

No. 14-60800

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

MURPHY OIL USA, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**CORRECTED PETITION FOR REHEARING EN BANC
OF THE NATIONAL LABOR RELATIONS BOARD**

KIRA DELLINGER VOL
Supervisory Attorney

JEFFREY W. BURRITT
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-0656
(202) 273-2989

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

RULE 35(b)(1) STATEMENT

The National Labor Relations Board petitions for rehearing en banc of *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). The issue presented is of exceptional importance—whether employers may require employees to waive their right, under Section 7 of the National Labor Relations Act (“NLRA,” 29 U.S.C. §§ 151, 157), to engage in concerted activity for mutual aid or protection. Just as an employer may not require that an employee waive her rights to earn a minimum wage or be free from age discrimination in the workplace, it may not require that she waive that core, substantive NLRA right, which is the “basic premise” upon which our national labor policy has been built. *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 at *1 (Oct. 28, 2014). Murphy Oil did just that by requiring that its employees sign arbitration agreements that preclude them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial.

In rejecting the Board’s finding that such agreements violate the NLRA, the panel adhered to the Court’s holding in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), *reh’g denied*, No. 12-60031 (April 16, 2014), that although Section 7 may protect employees’ right to engage in concerted legal activity, an arbitration agreement requiring that an employee individually arbitrate work-

related disputes must be enforced pursuant to the Federal Arbitration Act (“FAA,” 9 U.S.C. § 1, et seq.). That decision, however, rests on two erroneous premises.

First, it wrongly assumes that two coequal statutes—the NLRA and the FAA—are in conflict. Because concerted-action waivers are unlawful under long-established law preventing prospective waiver of Section 7 rights, the Board’s unfair-labor-practice finding fits squarely within the FAA’s savings clause, which provides that arbitration agreements must be enforced “save upon such grounds as exist at law or equity for the revocation of any contract.” 9 U.S.C. § 2. Second, as Judge Graves explained in his dissent in *D.R. Horton*, the Court erred in reading Supreme Court FAA jurisprudence as dispositive of issues the Supreme Court did not resolve.

737 F.3d at 364-65. Cases enforcing agreements requiring individual arbitration have done so in the context of other statutes (or judge-made rules) that are materially different from the NLRA; they did not address the issue of whether an arbitration agreement can lawfully waive an employee’s distinct Section 7 right to concerted pursuit of work-related claims. Such misapprehension of Supreme Court decisions is an error warranting an en banc hearing. *See UFCW Local 1036 v. NLRB*, 307 F.3d 760, 774 (9th Cir. 2002) (en banc).

TABLE OF CONTENTS

Headings	Page(s)
Rule 35(b)(1) Statement	
Statement of the issue	1
Course of proceedings and disposition of the case	1
Argument.....	3
1. The Court Erred in Finding that the NLRA and the FAA Conflict.....	3
2. The Court Erred in Finding the Supreme Court’s FAA Jurisprudence Dispositive	5
Conclusion	13

TABLE OF AUTHORITIES

Cases	Page(s)
<i>American Express Co. v. Italian Colors Restaurant</i> , 133 S. Ct. 2304 (2013).....	2 ,11
<i>AT&T Mobility LLC v. Concepcion</i> , 563 U.S. 333 (2011).....	3, 4, 5, 6, 9, 10, 11, 12
<i>Carter v. Countrywide Credit Industries, Inc.</i> , 362 F.3d 294 (5th Cir. 2004)	3
<i>CompuCredit Corp. v. Greenwood</i> , 132 S. Ct. 665 (2012).....	7
<i>Convergys Corp.</i> , 363 NLRB No. 51, 2015 WL 7750753 (Nov. 30, 2015).....	5
<i>Courier-Citizen Co. v. Boston Electrotypers Union No. 11</i> , 702 F.2d 273 (1st Cir. 1983).....	4
<i>D.R. Horton, Inc.</i> , 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012), <i>enforcement denied</i> , 737 F.3d 344 (5th Cir. 2013)	Rule 35(b)(1) Statement, 1-3, 5-7, 9-12
<i>Eastex, Inc. v. NLRB</i> , 437 U.S. 556 (1978).....	1, 6, 8, 9
<i>Emporium Capwell Co. v. Western Addition Community Organization</i> , 420 U.S. 50 (1975).....	9
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20 (1991).....	2-3, 5, 6, 7, 9, 12
<i>Ishikawa Gasket America, Inc.</i> , 337 NLRB 175 (2001), <i>enforced</i> , 354 F.3d 534 (6th Cir. 2004)	5

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>J.I. Case Co. v. NLRB</i> , 321 U.S. 332 (1944).....	5
<i>Kaiser Steel Corp. v. Mullins</i> , 455 U.S. 72 (1982).....	4
<i>Mitsubishi Motors Corp.</i> , 473 U.S. 614 (1985).....	5
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974).....	5
<i>Murphy Oil USA, Inc.</i> , 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), <i>enforcement denied</i> , 808 F.3d 1013 (5th Cir. 2015)..... Rule 35(b)(1) Statement, 1, 3, 7, 9, 11	
<i>National Licorice Co. v. NLRB</i> , 309 U.S. 350 (1940).....	2, 4, 6, 11
<i>NLRB v. Stone</i> , 125 F.2d 752 (7th Cir. 1942).....	5
<i>NLRB v. Washington Aluminum Co.</i> , 370 U.S. 9 (1962).....	8
<i>Rodriguez de Quijas v. Shearson/American Express, Inc.</i> , 490 U.S. 477 (1989)	7
<i>Salt River Valley Water Users' Association v. NLRB</i> , 206 F.2d 325 (9th Cir. 1953).....	8, 11-12
<i>Shearson/American Express, Inc. v. McMahon</i> , 482 U.S. 220 (1987).....	7
<i>UFCW Local 1036 v. NLRB</i> , 307 F.3d 760 (9th Cir. 2002).....	Rule 35(b)(1) Statement

