual aid or protection clause”).

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 & n.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 & n.15.

Indeed, as *Eastex* notes, for decades the Board has protected concerted legal activity. *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 modern NLRA jurisprudence. *See, e.g., Lewis v. Epic Sys. Corp.*, No. 15-2997, 2016 WL 3029464, at *2 (7th Cir. May 26, 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”); *Salt River Valley Water Users’ Association v. NLRB*, 206 F.2d 325 (9th Cir. 1953) (concerted petition conferring power of attorney to recover wages due under the FLSA).³

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). 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

³ *Accord Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188-89 (D.C. Cir. 2000) (concerted petitions for injunctions against workplace harassment); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) (“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).

together to better their working conditions.” *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

This Court’s decision in *Salt River Valley Water Users’ Association v. NLRB* aptly illustrates how concerted legal activity functions as a safety valve when a labor dispute arises. 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,” 206 F.2d at 328, this 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, e.g., Eastex*, 437 U.S. at 565-66 & n.15; *Moss Planing Mill Co.*, 103 NLRB 414, 418 (1953) (concerted wage claim before administrative agency), *enforced*, 206 F.2d 557 (4th Cir. 1953). 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' intention to remedy "the widening gap between wages and profits") (quoting 79 Cong. Rec. 2371 (1935)).

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). Accordingly, contrary to the Company's argument (Br. 35), it is immaterial 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). No more availing is the Company's assertion (Br. 34) 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 that Section 7 right. The NLRA requires that employers refrain from interfering with employees' exercise of their right to

collective legal action, regardless of whether employees are entitled to any particular procedural mechanisms for exercising those rights.⁴

Nor, contrary to the Company's (Br. 33) and the Chamber's assertions (Amicus 13-14), 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 3029464, at *3, as do the Board's earliest decisions finding that Section 7 protects the collective legal pursuit of work-related claims. *See* p. 10-11. Moreover, 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' Section 7 right to use those new procedures for their mutual aid or protection.⁵

⁴ The Company contends that the Supreme Court has rejected the idea that all litigants have a generalized "nonwaivable opportunity" to use class mechanisms. (Br. 36 (quoting *Italian Colors*, 133 S. Ct. at 2310)). But the quoted language is not inconsistent with the Supreme Court's recognition in *Eastex* that some litigants – those covered by the NLRA – have a Section 7 right to engage in concerted litigation activity. *Italian Colors* thus does not undermine the Board's interpretation of the NLRA as providing a right to access collective procedures without employer interference.

⁵ The Company's arbitration agreement, in any event, would preclude its employees from pursuing joint claims, notwithstanding that the procedural device of joinder existed in 1935.

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. *See City Disposal*, 465 U.S. at 829. *Accord Lewis*, 2016 WL 3029464, at *3 (holding that "even if Section 7 were ambiguous—and it is not," the Board's interpretation that employers may not "mak[e] agreements with individual employees barring access to class and collective remedies" is entitled to judicial deference).

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

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 section 7." 29 U.S.C. § 158(a)(1). Employer conduct is thus unlawful if it "reasonably tends to restrain or interfere" with employees' Section 7 rights.

Penasquitos Village, Inc., v. NLRB, 565 F.2d 1074, 1080 (9th Cir. 1977).

Accordingly, a workplace rule or policy that either explicitly restricts Section 7 activity, or that employees would "reasonably construe" as doing so, is unlawful.

Lutheran Heritage Village-Livonia, 343 NLRB 646, 646 (2004). It does not matter

whether the employer has applied or enforced the policy – mere maintenance constitutes an unfair labor practice. *Cintas Corp. v. NLRB*, 482 F.3d 463, 467-68 (D.C. Cir. 2007).

Here, because the Company imposed the Agreement on all employees as a condition of employment, which carries an “implicit threat” that failure to comply will result in loss of employment, the Board appropriately used the work-rule standard. *D.R. Horton*, 357 NLRB at 2283; *see also NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 481-83 (1st Cir. 2011) (applying to employment contract); *U-Haul Co.*, 347 NLRB 375, 377-78 (2006) (same), *enforced*, 255 F. App’x 527 (D.C. Cir. 2007). Applying that standard, the Board reasonably found (CER 4) that the Company’s maintenance of the Agreement violates Section 8(a)(1).

