

Nos. 15-4092, 16-1212

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

THE ROSE GROUP D/B/A APPLEBEE'S RESTAURANT

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

JEFF ARMSTRONG

Intervenor

**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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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition for review of The Rose Group d/b/a Applebee's Restaurant ("the Company"), and the cross-application for enforcement of the National Labor Relations Board ("the Board"), of a December 22, 2015 Board Order against the Company. The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act

(“NLRA”). 29 U.S.C. § 160(a). The Board’s Decision and Order is reported at 363 NLRB No. 75.¹

The petition and application were both timely, as the NLRA provides no time limits for such filings. Jeff Armstrong, a former Company employee and the Charging Party before the Board, has intervened on behalf of the Board. The Court has jurisdiction over this proceeding because the Board’s Order is final under Section 10(e) and (f) of the NLRA. 29 U.S.C. § 160(e) and (f). Venue is proper under Section (10)(f) because the Company transacts business in this circuit.

STATEMENT OF THE 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 program barring employees from concertedly pursuing work-related legal claims in any forum?

2. Did the Board reasonably find that the Company violated Section 8(a)(1) of the NLRA by maintaining an arbitration program that employees would reasonably believe bars or restricts them from filing unfair-labor-practice charges?

¹ “A.” cites are to the Joint Appendix filed with the Company’s opening brief on April 19, 2016. References preceding a semicolon are to the Board’s findings; cites following a semicolon are to supporting evidence. “Br.” cites are to the Company’s opening brief, and “Amicus” cites are to the brief of amicus curiae Chamber of Commerce.

STATEMENT OF RELATED CASES

This case has not been before this Court previously, and the Board is unaware of any related case as defined in L.A.R. 28.1(a)(2).

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The Company operates public restaurants selling food and beverages in Pennsylvania, New Jersey, Maryland, and Delaware. (A. 9; A. 64.) In April 2013, the Company implemented the Dispute Resolution Program (“the Program”). (A. 9; A. 65-66.) Each employee receives a copy of a booklet describing the Program and must sign the Agreement and Receipt for Dispute Resolution Program (“Agreement and Receipt”). (A. 9; A. 65.)

Under the Program, all work-related problems proceed through a multi-step process, the final stage of which is binding arbitration in lieu of court litigation. (A. 10; A. 70-72.) The Program is “a condition of [] employment and is the mandatory and exclusive means by which [work-related] problems may be resolved.” (A. 10; A. 70.) The Program expressly prohibits pursuit of class or collective claims, and provides that “there shall be no class or collective action rising from any employee’s claim(s), and each employee may only maintain a claim under this plan on an individual basis and may not participate in a class or collective action.” (A. 10; A. 73.)

The Agreement and Receipt contains similar language, emphasizing that employees have entered a “MUTUAL PROMISE TO RESOLVE CLAIMS BY BINDING ARBITRATION.” (A. 10; A. 77.) The employees must acknowledge that they agree “that all legal claims or disputes covered by the [Program] must be submitted to binding arbitration and that this binding arbitration will be the sole and exclusive final remedy for resolving any such claim or dispute.” (A. 10; A. 77.) And, like the terms outlined in the Program, the Agreement and Receipt informs employees that any arbitration will be “of an individual claim and that any such claim subject to arbitration will not be arbitrated on a collective or class-wide basis” (A. 10; A. 77.)

Since April 2013, the Company has required all employees to sign an agreement and receipt of the Program as a condition of employment. (A. 9-10; A. 66.) On April 6, 2013, the Company hired server Jeff Armstrong, who electronically signed the Agreement and Receipt. (A. 10; A. 66.) On August 25, 2014, Armstrong filed an unfair-labor-practice charge alleging, among other things, that the Company maintained an unlawful mandatory arbitration policy. (A. 11; A. 66-67.)