TABLE OF AUTHORITIES

Statutes:	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157).....	Rule 35(b)(1) Statement, 1, 2, 4, 7, 8, 9, 10, 13
Section 8 (29 U.S.C. § 158)	8
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	1, 8
Section 8(b)(1) (29 U.S.C. § 158(b)(1))	8
Section 9 (29 U.S.C. § 159)	8
Section 10 (29 U.S.C. § 160)	8
 Federal Arbitration Act (9 U.S.C. § 1, et seq.)	
9 U.S.C. § 2	Rule 35(b)(1) Statement, 2, 4, 12
 Age Discrimination in Employment Act (29 U.S.C. § 621, et seq.)	3, 6, 7, 9
 Fair Labor Standards Act (29 U.S.C. § 201, et seq.)	3

STATEMENT OF THE ISSUE

Did the Court err in finding that Supreme Court FAA jurisprudence compels rejection of the Board's finding that an employer violates the NLRA when it requires its employees to sign an agreement that precludes them from filing work-related claims on a joint, class, or collective basis in any forum, arbitral or judicial?

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

1. In light of the Court's rejection of *D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012), *enforcement denied*, 737 F.3d 344, the Board carefully reexamined its reasoning that an employer violates employees' Section 7 right to "engage in concerted activity for the purpose of . . . mutual aid or protection," when it requires them to sign an agreement obligating them to individually arbitrate work-related claims. *Murphy Oil*, 2014 WL 5465454 at *1 (quoting 29 U.S.C. § 157). In reaffirming its legal position, the Board pointed out that the Supreme Court has long recognized that Section 7 protects employees' right to engage in concerted legal activity. *Id.* at *6; *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978) (citing with approval cases illustrating principle). Furthermore, the Board explained that shortly after the NLRA's enactment, the Supreme Court held that individual agreements that restrict Section 7 rights violate Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), which bars employers from

interfering with employees' Section 7 rights. *Id.* (citing *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 360-61 (1940)).

The Board found that relying on employees' Section 7 rights to invalidate individual arbitration agreements that waive employees' right to pursue collective legal action is consistent with both the NLRA and the FAA. *Id.* While the FAA reflects "a liberal federal policy favoring arbitration," that policy has its limits. *Id.* at *7 & n.43 (citing *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013)). Congress expressly restricted the reach of the FAA in its savings clause, 9 U.S.C. § 2, which provides that arbitration agreements may be revoked on the same grounds as any contract.

2. In reviewing the Board's decision, the panel (Judges Jones, Smith, and Southwick), stated that it was bound by the panel majority decision in *D.R. Horton*. There, the Court (Judges Southwick and King; Judge Graves, dissenting) began by noting that it owed deference to the Board's interpretation of Section 7 and that "cases under the NLRA give some support to the Board's analysis." 737 F.3d at 356-57. Nevertheless, it found that the Board's interpretation of the NLRA was precluded by the Supreme Court's FAA jurisprudence. The Court relied on "numerous decisions holding that there is no right to use class procedures under various work-related statutory frameworks" to find that there was also no such substantive right in the NLRA. *Id.* (citing principally *Gilmer v.*

Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (Age Discrimination in Employment Act, (“ADEA”), 29 U.S.C. § 621, et seq.), and *Carter v. Countrywide Credit Indus.*, 362 F.3d 294, 297 (5th Cir. 2004) (Fair Labor Standards Act, 29 U.S.C. § 201, et seq.). The Court also rejected the Board’s argument that mandatory individual arbitration agreements fit within the FAA’s savings clause. It found, based solely on *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011), that the effect of the Board’s policy is to disfavor arbitration in violation of the FAA. *D.R. Horton*, 737 at 359. It concluded that “because a substantive right to proceed collectively has been foreclosed by prior decisions,” *id.* at 361 (citing *Gilmer*, 500 U.S. at 32; *Carter*, 362 F.3d at 298), “[t]he end result is that the Board’s decision creates either a right that is hollow or one premised on an already-rejected justification.” *Id.* In the present case, the Court reaffirmed the *D.R. Horton* panel’s holding that an employer does not violate the NLRA by imposing on employees an arbitration agreement waiving their right to pursue class or collective claims in all forums. *Murphy Oil*, 808 F.3d at 1015.

ARGUMENT

1. The Court Erred in Finding that the NLRA and the FAA Conflict

The Supreme Court explained in *Concepcion* that the FAA requires courts to “place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms.” 563 U.S. at 339. Under that “equal footing”

principle, defenses affecting 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. Conversely, arbitration agreements that are revocable on the same legal or equitable grounds that apply to any contract are expressly exempted from the FAA under its so-called savings clause. 9 U.S.C. § 2.

Illegality is an established, generally applicable contract defense. The Supreme Court has held that a federal court may not enforce a contract that violates federal law. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-84 (1982). Applying that defense, the Court in *Kaiser Steel* 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 “federal courts may not enforce a contractual provision that violates section 8 of the [NLRA]”).