1. The Agreement unlawfully restricts Section 7 activity

The Agreement facially and indisputably restricts employees’ Section 7 rights because it prohibits employees from pursuing *any* concerted legal claims, without exception. Specifically, the Agreement requires that “all legal disputes” and “claims” be submitted to arbitration, and states, in all capital letters, “YOU AND THE COMPANY AGREE THAT EACH MAY BRING AND PURSUE CLAIMS AGAINST THE OTHER ONLY IN YOUR/ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF, CLASS MEMBER OR REPRESENTATIVE IN ANY PURPORTED CLASS, REPRESENTATIVE OR

COLLECTIVE PROCEEDING.” (CER 20; 30.) The Agreement provides that “‘claims’ mean all disputes arising out of or related to your application for employment, the application and recruitment process, the interview process, the formation of the employment relationship, your employment by the Company, or your separation from employment with the Company.” This broad definition forces employees to waive their right to any kind of collective legal action. By requiring that employees individually arbitrate all work-related claims, the Agreement explicitly restricts employees from exercising their long-recognized right concertedly to enforce employment laws. Therefore, it violates Section 8(a)(1).

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

As the Board explained in *D.R. Horton*, 357 NLRB at 2280-81, and *Murphy Oil*, 2014 WL 5465454, at *1, 6, the Board’s finding that the Agreement violates Section 8(a)(1) is also consistent with longstanding Board and court precedent establishing 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 3029464, 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 violations of the NLRA “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); *Carlisle Lumber Co.*, 2 NLRB 248, 264-66 (1936) (unlawful to require agreement to “renounce any and all affiliation with any labor organization”), enforced as modified, 94 F.2d 138 (9th Cir. 1937). 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 Am., 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) (finding employer violated Section 8(a)(1) by conditioning return to work from suspension on broad waiver of rights, both present and future, to invoke Board's processes for alleged unfair labor practices); *Reichhold Chems.*, 288 NLRB 69, 71 (1988) (explaining "in future waiver" of right to access Board's processes is contrary to NLRA). In sum, all individual contracts that prospectively waive Section 7 rights 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.

The proposition that an employer may not lawfully induce an employee prospectively to waive her Section 7 rights 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, the decision whether collectively to walk out of a cold plant 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 (Nov. 20, 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 768, 775 (1982) (same). In this context, prospective individual waivers, like the contract struck down in *National Licorice*, 309 U.S. at 361, impair the “full freedom” of the signatory employees to decide for themselves whether to participate in a particular concerted activity.⁶

The fact that Section 7 also protects employees’ “right to refrain” from concerted activity does not change that calculus. Similar to the choice to engage in concerted activity, the right to refrain belongs to the employee to exercise, free

⁶ 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 the right of the employee 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*, 295 NLRB 889, 892 (1989) (employer could not hold employee to “earlier unconditional promises to refrain from organizational activity”).

from employer interference, in the context of a specific workplace dispute. As the Board has explained, employees remain free to refrain by choosing 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.”).

Prospective waivers of Section 7 rights are unlawful not only because they impair the rights of employees who are party to them but also because they preemptively deprive the 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, the Section 7 right to engage in concerted activity depends on the employee’s ability 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. 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.

Contrary to the Company's argument (Br. 27), this Court's decision in *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072 (9th Cir. 2014), does not "refut[e] the Board's position" finding unlawful the prospective waiver of employees' Section 7 rights. In that case, this Court held that an arbitration agreement waiving an employee's right to bring concerted legal claims did not "interfere with, restrain, or coerce" the employee within the meaning of Section 8(a)(1) of the NLRA because the agreement had an opt-out provision. *Id.* at 1075.

Johnmohammadi has no bearing here. This Court was not reviewing a Board decision and the Board had not yet ruled on the effect of opt-out provisions in such contracts.⁷ Here, by contrast, this Court is reviewing the Board's interpretation of Section 8(a)(1), an issue to which the Board receives considerable

⁷ *Johnmohammadi* predated the Board's decision in *On Assignment Staffing Servs., Inc.*, 362 NLRB No. 189, 2015 WL 5113231, at *7-11 (2015), *petition for review filed*, 5th Cir. No. 15-60642, 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. It is unnecessary to reach that issue in this case, as the Company clearly required the employee to sign the Agreement, on penalty of discharge.

deference. *Local Joint Executive Bd. of Las Vegas*, 515 F.3d at 945. Moreover, as noted, the arbitration agreement at issue in *Johnmohammadi* concerned an agreement that permitted employees to opt out of arbitration, unlike the Agreement at issue here. Indeed, this Court specifically declined to reach the issue presented in this case of whether an employer who forces employees to sign a class-action waiver, on penalty of discharge, violates the NLRA. *Johnmohammadi*, 755 F.3d at 1075. *See also Lewis*, 2016 WL 3029464, at *4 (explaining it was unnecessary to resolve conflict between *Johnmohammadi* and Seventh Circuit precedent finding unlawful contractual waiver of right to engage in Section 7 activity because the arbitration agreement at issue “was a condition of continued employment”). Thus *Johnmohammadi* does not put to rest the issue of whether the Board has reasonably interpreted the NLRA to find that the Agreement here is an unlawful waiver of employees’ Section 7 right to engage in collective legal activity.