II. PROCEDURAL HISTORY

Acting on the unfair-labor-practice charge filed by Armstrong, the Board’s General Counsel dismissed certain allegations and issued a complaint alleging that

the Company violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by maintaining a policy under which employees waived their right to engage in concerted legal action in any forum. (A. 11; A. 51-54, 79-81.) The complaint also alleged that the Company violated Section 8(a)(1) of the NLRA by maintaining a policy that employees would reasonably construe as barring them from filing unfair-labor-practice charges with the Board. (A. 11; A. 51-54.) The case was heard before an administrative law judge, who issued a decision and recommended order finding the violations as alleged. (A. 83-93.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On December 22, 2015, the Board (Chairman Pearce and Member McFerran; Member Miscimarra, dissenting) issued a Decision and Order affirming the judge's rulings and conclusions and adopting the judge's recommended order, as modified. (A. 4-14.) The Board found that the Company violated Section 8(a)(1) by maintaining the Program with its waiver of the right to engage in concerted legal action in all forums and by maintaining a program that employees would reasonably believe bars their right to file charges with the Board. (A. 4.) The Board's Order requires the Company to cease and desist from maintaining such a policy. (A. 4.) Affirmatively, the Company must rescind or revise the Program, notify current and former employees who were bound by the Program of the change, and post a remedial notice. (A. 4.)

STANDARD OF REVIEW

In enacting the NLRA, Congress established the Board and charged it with the primary authority to interpret and apply the statute. *Garner v. Teamsters, Chauffeurs & Helpers Local 776*, 346 U.S. 485, 490 (1953). Accordingly, the Board’s “construction of the NLRA will be upheld if it is ‘reasonably defensible.’” *Quick v. NLRB*, 245 F.3d 231, 241 (3d Cir. 2001) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)); *see also City of Arlington v. FCC*, 133 S. Ct. 1863, 1870-71 (2013) (to reject agency interpretation of statute within its expertise requires showing that “the statutory text forecloses” agency’s interpretation). Specifically, the Court will uphold the Board’s legal interpretations if they are “rational and consistent with the [NLRA].” *Grane Health Care v. NLRB*, 712 F.3d 145, 149 (3d Cir. 2013). Questions of law regarding other statutes are reviewed *de novo*. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002).

SUMMARY OF ARGUMENT

This case arises at the intersection of two federal statutes: the NLRA and the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (“FAA”). To the extent possible, both must be given effect. Applying its decisions in *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), *petition for reh’g en banc denied*, 5th Cir. No. 12-60031 (April 16, 2014), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (2014), *enforcement*

denied in relevant part, 808 F. 3d 1013 (5th Cir. 2015), *petition for reh'g en banc denied*, 5th Cir. No. 14-60800 (May 13, 2016), the Board reasonably held that the Company's Program violates the NLRA and correctly found that its unfair-labor-practice finding does not offend the FAA's general mandate to enforce arbitration agreements according to their terms.

Longstanding Supreme Court and Board precedent establish that Section 7 of the NLRA protects employees' right to pursue work-related legal claims concertedly. It also makes clear that individual agreements that prospectively waive Section 7 rights are unlawful. Such waivers violate Section 8(a)(1) of the NLRA, which bars interference with Section 7 rights. Accordingly, the Company's maintenance of a program that requires 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 Program. Because the Program 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 Program violates the NLRA for reasons that are unrelated to arbitration and consistently have been applied to various types of individual contracts. The Supreme Court's FAA jurisprudence does not compel a different result. The Court has enforced agreements requiring individual arbitration in other contexts, but has never held

that the FAA mandates enforcement of an arbitration agreement that directly violates another federal statute. Such a result would run counter to the longstanding principle that when two co-equal statutes can be harmonized, courts should give effect to both.

The Company also violated Section 8(a)(1) by maintaining a policy 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 Program's broad statement that all employment-related claims are subject to arbitration as prohibiting employees from filing charges with the Board. The Company's emphasis on a singular, obscurely placed disclaimer that would foster confusion among employees is insufficient to overcome the Board's reasonable finding that the Program would be understood by employees to restrict the filing of Board charges.