Individual contracts that prospectively waived NLRA Section 7 rights have long been held illegal in multiple circumstances. *See Nat’l Licorice*, 309 U.S. at 361 (individual contracts relinquishing employees’ rights to strike and negotiate

closed-shop agreements amounted to renunciation of NLRA rights and “were a continuing means of thwarting the policy of the [NLRA]”).¹

Because the defense of NLRA illegality is unrelated to the fact that an agreement to arbitrate is at issue, it falls squarely within the FAA’s savings clause. In other words, the FAA’s policy favoring arbitration and the NLRA’s specific right to concerted activity are “capable of co-existence.” *Murphy Oil*, 2014 WL 5465454 at *12 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). As discussed below, this Court’s decision in *D.R. Horton* erred in finding otherwise.

2. The Court Erred in Finding the Supreme Court’s FAA Jurisprudence Dispositive

In *D.R. Horton*, reaffirmed in *Murphy Oil*, this Court found that two decisions of the Supreme Court—*Gilmer* and *Concepcion*—required rejection of the Board’s legal position. 737 F.3d at 357-60. The Court reached this result even though neither *Gilmer* nor *Concepcion* decided any NLRA issue, much less

¹ *Accord 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”); *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942) (individual contracts requiring employees to adjust grievances with employer individually violated NLRA); *Convergys Corp.*, 363 NLRB No. 51, 2015 WL 7750753 at *1 & n.3 (Nov. 30, 2015) (class-action waiver, which did not provide for arbitration of claims and thus did not implicate FAA, violates NLRA), petition for review filed, 5th Cir. No. 15-60860; *Ishikawa Gasket Am., Inc.*, 337 NLRB 175, 175-76 (2001) (agreement conditioning severance payments on employee’s agreement not to help other employees in disputes against employer or to act “contrary to the [employer’s] interests in remaining union-free,” violates NLRA), *enforced*, 354 F.3d 534 (6th Cir. 2004).

purported to overrule *Eastex*, 437 U.S. at 565-66, which recognized the NLRA right of employees to join together to enforce their employment rights, or *National Licorice*, 309 U.S. at 361, which struck down individual contracts prospectively waiving the employee's NLRA rights to engage in concerted activity for mutual aid and protection. The inferences the Court drew from *Gilmer* and *Concepcion* with respect to the NLRA are demonstrably in error.

a. From *Gilmer*, the *D.R. Horton* Court drew the inference that an employee's use of concerted legal procedures "is not a substantive right." 737 F.3d at 357. In so reasoning, this Court overlooked that whether concerted legal activity is a substantive right under the ADEA, the statute considered in *Gilmer*, is a different question from whether that same activity is a substantive right under the NLRA. *D.R. Horton* misapprehended *Gilmer* by failing to recognize that its relevant lesson is that whether a right is considered substantive for FAA purposes turns on an analysis of the particular statute at issue. The decisive question is whether the right is critical to the goals of the statute.

In *Gilmer*, the Court looked to the purpose of the ADEA in determining that an arbitration agreement could be enforced despite the ADEA's judicial-forum provision and a provision creating an optional collective-litigation procedure. 500 U.S. 20, 27-28 (1991). To begin its analysis, the Court determined that Congress' purpose in enacting the ADEA was "to prohibit arbitrary age

discrimination in employment.” *Id.* at 27. In rejecting the challenge to arbitration based on the statute’s judicial-forum provision, the Court emphasized 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. NLRB*, 473 U.S. 614, 628 (1985)). The Supreme Court has consistently maintained that same focus on statutory purpose in assessing federal rights asserted in challenges to arbitration agreements.²

If the same mode of statutory analysis used in *Gilmer* is applied to the NLRA, it is apparent that the Board correctly held that the NLRA Section 7 right of employees to engage in concerted or union activity for mutual aid and protection is the “critical” or “principal” substantive right that Congress provided employees in enacting the NLRA. *Murphy Oil*, 2014 WL 5465454 at *1; *D.R. Horton*, 2012 WL 36274, at *2; *see also D.R. Horton*, 737 F.3d at 357, 364-65 (Judge Graves, dissenting). Section 7 is the foundation underlying the entire architecture

² In decisions rejecting challenges to the enforcement of arbitration agreements based on provisions in other federal statutes, the Supreme Court has repeatedly emphasized that the provisions in question are ancillary to the congressional goals of the statutes containing them. *See, e.g., CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 671 (2012) (judicial-forum provision not “principal substantive provision[]” of Credit Repair Organizations Act); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (judicial-forum and venue provisions in Securities Act not “so critical that they cannot be waived”); *Shearson/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).

of the statute.³ And for more than 70 years, employees covered by the NLRA, recognizing the strength in numbers, have availed themselves of their Section 7 right to band together to take advantage of the evolving body of laws and procedures that legislatures have provided for the redress of their grievances. *See, e.g., Eastex*, 437 U.S. at 565-66 & n.15 (recognizing Section 7's protection of these employee activities); *Salt River Valley Water Users' Association v. NLRB*, 206 F.2d 325 (9th Cir. 1953) (recognizing that concerted activity "is often an effective weapon for obtaining [benefits] to which [employees]... are already 'legally' entitled," because they may exert "group pressure upon the [employer] in regard to possible negotiation and settlement of [their] claims").