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 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 arbitration 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.

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, in light of the longstanding prohibition on individual contracts that prospectively waive Section 7 rights. That the Company 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; the Company 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, 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

The Company's principal defense is that the FAA precludes enforcement of the Board's Order barring the prospective waiver of the employees' Section 7 right to seek to improve working conditions through collective litigation. The Company's defense should be rejected on the ground 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). *Accord POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014). As demonstrated below, because agreements unlawful under the NLRA are exempted from enforcement by the FAA’s savings clause, there is 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 express 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). “[C]ourts must [therefore] place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms.” *Id.* (internal quotations omitted).

Under 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 expressly limits the FAA's command to enforce arbitration agreements as written and, consequently, limits 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. 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 (pp. 19-20), 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 refrain from 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 (Nov. 30, 2015) (application for employment), *petition for review filed*, 5th Cir. No. 15-60860; *cf. Logisticare Solutions, Inc.*, 363 NLRB No. 85, 2015 WL 9460027, at *1 (Dec. 24, 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, *see Concepcion*, 563 U.S. at 339, the Board harbors no prejudice against arbitration. *See Carey v. Westinghouse Electric 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 *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." *D.R. Horton*, 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 the Company'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 3029464, at *6. In coming to that conclusion, the court agreed with the Board that contracts restricting Section 7 activity are illegal. *Id.* at 10, 14. It also noted that, rather than embodying hostility, the NLRA "does not disfavor arbitration" as a mechanism of dispute resolution. *Id.* at 15-16. Because the arbitration agreement at issue "ran up against

the substantive right to act collectively that the NLRA gives to employees,” the court refused to enforce the agreement. *Id.* at 16.

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 the Company violated the NLRA by maintaining agreements that require 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.⁸ There is no conflict between either the express statutory requirements, or animating policy considerations, of the FAA and NLRA with respect to that unfair-labor-practice.⁹

⁸ 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-employment-related claims, or that involve employees exempt from NLRA coverage, such as statutory supervisors or managers. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (age-discrimination claim by manager); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 673 (2012) (consumer claims under Credit Repair Organization Act); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483 (1989) (investor claims under Securities Act).

⁹ For that reason, it is unnecessary to reach the question (Br. 37-40) of whether the NLRA clearly contains a “contrary congressional command” overruling the FAA. That inquiry is designed to determine which statutory imperative 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 3029464, at *6 (finding “no conflict between the NLRA and the FAA, let alone an irreconcilable one”).

2. The Board's *D.R. Horton* and *Murphy Oil* Decisions Are Consistent with the Supreme Court's FAA Jurisprudence

The Company is mistaken in its contention (Br. 30-33) 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 work-related claims concertedly. Nor has the Court found enforceable an arbitration agreement that violates a federal statute – as the Agreement violates Section 8(a)(1). Finding that a contract illegal under the NLRA does not fit within the FAA's savings clause would 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 the Company cites (Br. 30-36) 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

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.

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). 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 took note of the ADEA provisions affording a judicial-forum and optional collective-action procedures, but did not find those provisions to be central to the ADEA’s purpose, stating 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 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).¹⁰

¹⁰ 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 671 (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); *accord Kuehner v. Dickinson & Co.*, 84 F.3d 316, 320 (9th Cir. 1996) (jury trial right under FLSA is not substantive and therefore can be waived).

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’s 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 Section 7 rights 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*, “The 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 (1981) (describing NLRA as “designed to ... encourag[e] employees to promote their interests *collectively*”).

The structure of the NLRA further demonstrates that fundamental nature. As the Seventh Circuit has stated, “Every other provision of the statute serves to enforce the rights Section 7 protects.” *Lewis*, 2016 WL 3029464, at *9. In Section 8, Congress prohibited restriction of Section 7 rights. 29 U.S.C. § 158(a)(1), (b)(1). 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 565.¹¹

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.¹² 29 U.S.C. § 104.