ARGUMENT

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

A. The Court Is Jurisdictionally Barred from Considering Certain of the Company's Objections Because the Company Failed To Urge Them Before the Board

As a preliminary matter, certain of the Company's objections are not properly before the Court. Specifically, the Company makes a number of

objections for the first time on appeal, never having urged them to the Board.

Those objections are as follows:

- Section 7 protects only rights concerning “collective bargaining” (Br. 25);
- The Board is unlawfully legislating remedies under non-NLRA statutes (Br. 25);
- The Board is acting contrary to the Rules Enabling Act by “transform[ing]” Federal Rule of Civil Procedure 23, which governs class action procedures, into a “substantive right” (Br. 29);
- The Board’s decision conflicts with collective-action procedures under the Fair Labor Standards Act (Br. 30); and
- The Board’s decision interferes with the right under Section 9(a) of the NLRA to refrain from collective legal activity (Br. 31).

Under Section 10(e) of the NLRA, “[n]o objection that has not been urged before the Board . . . shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e); *accord Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (court lacks jurisdiction to consider issue not raised before Board); *NLRB v. Konig*, 79 F.3d 354, 360 (3d Cir. 1996). The Company’s failure to make the above objections to the Board renders this Court without jurisdiction to

consider them. Because this case, however, presents a significant issue of first impression for the Court, the Board, in addition to noting that the objection was not raised below, fully responds to each of the Company's waived objections in order to facilitate the Court's understanding of the Board's rationale.²

B. Section 7 of the NLRA Protects Concerted Legal Activity for Mutual Protection

Section 7 guarantees employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other concerted activities* for the purpose of collective bargaining or other *mutual aid or protection*, and ... to refrain from any or all of such activities.” 29 U.S.C. § 157 (emphasis added). As explained below, courts have long upheld the Board's construction of Section 7 as protecting concerted pursuit of work-related legal claims, consistent with the language and purposes of the NLRA. That construction falls squarely within the Board's expertise and its responsibility for delineating federal labor law generally, and Section 7 in particular. *See NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (noting that “the task of defining the scope of [Section] 7 ‘is for the Board

² The Chamber likewise argues (Amicus 15-16) that the Board's decision unlawfully expands Rule 23 into a substantive right, but since the Company did not raise this issue below, it cannot be argued to the Court. *See DirectTV, Inc. v. Pepe*, 431 F.3d 162, 164 (3d. Cir. 2005). However, as noted above, given the importance of the issues of first impression, the Board has fully responded herein to jurisdictionally barred objections; the Board's response to the Company's objection regarding Rule 23 is also responsive to the Chamber's objections.

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))).

Central to this case is the Board’s holding that the right of employees to engage in concerted activity for mutual aid or protection – the “basic premise” upon which our national labor policy has been built, *Murphy Oil*, 2014 WL 5465454, at *1 – includes concerted *legal* activity. The reasonableness of the Board’s view was confirmed by the Supreme Court in *Eastex*, 437 U.S. at 565-66 & nn.15-16. In that case, the Court recognized that Section 7’s broad guarantee reaches beyond immediate workplace disputes to encompass employees’ efforts “to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship,” including “through resort to administrative and judicial forums.” *Id.* at 565-66.³

Indeed, as *Eastex* notes, the Board has protected concerted legal activity for decades. *Id.* at 565-66 & n.15. That line of cases dates back to *Spandsco Oil &*

³ The Company posits (Br. 24) that an employee’s choice of forum to seek redress, such as filing a collective action in court, is not protected, so long as employees can improve working conditions in other ways. Board law is to the contrary. *See Serendipity-Un-Ltd.*, 263 NLRB 768, 775 (1982) (employees have right “to engage in concerted activity which they decide is appropriate,” even if “alternative methods of solving the problems” are available (internal quotations omitted)). Accordingly, the Board reasonably held that individual agreements that wholly foreclose one avenue of Section 7 activity violate Section 8(a)(1), regardless of whether employees can engage in other types of Section 7 activity.