Denying employees the safety valve of concerted litigation, like denying them the safety valve of walking out in protest of working conditions, "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). Because the right to engage in concerted activity for mutual aid or protection is a core substantive right, an arbitration agreement that precludes

³ Every other provision of the NLRA flows from Section 7. In Section 8, Congress prohibited employers and unions alike from restraining or coercing employees in the exercise of Section 7 rights. 29 U.S.C. § 158(a)(1) and (b)(1). Section 9 establishes procedures to implement representational Section 7 rights (e.g., elections, exclusive representation). 29 U.S.C. § 159. And Section 10 empowers the Board to prevent violations of Section 8. 29 U.S.C. § 160.

employees covered by the NLRA from exercising that right in any forum is a violation of substantive rights akin to a contract providing that employees can be fired on the basis of age contrary to the ADEA.

In short, nothing in *Gilmer* warranted *D.R. Horton*'s rejection of the Board's holding that the *Eastex* rights at issue here are substantive rights for FAA purposes. There is no conflict between *Gilmer*'s holding that ADEA's substantive rights can be effectively vindicated in individual arbitration proceedings, 500 U.S. at 27-29, and the Board's holding that the substantive rights protected by the NLRA are impaired by individual arbitration agreements that deny employees *any* forum, arbitral or judicial, to exercise their "basic right under Section 7 to engage in concerted activity as a means to secure whatever workplace rights the law provides them." *Murphy Oil*, 2014 WL 5465454 at *10. Different substantive rights are at issue and different outcomes are to be expected. *Cf. Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 71-72 (1975) (observing that 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").

b. The lessons that the *D.R. Horton* drew from *Concepcion* are no less flawed than the lessons it drew from *Gilmer*. *Concepcion* was the sole case *D.R. Horton* cited in holding that the FAA's savings clause does not exempt an individual arbitration agreement prospectively waiving an employee's Section 7

rights. 737 F.3d at 358-60. The Court misconstrued the holding in *Concepcion* and failed to give effect to the plain language of the savings clause.

In *Concepcion*, the Supreme Court found that the FAA preempted a judge-made state rule that was intended to ensure prosecution of low-value claims by enabling consumers to bring them collectively. *Id.* at 340. The rule required the availability of class-wide arbitration, which the Court found “interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA.” 563 U.S. at 344, 346-52.

In *D.R. Horton*, this Court acknowledged that the Board’s decision does not similarly require the opportunity to arbitrate as a class. To the contrary, the Board’s decision recognizes the employer’s right “to insist that *arbitral* proceedings be conducted on an individual basis,” so long as employees remain free to bring collective actions in another forum. 737 F.3d at 358 (quoting *D.R. Horton*, 2012 WL 36274, at *16). Nevertheless, the Court found controlling *Concepcion*’s finding that the state rule did not fit within the savings clause because it disfavored arbitration. The Court reasoned that the Board rule at issue similarly disfavors arbitration because, by vindicating the Section 7 right of employees to bring joint or class actions in a judicial forum if denied that right in arbitration, it gave employers less incentive to resolve claims in individual arbitration. *Id.* at 359.

Overlooked in the Court’s analysis was that, in *Concepcion*, the Supreme Court took issue with a body of state law that it found had been “applied in a fashion that disfavors arbitration.” *Id.* at 341; *see also id.* at 343 (noting that “California’s courts have been more likely to hold contracts to arbitrate unconscionable than other contracts”).⁴ The same cannot be said about the body of NLRA law before the Court in *D.R. Horton*. The Court acknowledged as a general matter that the Board embraces arbitration as “a central pillar of Federal labor relations policy.” *D.R. Horton*, 2012 WL 36274 at *17. And, as demonstrated above, the body of Board law finding unlawful individual employee agreements that prospectively waive the right to engage in concerted activity for mutual aid and protection is not targeted at arbitration agreements. Rather, it rests on longstanding general principles that apply to all such prospective waivers. Like the contracts struck down in *National Licorice*, 309 U.S. at 361, such prospective individual waivers impair the full freedom of the signatory employees to decide for themselves whether to join or refrain from participating in concerted activity at the time when labor disputes actually arise (as, for example, in *Salt River Valley*,

⁴ Similarly, in *Italian Colors*, the Supreme Court applied *Concepcion* to strike down federal-court procedural requirements that discouraged arbitration by requiring the parties to surmount formidable threshold barriers to gain access to arbitration. 133 S.Ct. at 2312.

206 F.2d at 328, where the employees' concerted activity was prompted by their discovery of violations of minimum wage laws).

In sum, in relying on *Concepcion* to hold that the FAA's savings clause is not a basis for invalidating the prospective waivers of NLRA rights in the arbitration agreements at issue, this Court's *D.R. Horton* decision departed from *Concepcion*'s rationale, which was expressly tied to rules aimed at arbitration agreements. Nothing in *Concepcion* compelled this Court's refusal to give effect to general contract defenses under the NLRA that apply to all individual employee contracts. 737 F.3d at 359-60. By so extending *Concepcion*, this Court's *D.R. Horton* decision erroneously denied all meaning to the FAA savings clause, which, in plain language, authorizes the revocation of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract."

9 U.S.C. § 2.

In conclusion, the *D.R. Horton* panel misinterpreted *Gilmer* and *Concepcion* in holding that the Supreme Court's FAA decisions foreclosed "a substantive right to proceed collectively," 739 F.3d at 361, and that the illegality of individual prospective waivers of NLRA concerted activity rights did not save the agreements at issue from being enforced pursuant to the FAA. *Id.* at 359-60. In relying on *D.R. Horton*, as circuit law required, the panel in this case reached an erroneous result. It should have held that the Board correctly determined that Murphy Oil's

maintenance and enforcement of agreements requiring individual arbitration of work-related claims violates the NLRA. The panel's error, and the need to resolve the exceptionally important question of whether employees' Section 7 rights must give way to the FAA's policy favoring the enforcement of arbitration agreements, warrants en banc consideration by this Court.