¹¹ 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 v. FCC*, 133 S. Ct. 1863, 1871 (2013) (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"). For this reason, the Company errs (Br. 18) in its assertion that the Court should review the Board's decision *de novo* because the Board acted outside its expertise.

¹² The Company (Br. 43) is mistaken in its claim that the Board did not rely on the Norris-LaGuardia Act to support its decision and therefore cannot do so here. The

Unlike in the cases cited by the Company, 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. *See Lewis*, 2016 WL 3029464, at *9 (observing that “[c]ourts routinely invalidate arbitration provisions that interfere with substantive statutory rights”).

The Company’s reliance on *Concepcion* (Br. 41-42) is flawed for similar reasons. Unlike the Agreement, the arbitration agreement in that case did not directly violate a co-equal federal law. In *Concepcion*, the rule that assertedly precluded enforcement of the agreement under the FAA’s savings clause was a judicial interpretation of state unconscionability principles. It was intended to

Board’s decision (CER 43) relies on *D.R. Horton* and *Murphy Oil*; both of which discuss the Norris-LaGuardia Act as an example of federal labor policy’s longstanding disfavor of contracts requiring employees to forgo collective action. *See* 357 NLRB at 2281, 2014 WL 5465454, at *1.

ensure prosecution of low-value claims arising under other statutes by enabling consumers to bring them collectively. 563 U.S. at 340.¹³ 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.

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

¹³ Similarly, in *American Express Co. v. Italian Colors Restaurant*, 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. 2304, 2308-09 (2013).

savings clause does not encompass a defense of contract illegality based on the core statutory policies of the NLRA, a co-equal federal law. To the contrary, reading the savings clause so narrowly as to exclude the defense of illegality under Section 7 “would render the FAA’s saving clause a nullity.” *Lewis*, 2016 WL 3029464, at *8.

The Board has not 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.¹⁴ Moreover, the Board has not applied the 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.* at 343 (“it 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

¹⁴ 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).

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.¹⁵ *D.R. Horton*, 357 NLRB at 2288. And, rather than 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

¹⁵ There is, accordingly, no basis for amicus curiae Chamber of Commerce to opine (Amicus 27) that "faced with the prospect of class arbitration," employers "would simply abandon arbitration altogether—to the detriment of employees, businesses, and the economy as a whole."

To the extent the Chamber maintains (*id.* at 28-31) that arbitration is a better means of resolving workplace disputes for employees, as well as employers, its view of the employees' best interests is appropriately discounted. *See Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (explaining Board is "entitled to suspicion" concerning employer's "benevolence as its workers' champion"). 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); *Caval Tool Div.*, 331 NLRB 858, 862-63 (2000) ("[A]n employee who espouses the cause of another employee is engaged in concerted activity, protected by Section 7...."), *enforced*, 262 F.3d 184 (2d Cir. 2001); *accord NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-06 (2d Cir. 1942) (worker solidarity established 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").

(citing *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960)).

The Company 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*.¹⁶ 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

¹⁶ Likewise, other circuits’ decisions rejecting the Board’s *D.R. Horton* position in non-Board cases overread Supreme Court precedent and reflect a misunderstanding of the Board’s position. *See Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (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 (2d Cir. 2013) (per curiam) (rejecting citation to Board’s *D.R. Horton* decision based on *Owen*, without analysis). The Eighth Circuit’s decision in *Cellular Sales of Missouri, LLC v. NLRB*, relies on *Owen* to reject *Horton* in a Board case, but added no new rationale. *See Cellular Sales of Missouri, LLC v. NLRB*, No. 15-1620, slip op. at 6 (8th Cir. June 2, 2016). The Company also cites (Br. 29) *Walthour v. Chipio Windshield Repair*, but the Eleventh Circuit did not reach the NLRA issue there. 745 F.3d 1326, 1330 (11th Cir. 2014) (rejecting argument that optional FLSA collective-action provision overrides FAA’s enforcement mandate; no NLRA-based argument). None of those decisions address the Board’s savings clause argument. District court decisions rejecting the Board’s position suffer from the same analytical flaws. Indeed, as the Seventh Circuit noted, the Fifth Circuit is the only circuit to “engag[e] substantively with the relevant arguments.” *Lewis*, 2016 WL 3029464, at *8.

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 Board’s application of longstanding NLRA principles and the judge-made California rule in that case. The Seventh Circuit, by contrast, has 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 3029464, at *7.