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”); *Frank Briscoe, Inc. v. NLRB*, 637 F.2d 946, 949-50 (3d. Cir. 1981) (filing charges with EEOC constitutes protected concerted activity).⁴

⁴ *Accord Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188-89 (D.C. Cir. 2000) (concerted petitions for injunctions against workplace harassment protected by Section 7); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) (“Generally, filing by employees of a labor related civil action is protected activity under section 7 of the NLRA unless the employees acted in bad faith.”); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (same); *Moss Planing Mill Co.*, 103 NLRB 414, 419 (1953) (employees “acted in concert for their mutual aid and protection in prosecuting their wage claims under the wage and hour law”), *enforced*, 206 F.2d 557 (4th Cir. 1953); *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).

Section 7's protection of collective 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 together to better their working conditions." *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962).

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

the employer to redress their work-related claims through resort to legal processes.
Id. at 328.

Protecting employees' concerted pursuit of legal claims also advances the congressional objective of "restoring equality of bargaining power between employers and employees." 29 U.S.C. § 151; *accord Murphy Oil*, 2014 WL 5465454, at *1. Recognizing the strength in numbers, statutory employees have long exercised their Section 7 right to band together to take advantage of the evolving body of laws and procedures that legislatures have provided to redress their grievances. *See supra* pp. 10-12. Such collective legal action seeks to unite workers generally and to lay a foundation for more effective collective bargaining. *See Eastex*, 437 U.S. at 569-70. That result, in turn, furthers the NLRA's objective of enabling employees, through collective action, to increase their economic well-being. *See Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 753-54 (1985) (noting Congress's intention to remedy "the widening gap between wages and profits") (quoting 79 Cong. Rec. 2371 (1935)).

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 (Br. 29-30) and the Chamber's arguments (Amicus 22-

23), 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.*, 133S.Ct. 2304, 2309 (2013). No more availing are the Company’s (Br. 27-29) and Chamber’s claims (Amicus 15-16) that because Rule 23 creates purely “procedural rights,” the Board is acting contrary to the Rules Enabling Act by finding that Rule 23 affords employees substantive rights.⁵ The Company’s argument fails to recognize that the NLRA, not Rule 23, creates the substantive right to engage in concerted legal action; Rule 23 is just one possible option for exercising a Section 7 right, an alternative to carrying a picket sign or distributing a handbill.⁶ *See Lewis*, 2016 WL 3029464, at *9 (“Rule 23 is not the source of the collective right here; Section 7 of the NLRA is.”). The NLRA requires that employers refrain from interfering with employees’ exercise of their right to collective legal action, regardless of

⁵ As explained above (pp. 8-10), the Company has not properly preserved for this Court’s consideration its objection that the Board’s decision runs counter to the Rules Enabling Act. In any event, as explained, the concerns regarding the Rules Enabling Act and Rule 23 are unfounded.

⁶ The Company’s reliance on (Br. 30) *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 265 (3d Cir. 2012), is thus similarly misplaced. *Knepper* simply reiterates the proposition that Rule 23 cannot create a substantive right. *Id.* at 264. For the reasons explained above, the Board’s position does not run afoul of Rule 23.

whether employees are entitled to any particular procedural mechanisms for exercising those rights.⁷

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

⁷ Nor does it matter, contrary to the Chamber’s assertions (Amicus 23 n.7), that modern class-action procedures were not available to employees in 1935 when the NLRA was enacted. Joint and collective claims of various forms long predate Rule 23, *Lewis*, 2016 WL 3029646, at *3-4, as do the Board’s earliest decisions finding that Section 7 protects the collective legal pursuit of work-related claims. *See supra* pp. 10-12. In any event, the NLRA was drafted to allow the Board to respond to new developments. *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (recognizing Board’s “responsibility to adapt the [NLRA] to changing patterns of industrial life”). The relevant point is that when class-action procedures became available, the NLRA barred employers from interfering with their employees’ Section 7 right to use those new procedures for their mutual aid or protection.