CONCLUSION

The Board respectfully requests that the Court rehear this case en banc and enter a judgment enforcing the Board's Order in full.

s/ Kira Dellinger Vol
KIRA DELLINGER VOL
Supervisory Attorney

s/ Jeffrey W. Burritt
JEFFREY W. BURRITT
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570
(202) 273-0656
(202) 273-2989

RICHARD F. GRIFFIN, JR.

General Counsel

JENNIFER ABRUZZO

Deputy General Counsel

JOHN FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

April 2016

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

MURPHY OIL USA, INC.	*	
	*	
Petitioner/Cross-Respondent	*	No. 14-60800
	*	
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	10-CA-038804
	*	
Respondent/Cross-Petitioner	*	
	*	

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

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 18th day of April, 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-60800

United States Court of Appeals
Fifth Circuit

FILED

October 26, 2015

Lyle W. Cayce
Clerk

MURPHY OIL USA, INCORPORATED,

Petitioner/Cross - Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross - Petitioner

On Petitions for Review of an Order
of the National Labor Relations Board

Before JONES, SMITH, and SOUTHWICK, Circuit Judges.

LESLIE H. SOUTHWICK, Circuit Judge:

The National Labor Relations Board concluded that Murphy Oil USA, Inc., had unlawfully required employees at its Alabama facility to sign an arbitration agreement waiving their right to pursue class and collective actions. Murphy Oil, aware that this circuit had already held to the contrary, used the broad venue rights governing the review of Board orders to file its petition with this circuit. The Board, also aware, moved for en banc review in order to allow arguments that the prior decision should be overturned. Having failed in that motion and having the case instead heard by a three-judge panel, the Board will not be surprised that we adhere, as we must, to our prior ruling. We GRANT Murphy Oil's petition, and hold that the corporation did not

No. 14-60800

commit unfair labor practices by requiring employees to sign its arbitration agreement or seeking to enforce that agreement in federal district court.

We DENY Murphy Oil's petition insofar as the Board's order directed the corporation to clarify language in its arbitration agreement applicable to employees hired prior to March 2012 to ensure they understand they are not barred from filing charges with the Board.

FACTS AND PROCEDURAL BACKGROUND

Murphy Oil USA, Inc., operates retail gas stations in several states. Sheila Hobson, the charging party, began working for Murphy Oil at its Calera, Alabama facility in November 2008. She signed a "Binding Arbitration Agreement and Waiver of Jury Trial" (the "Arbitration Agreement"). The Arbitration Agreement provides that, "[e]xcluding claims which must, by . . . law, be resolved in other forums, [Murphy Oil] and Individual agree to resolve any and all disputes or claims . . . which relate . . . to Individual's employment . . . by binding arbitration." The Arbitration Agreement further requires employees to waive the right to pursue class or collective claims in an arbitral or judicial forum.

In June 2010, Hobson and three other employees filed a collective action against Murphy Oil in the United States District Court for the Northern District of Alabama alleging violations of the Fair Labor Standards Act ("FLSA"). Murphy Oil moved to dismiss the collective action and compel individual arbitration pursuant to the Arbitration Agreement. The employees opposed the motion, contending that the FLSA prevented enforcement of the Arbitration Agreement because that statute grants a substantive right to collective action that cannot be waived. The employees also argued that the Arbitration Agreement interfered with their right under the National Labor Relations Act ("NLRA") to engage in Section 7 protected concerted activity.

No. 14-60800

While Murphy Oil's motion to dismiss was pending, Hobson filed an unfair labor charge with the Board in January 2011 based on the claim that the Arbitration Agreement interfered with her Section 7 rights under the NLRA. The General Counsel for the Board issued a complaint and notice of hearing to Murphy Oil in March 2011.

In a separate case of first impression, the Board held in January 2012 that an employer violates Section 8(a)(1) of the NLRA by requiring employees to sign an arbitration agreement waiving their right to pursue class and collective claims in all forums. *D.R. Horton, Inc.*, 357 N.L.R.B. 184 (2012). The Board concluded that such agreements restrict employees' Section 7 right to engage in protected concerted activity in violation of Section 8(a)(1). *Id.* The Board also held that employees could reasonably construe the language in the *D. R. Horton* arbitration agreement to preclude employees from filing an unfair labor practice charge, which also violates Section 8(a)(1). *Id.* at *2, 18.

Following the Board's decision in *D.R. Horton*, Murphy Oil implemented a "Revised Arbitration Agreement" for all employees hired after March 2012. The revision provided that employees were not barred from "participating in proceedings to adjudicate unfair labor practice[] charges before the" Board. Because Hobson and the other employees involved in the Alabama lawsuit were hired before March 2012, the revision did not apply to them.