The Company (Br. 26-27) also overreads this Court’s decision in *Richards v. Ernst & Young, LLP*, 744 F.3d 1072 (9th Cir. 2013) by suggesting that it “cast[s] doubt” on the Board’s determination that the Agreement is unlawful. In that case, this Court held that the plaintiff had waived her argument that the arbitration agreement was unenforceable based on the Board’s *D.R. Horton* rationale, and then cited decisions both rejecting and applying that rationale. *Id.* at 1075 & n.3. Accordingly, this Court enforced the arbitration agreement at issue without entertaining any argument regarding the *D.R. Horton* analysis.

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.

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 precluding collective action in any forum unlawful under the NLRA and unenforceable under the FAA.

II. THE COMPANY VIOLATED SECTION 8(a)(1) OF THE NLRA BY FORCING EMPLOYEES TO SIGN AN AGREEMENT THEY WOULD REASONABLY UNDERSTAND AS RESTRICTING THEIR RIGHT TO FILE CHARGES WITH THE BOARD

Employees have an unquestionable Section 7 right to file and pursue charges before the Board. *See Util. Vault Co.*, 345 NLRB 79, 82 (2005). As discussed above (p. 17), any workplace rule that either explicitly restricts that right, or that employees would “reasonably construe” as doing so, is unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004); *accord Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 208-09 (5th Cir. 2014). The Board properly found that employees would reasonably read the Agreement to restrict their right to file charges with the Board.

The Agreement tells employees that “all Claims between you and the Company shall be exclusively decided by arbitration.” (CER 20.) The Agreement requires mandatory arbitration of “any claim” arising “under a statute” or “federal law,” including claims of discrimination, retaliation, or discharge, or for wages. (CER 3.) “In light of the breadth” of the Agreement, the Board reasonably concluded that the employees would construe the Agreement as disallowing employees from filing charges with the Board. *Id. See, e.g., U-Haul Co. of California*, 347 NLRB 375, 377 (2006), *enforced*, 255 F. App’x. 527 (D.C. Cir. 2007) (finding unlawful an arbitration agreement that applied to all “disputes, claims or controversies that a court of law would be authorized to entertain”). *See*

also Cellular Sales of Missouri, LLC v. NLRB, No. 15-1620, slip op. at 9-10 (8th Cir. June 2, 2016).

The Company contends (Br. 45-47) that the Board's decision is not supported by substantial evidence because the employees in this case presumably did not read the Agreement to prohibit them from filing Board charges, and the Company did nothing to enforce the policy against employees filing Board charges. This argument misunderstands the *Lutheran Heritage* test, which requires only a finding that a reasonable employee would understand the Agreement as prohibiting filing charges with the Board. 343 NLRB at 646. The Board, in making this finding, "focuses on the text" of the challenged rule and does not consider how "employees have . . . construed the rule." *Cintas Corp.*, 482 F.3d at 467 (stating that so long as the Board's "textual analysis is reasonably defensible and adequately explained," the Board "need not rely on evidence of employee interpretation consistent with its own to determine that a company rule violates . . . the [NLRA]"). As the Board explained, "it is settled that production of extrinsic evidence, such as testimony showing that employees interpreted the rule to preclude access to the Board, is not a precondition to finding that a rule is unlawful by its terms." (CER 3.) *See Flex Frac*, 746 F.3d at 209 ("the actual practice of employees is not determinative" of a work rule's legality under the NLRA). Thus, contrary to the Company, the Agreement is not lawful simply because it did not

stop employees from filing charges. Rather, the relevant question here is whether the employer's action (here, maintenance of the Agreement) has a reasonable tendency to restrict or coerce Section 7 rights, not whether a particular employee is actually coerced. Similarly, evidence of enforcement is not required; the Board may conclude that maintenance of a work rule is unlawful absent any evidence of enforcement. *Flex Frac*, 746 F.3d at 209.

Next, the Company contends (Br. 47-49) that employees would reasonably interpret the Agreement – with its multiple references to a “court” or a “jury” – as referring only to claims that can be decided in court and not as excluding administrative charges with the Board. But these references to a “court” or “jury” do not overcome the breadth of the Agreement's definition of “claims,” which includes “all disputes arising out of or related to [an] application for employment.” (CER 3; 30.) A reasonable employee would understand a Board unfair-labor-practice hearing, over which an administrative law judge presides and both parties present testimony according to the Federal Rules of Evidence, to be a form of court hearing. For example, in *U-Haul*, the Board found a violation where the arbitration agreement applied only to “disputes, claims or controversies that a court of law would be authorized to entertain,” reasoning that the reference to a court of law “did nothing to clarify that the arbitration policy does not extend to the filing of unfair labor practice charges.” 347 NLRB at 377-78 (2006). The Board in *U-*

Haul also observed that “decisions of the [Board] can be appealed to a United States court of appeals,” on which judges sit. *Id.* at 377. Moreover, ambiguities in an employment policy are construed against the promulgator of that policy. *See Lafayette Park Hotel*, 326 NLRB 824, 828 (1996), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). It was therefore reasonable for the Board to conclude that an employee would understand the Agreement as encompassing Board charges, even absent any explicit mention of administrative agencies.