C. The Program’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 “may reasonably tend to coerce or intimidate employees” in the exercise of their Section 7 rights. *Local 542, Int’l Union of Operating Eng’rs v. NLRB*, 328 F.2d 850, 852-53 (3d Cir. 1964).

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); *Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007). It does not matter whether the employer has applied or enforced the policy – mere maintenance constitutes an unfair labor practice. *Cintas*, 482 F.3d at 467-68. Here, because the Company imposed the Program 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, contrary to the Company’s assertions (Br. 45 n.13), appropriately utilized 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 work-rule analysis to terms of 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 (A 4) that the Company's maintenance of the Program violates Section 8(a)(1).

1. The Program unlawfully restricts Section 7 activity

The Program facially and indisputably restricts employees' Section 7 rights because it prohibits employees from pursuing *any* concerted legal claims, without exception. Specifically, it establishes "the mandatory and exclusive means" to resolve all "covered workplace claims." (A. 10.) It expressly proscribes all "class and collective action." (A. 10.) By requiring that employees individually arbitrate all work-related claims, the Program 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)

The Board's finding that the Program 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 NLRA violations “obviously must yield or the [NLRA] would be reduced to a futility”).⁸

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)

⁸ For the first time on appeal (*see pp. 8-10*), the Company objects to (Br. 25) the Board’s reliance on *National Licorice* and *J.I. Case* as “misplaced” because those cases did not involve bans on the pursuit of collective legal action. The Company’s attempt to distinguish those two cases because they “dealt with *the real core of Section 7 rights* – ‘the right to self-organization, to form, join, or assist labor organizations, and to bargain collectively,’” (Br. 25) (emphasis added), finds no basis in the NLRA. As the Board has explained, “[t]he Section 7 right to act concertedly for mutual aid and protection is not limited to supporting a labor union and pursuing collective bargaining with employers.” *Murphy Oil*, 2014 WL 5465454, *1 (citing *Eastex*, 437 U.S. at 566). Indeed, Section 7, by its express language, also guarantees employees the right 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).

(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 futuro 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 337.⁹

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

⁹ Collective waivers negotiated on behalf of employees by their exclusive bargaining representative, by contrast, are permissible. For example, a union may waive the employees’ right to engage in an economic strike, for the term of a collective-bargaining agreement, provided that the waiver is clear and unmistakable. *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 705-06 (1983); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280-83 (1956). Such waivers are themselves the product of concerted activity – the choice of employees to exercise their Section 7 right “to bargain collectively through representatives of their own choosing.” 29 U.S.C. § 157; *D.R. Horton*, 357 NLRB at 2286; *see also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 248 (2009) (emphasizing that the agreement was a “bargained-for exchange,” which “stem[med] from an *exercise* of Section 7 rights: the collective-bargaining process”). *Pyett*, therefore, is of no aid to the Company (Br. 33) because it stands on an entirely different footing from the Program here, which the Company imposed on individual employees as a condition of employment. *See Stone*, 125 F.2d at 756 (rejecting employer’s attempt to analogize collectively bargained waivers to individual arbitration agreements waiving Section 7 rights, which “thereafter impose[] a restraint upon collective action”).

(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., Wash. Aluminum*, 370 U.S. at 14-15 (concerted activity spurred by extreme cold in plant); *Salt River Valley*, 206 F.2d at 328 (concerted activity prompted by violations of minimum-wage laws).

As the Board has recognized, an individual employee’s decision whether collectively to walk out of a cold plant or to join with other employees in a lawsuit over wages and hours is materially different from the decision of an individual employee – made in advance of any concrete grievance – to agree to refrain from *any* future concerted activity, regardless of the circumstances. *See Nijjar Realty, Inc.*, 363 NLRB No. 38, 2015 WL 7444737, at *5 (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). 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.¹⁰

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 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

¹⁰ 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”).

their workplace claims individually, *D. R. Horton* does not compel *employees* to pursue their claims concertedly.”) (Emphasis in original).