In September 2012, the Alabama district court stayed the FLSA collective action and compelled the employees to submit their claims to arbitration pursuant to the Arbitration Agreement.¹ One month later, the

¹ The employees never submitted their claims to arbitration. In February 2015, the employees moved for reconsideration of the Alabama district court's order compelling arbitration. The district court denied their motion and ordered the employees to show cause why their case should not be dismissed with prejudice for failing to adhere to the court's order compelling arbitration. The district court ultimately dismissed the case with prejudice for "willful disregard" of its instructions in order to "gain[a] strategic advantage." *Hobson v. Murphy Oil USA, Inc.*, No. CV-10-S-1486-S, 2015 WL 4111661, at *3 (N.D. Ala. July 8, 2015),

No. 14-60800

General Counsel amended the complaint before the Board stemming from Hobson's charge to allege that Murphy Oil's motion to dismiss and compel arbitration in the Alabama lawsuit violated Section 8(a)(1) of the NLRA.

Meanwhile, the petition for review of the Board's decision in *D.R. Horton* was making its way to this court. In December 2013, we rejected the Board's analysis of arbitration agreements. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). We held: (1) the NLRA does not contain a "congressional command overriding" the Federal Arbitration Act ("FAA");² and (2) "use of class action procedures . . . is not a substantive right" under Section 7 of the NLRA. *Id.* at 357, 360–62. This holding means an employer does not engage in unfair labor practices by maintaining and enforcing an arbitration agreement prohibiting employee class or collective actions and requiring employment-related claims to be resolved through individual arbitration. *Id.* at 362.

In analyzing the specific arbitration agreement at issue in *D.R. Horton*, however, we held that its language could be "misconstrued" as prohibiting employees from filing an unfair labor practice charge, which would violate Section 8(a)(1). *Id.* at 364. We enforced the Board's order requiring the employer to clarify the agreement. *Id.* The Board petitioned for rehearing en banc, which was denied without a poll in April 2014.

The Board's decision as to Murphy Oil was issued in October 2014, ten months after our initial *D.R. Horton* decision and six months after rehearing was denied. The Board, unpersuaded by our analysis, reaffirmed its *D.R. Horton* decision. It held that Murphy Oil violated Section 8(a)(1) by "requiring

appeal docketed, No. 15-13507 (11th Cir. Aug. 5, 2015). The employees timely appealed. The case is pending before the Eleventh Circuit.

² 9 U.S.C. § 1 *et seq.*

No. 14-60800

its employees to agree to resolve all employment-related claims through individual arbitration, and by taking steps to enforce the unlawful agreements in [f]ederal district court.” The Board also held that both the Arbitration Agreement and Revised Arbitration Agreement were unlawful because employees would reasonably construe them to prohibit filing Board charges.

The Board ordered numerous remedies. Murphy Oil was required to rescind or revise the Arbitration and Revised Arbitration agreements, send notification of the rescission or revision to signatories and to the Alabama district court, post a notice regarding the violation at its facilities, reimburse the employees’ attorneys’ fees incurred in opposing the company’s motion to dismiss and compel arbitration in the Alabama litigation, and file a sworn declaration outlining the steps it had taken to comply with the Board order.

Murphy Oil timely petitioned this court for review of the Board decision.

DISCUSSION

Board decisions that are “reasonable and supported by substantial evidence on the record considered as a whole” are upheld. *Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 518 (5th Cir. 2007) (citation and quotation marks omitted); *see also* 29 U.S.C. § 160(e). “Substantial evidence is such relevant evidence as a reasonable mind would accept to support a conclusion.” *J. Vallery Elec., Inc. v. NLRB*, 337 F.3d 446, 450 (5th Cir. 2003) (citation and quotation marks omitted). This court reviews the Board’s legal conclusions *de novo*, but “[w]e will enforce the Board’s order if its construction of the statute is reasonably defensible.” *Strand Theatre*, 493 F.3d at 518 (citation and quotation marks omitted).

No. 14-60800

I. Statute of Limitations and Collateral Estoppel

Murphy Oil asserts that Hobson filed her charge too late after the execution of the Arbitration Agreement and the submission of Murphy Oil's motion to compel in the Alabama litigation. By statute, "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b). Murphy Oil also contends that the Board is collaterally estopped from considering whether it was lawful to enforce the Arbitration Agreement because the district court had already decided that issue in the Alabama litigation.

Both of these arguments were raised in Murphy Oil's answer to the Board's complaint. They were not, though, discussed in its brief before the Board. "No objection that has not been urged before the Board . . . shall be considered by the court" 29 U.S.C. § 160(e), (f). Similarly, we have held that "[a]ppellate preservation principles apply equally to petitions for enforcement or review of NLRB decisions." *NLRB v. Catalytic Indus. Maint. Co. (CIMCO)*, 964 F.2d 513, 521 (5th Cir. 1992). While Murphy Oil may have properly pled its statute of limitations and collateral estoppel defenses, it did not sufficiently press those arguments before the Board. Thus, they are waived. *See* 29 U.S.C. § 160(e), (f).

II. D.R. Horton and Board Nonacquiescence

The Board, reaffirming its *D.R. Horton* analysis, held that Murphy Oil violated Section 8(a)(1) of the NLRA by enforcing agreements that "requir[ed] . . . employees to agree to resolve all employment-related claims through individual arbitration." In doing so, of course, the Board disregarded this court's contrary *D.R. Horton* ruling that such arbitration agreements are

No. 14-60800

enforceable and not unlawful. *D.R. Horton*, 737 F.3d at 362.³ Our decision was issued not quite two years ago; we will not repeat its analysis here. Murphy Oil committed no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing the arbitration agreements at issue here. *See id.*

Murphy Oil argues that the Board’s explicit “defiance” of *D.R. Horton* warrants issuing a writ or holding the Board in contempt so as to “restrain [it] from continuing its nonacquiescence practice with respect to this [c]ourt’s directive.” The Board, as far as we know, has not failed to apply our ruling in *D.R. Horton* to the parties in that case. The concern here is the application of *D.R. Horton* to new parties and agreements.