The Company claims (Br. 49) that *U-Haul* is distinguishable because the policy at issue there did not include the Agreement’s language excluding “disputes that cannot be arbitrated as a matter of law.” But the Board rightly explained (CER 3) that this distinction is immaterial because unfair labor practices *can* be arbitrated. The Company also contends that *U-Haul* is distinguishable because that policy, unlike the Agreement, was promulgated in response to union activity. But, in *U-Haul*, as here, there was no finding that the agreement at issue was promulgated in response to union activity; this purported distinction is therefore irrelevant to the analysis.

Finally, the Company contends that the Board “aims to force employers to include an express exception for charges under the NLRA[.]” (Br. 49-51.) But the Board’s decision in this case does not require the Company to write any arbitration policy, and certainly does not require them to write one that specifically mentions

Board charges. Instead, the Board's Order requires only that the Company cease and desist from "[m]aintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board," and the Board properly acted within its broad remedial discretion in ordering withdrawal of the Company's unlawful rule. (CER 4.) *See, e.g., NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 482 (1st Cir. 2011) (when employer maintains an unlawful work rule, recession of that rule is the proper remedy). Thus, the Board's finding that the Agreement interfered with employees' right to file charges with the Board "is rational and consistent with the statute," and therefore entitled to deference. *See United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 766-767 (9th Cir. 2002).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

STATEMENT OF RELATED CASES

The following cases all raise the same or closely related issue of whether an arbitration agreement that waives employees' Section 7 right to concerted legal action violates Section 8(a)(1) of the NLRA. All cases are currently pending in this Court, and to Board counsel's knowledge, this list is exhaustive as of June 3, 2016:

Morris v. Ernst & Young, LLP, 13-16599

Countrywide Financial Corp. v. NLRB, 15-72700

Nijjar Realty, Inc. v. NLRB, 15-73921

Philmar Care, LLC v. NLRB, 16-70069

CPS Security (USA), Inc. v. NLRB, 16-70488

Century Fast Foods, Inc. v. NLRB, 16-70686

Network Capital Funding Corp. v. NLRB, 16-70687

FAA Concord H, Inc. v. NLRB, 16-70694

Apple American Group, LLC v. NLRB, 16-70816

The Pep Boys Manny Moe & Jack of California v. NLRB, 16-71036

Kenai Drilling, Ltd. v. NLRB, 16-71148

Bloomington's, Inc. v. NLRB, 16-71338

Ralph's Grocery Co. v. NLRB, 16-71422

Covenant Care California, LLC v. NLRB, 16-71502

Respectfully submitted,

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National Labor Relations Board
June 3, 2016

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

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Petitioner/Cross-Respondent	*
	*
v.	*
	*
NATIONAL LABOR RELATIONS BOARD	* Nos. 15-72839,
	* 15-72931
Respondent/Cross-Petitioner	*
	* Board Case No.
and	* 31-CA-104872
	*
ALEXIS HANSON, CHANELLE PANITCH, and	*
JAMIE WEST	*
	*
Intervenors	*
	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 11,711 words of proportionally-spaced, 14-point type and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 3rd day of June, 2016

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JAMIE WEST	*
	*
Intervenors	*
	*

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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NATIONAL LABOR RELATIONS BOARD)	
)	
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STATUTORY ADDENDUM

Except for the following, all applicable statutes and rules are contained in the brief of Hoot Winc, LLC and Ontario Wings, LLC.

National Labor Relations Act, 29 U.S.C. § 151, et. seq.

Section 1 (29 U.S.C. § 151)	2
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NATIONAL LABOR RELATIONS ACT

Section 1 of the NLRA (29 U.S.C. § 151): Findings and Policies.

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It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 10 of the NLRA (29 U.S.C. § 160): Prevention of Unfair Labor Practices.

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. . . .

(c) Reduction of testimony to writing; findings and orders of Board

. . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the

proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. . . .