An administrative agency’s need to acquiesce to an earlier circuit court decision when deciding similar issues in later cases will be affected by whether the new decision will be reviewed in that same circuit. *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 735–43 (1989). Murphy Oil could have sought review in (1) the circuit where the unfair labor practice allegedly took place, (2) any circuit in which Murphy Oil transacts business, or (3) the United States Court of Appeals for the District of Columbia. 29 U.S.C. § 160(f). The Board may well not know which circuit’s law will be applied on a petition for review. We do not celebrate the Board’s failure to follow our *D.R. Horton* reasoning, but neither do we condemn its nonacquiescence.

³ Several of our sister circuits have either indicated or expressly stated that they would agree with our holding in *D.R. Horton* if faced with the same question: whether an employer’s maintenance and enforcement of a class or collective action waiver in an arbitration agreement violates the NLRA. *See Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336 (11th Cir. 2014), *cert. denied*, 134 S. Ct. 2886 (2014); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 355 (2014); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–55 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013).

No. 14-60800

III. The Agreements and NLRA Section 8(a)(1)

The Board also held that Murphy Oil's enforcement of the Arbitration Agreement and Revised Arbitration Agreement violated Section 8(a)(1) of the NLRA because employees could reasonably believe the contracts precluded the filing of Board charges. Hobson and the other employees involved in the Alabama litigation were subject to the Arbitration Agreement applicable to employees hired before March 2012. The Revised Arbitration Agreement contains language that sought to correct the possible ambiguity.

A. The Arbitration Agreement in Effect Before March 2012

Section 8(a) of the NLRA makes it unlawful for an employer to commit unfair labor practices. 29 U.S.C. § 158(a). For example, an employer is prohibited from interfering with employees' exercise of their Section 7 rights. *Id.* § 158(a)(1). Under Section 7, employees have the right to self-organize and "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.* § 157.

The Board is empowered to prevent unfair labor practices. This power cannot be limited by an agreement between employees and the employer. *See id.* § 160(a). "Wherever private contracts conflict with [the Board's] functions, they . . . must yield or the [NLRA] would be reduced to a futility." *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944). Accordingly, as we held in *D.R. Horton*, an arbitration agreement violates the NLRA if employees would reasonably construe it as prohibiting filing unfair labor practice charges with the Board. 737 F.3d at 363.

Murphy Oil argues that Hobson's choice to file a charge with the Board proves that the pre-March 2012 Arbitration Agreement did not state or suggest such charges could not be filed. The argument misconstrues the question.

No. 14-60800

“[T]he actual practice of employees is not determinative” of whether an employer has committed an unfair labor practice. *See Flex Frac Logistics, L.L.C. v. NLRB*, 746 F.3d 205, 209 (5th Cir. 2014). The Board has said that the test is whether the employer action is “likely to have a chilling effect” on employees’ exercise of their rights. *Id.* (citing *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998)). The possibility that employees will misunderstand their rights was a reason we upheld the Board’s rejection of a similar provision of the arbitration agreement in *D.R. Horton*. We explained that the FAA and NLRA have “equal importance in our review” of employment arbitration contracts. *D.R. Horton*, 737 F.3d. at 357. We held that even though requiring arbitration of class or collective claims in all forums does not “deny a party any statutory right,” an agreement reasonably interpreted as prohibiting the filing of unfair labor charges would unlawfully deny employees their rights under the NLRA. *Id.* at 357–58, 363–64.

Murphy Oil’s Arbitration Agreement provided that “any and all disputes or claims [employees] may have . . . which relate in any manner . . . to . . . employment” must be resolved by individual arbitration. Signatories further “waive their right to . . . be a party to any group, class or collective action claim in . . . any other forum.” The problem is that broad “any claims” language can create “[t]he reasonable impression . . . that an employee is waiving not just [her] trial rights, but [her] administrative rights as well.” *D.R. Horton*, 737 F.3d at 363–64 (citing *Bill’s Electric, Inc.*, 350 N.L.R.B. 292, 295–96 (2007)).

We do not hold that an express statement must be made that an employee’s right to file Board charges remains intact before an employment arbitration agreement is lawful. Such a provision would assist, though, if incompatible or confusing language appears in the contract. *See id.* at 364.

We conclude that the Arbitration Agreement in effect for employees hired before March 2012, including Hobson and the others involved in the

No. 14-60800

Alabama case, violates the NLRA. The Board's order that Murphy Oil take corrective action as to any employees that remain subject to that version of the contract is valid.

B. The Revised Arbitration Agreement in Effect After March 2012

In March 2012, following the Board's decision in *D.R. Horton*, Murphy Oil added the following clause in the Revised Arbitration Agreement: “[N]othing in this Agreement precludes [employees] . . . from participating in proceedings to adjudicate unfair labor practice[] charges before the [Board].” The Board contends that Murphy Oil's modification is also unlawful because it “leaves intact the entirety of the original Agreement” including employees' waiver of their right “to commence or be a party to any group, class or collective action claim in . . . any other forum.” This provision, the Board said, could be reasonably interpreted as prohibiting employees from pursuing an administrative remedy “since such a claim could be construed as having ‘commence[d]’ a class action in the event that the [Board] decides to seek classwide relief.”

We disagree with the Board. Reading the Murphy Oil contract as a whole, it would be unreasonable for an employee to construe the Revised Arbitration Agreement as prohibiting the filing of Board charges when the agreement says the opposite. The other clauses of the agreement do not negate that language. We decline to enforce the Board's order as to the Revised Arbitration Agreement.

IV. Murphy Oil's Motion to Dismiss and NLRA Section 8(a)(1)

Finally, the Board held that Murphy Oil violated Section 8(a)(1) by filing its motion to dismiss and compel arbitration in the Alabama litigation. As noted above, Section 8(a) prohibits employers from engaging in unfair labor

No. 14-60800

practices. 29 U.S.C. § 158(a). Section 8(a)(1) provides that an employer commits an unfair labor practice by “interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise” of their Section 7 rights, including engaging in protected concerted activity. *Id.* §§ 157, 158(a)(1).

The Board said that in filing its dispositive motion and “eight separate court pleadings and related [documents] . . . between September 2010 and February 2012,” Murphy Oil “acted with an illegal objective [in] . . . ‘seeking to enforce an unlawful contract provision’” that would chill employees’ Section 7 rights, and awarded attorneys’ fees and expenses incurred in “opposing the . . . unlawful motion.” We disagree and decline to enforce the fees award.

The Board rooted its analysis in part in *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983). That decision discussed the balance between an employer’s First Amendment right to litigate and an employee’s Section 7 right to engage in concerted activity. In that case, a waitress filed a charge with the Board after a restaurant terminated her employment; she believed she was fired because she attempted to organize a union. *Id.* at 733. After the Board’s General Counsel issued a complaint, the waitress and several others picketed the restaurant, handing out leaflets and asking customers to boycott eating there. *Id.* In response, the restaurant filed a lawsuit in state court against the demonstrators alleging that they had blocked access to the restaurant, created a threat to public safety, and made libelous statements about the business and its management. *Id.* at 734. The waitress filed a second charge with the Board alleging that the restaurant initiated the civil suit in retaliation for employees’ engaging in Section 7 protected concerted activity, which violated Section 8(a)(1) and (4) of the NLRA. *Id.* at 734–35.

The Board held that the restaurant’s lawsuit constituted an unfair labor practice because it was filed for the purpose of discouraging employees from seeking relief with the Board. *Id.* at 735–37. The Supreme Court remanded

No. 14-60800

the case for further consideration, stating: “The right to litigate is an important one,” but it can be “used by an employer as a powerful instrument of coercion or retaliation.” *Id.* at 740, 744. To be enjoined, the Court said the lawsuit prosecuted by the employer must (1) be “baseless” or “lack[ing] a reasonable basis in fact or law,” and be filed “with the intent of retaliating against an employee for the exercise of rights protected by” Section 7, or (2) have “an objective that is illegal under federal law.” *Id.* at 737 n.5, 744, 748.

We start by distinguishing this dispute from that in *Bill Johnson’s*. The current controversy began when three Murphy Oil employees filed suit in Alabama. Murphy Oil defended itself against the employees’ claims by seeking to enforce the Arbitration Agreement. Murphy Oil was not retaliating as Bill Johnson’s may have been. Moreover, the Board’s holding is based solely on Murphy Oil’s enforcement of an agreement that the Board deemed unlawful because it required employees to individually arbitrate employment-related disputes. Our decision in *D.R. Horton* forecloses that argument in this circuit. 737 F.3d at 362. Though the Board might not need to acquiesce in our decisions, it is a bit bold for it to hold that an employer who followed the reasoning of our *D.R. Horton* decision had no basis in fact or law or an “illegal objective” in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders.

Moreover, the timing of Murphy Oil’s motion to dismiss when compared to the timing of the *D.R. Horton* decisions counsels against finding a violation of Section 8(a)(1). The relevant timeline of events is as follows:

- (1) July 2010: Murphy Oil filed its motion to dismiss and sought to compel arbitration in the Alabama litigation;
- (2) January 2012: the Board in *D.R. Horton* held it to be unlawful to require employees to arbitrate employment-related claims individually, and

No. 14-60800

the D.R. Horton agreement violated the NLRA because it could be reasonably construed as prohibiting the filing of Board charges;

(3) October 2012: the Board's General Counsel amended the complaint against Murphy Oil to allege that Murphy Oil's motion in the Alabama litigation violated Section 8(a)(1); and

(4) December 2013: this court granted D.R. Horton's petition for review of the Board's order and held that agreements requiring individual arbitration of employment-related claims are lawful but that the specific agreement was unlawful because it could be reasonably interpreted as prohibiting the filing of Board charges.

In summary, Murphy Oil's motion was filed a year and a half before the Board had even spoken on the lawfulness of such agreements in light of the NLRA. This court later held that such agreements were generally lawful. Murphy Oil had at least a colorable argument that the Arbitration Agreement was valid when its defensive motion was made, as its response to the lawsuit was not "lack[ing] a reasonable basis in fact or law," and was not filed with an illegal objective under federal law. *See Bill Johnson's*, 461 U.S. at 737 n.5, 744, 748. Murphy Oil's motion to dismiss and compel arbitration did not constitute an unfair labor practice because it was not "baseless." We decline to enforce the Board's order awarding attorneys' fees and expenses.

* * *

The Board's order that Section 8(a)(1) has been violated because an employee would reasonably interpret the Arbitration Agreement in effect for employees hired before March 2012 as prohibiting the filing of an unfair labor practice charge is ENFORCED. Murphy Oil's petition for review of the Board's decision is otherwise GRANTED.