Prospective waivers of Section 7 rights are unlawful not only because they impair the rights of the employees who are party to them, but also because they preemptively deprive non-signatory employees of the signatory employees’ mutual aid and support at the time that an actual dispute arises. That impairment occurs because, as discussed above, collective action depends on employees having the right to communicate with and appeal to fellow employees to join in such action. *See, e.g., Signature Flight Support*, 333 NLRB 1250, 1260 (2001) (finding employee efforts “to persuade other employees to engage in concerted activities” protected), *enforced mem.*, 31 F. App’x 931 (11th Cir. 2002); *Am. Fed’n of Gov’t Employees*, 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.

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.

Finally, the Company, again raising an argument not presented to the Board, contends (Br. 31-32) that the Board's unfair-labor-practice finding interferes with Section 9(a) of the NLRA, 29 U.S.C. § 159(a). This Court is jurisdictionally barred from considering this contention, *see* pp. 8-10. But, in any event, the Board's barring the Company from *requiring* its employees to present their grievances individually is not an interference with the limited right Section 9(a) affords employees to present their grievances individually if they choose to do so. As the Board explained in *Murphy Oil*, Section 9(a) confers on a union the status of exclusive-bargaining representative "[p]rovided" that employees "shall have the right at any time to present grievances to the employer and to have such grievances adjusted...." 2014 WL 5465454, at *23. The proviso guarantees that employees can present grievances, and that employers can entertain them, free from allegations of direct dealing with union-represented employees in violation of Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5). *See Emporium Capwell Co.*

v. Western Addition Cmty. Org., 420 U.S. 50, 62 n.12 (1975) (citation to legislative history omitted). Section 9(a) does not create a distinct employee right: while employers *may* entertain individual grievances from union-represented employees, their refusal to do so is not an unfair labor practice. *Id.* In short, the Section 9(a) proviso merely carves out an exception to the provision’s rule of union exclusivity. *Murphy Oil*, 2014 WL 5465454, at *23 n.95 (citing *Black-Clawson Co. v. Int’l Ass’n of Machinists Lodge 355*, 313 F.2d 179, 185 (2d Cir. 1962) (“This construction ... best comports with the structure of the section. ‘The office of a proviso is seldom to create substantive rights and obligations; it carves exceptions out of what goes before.’”) (quoting Archibald Cox, *Rights Under A Labor Agreement*, 69 HARV. L. REV. 601, 624 (1956)).)¹¹

In sum, the Program’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

¹¹ In attempting to characterize the Board’s decision as an interference with the right of its employees to resolve workplace disputes individually, the Company simply disregards that what the Board has proscribed is the Company’s insistence on a prospective waiver of its employees’ right to act collectively if they so choose. Employees are free to refrain from concerted action when they have a grievance. Further, as explained below, pp. 30-31, nothing in the Board’s *D.R. Horton* decision prohibits an employer from requiring arbitration of all *individual* work-related claims; as the Board explained, “[e]mployers remain free to insist that *arbitral* proceedings be conducted on an individual basis.” 357 NLRB at 2288.

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.

D. 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 employees’ Section 7 right to seek to improve working conditions through collective litigation. But that position contravenes the settled principle that “when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see also POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236-39 (2014). As demonstrated below, agreements that are unlawful under the NLRA are exempted from enforcement by the FAA’s savings clause. There is thus no difficulty in fully enforcing each statute according to its terms.

Section 2 of the FAA provides that arbitration agreements “shall be valid, irrevocable, and enforceable, *save* upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (emphasis added). That enforcement mandate, with its savings-clause exception, “reflect[s] both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal quotations omitted). “[C]ourts must [therefore] place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms.” *Id.*; *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (FAA’s purpose is “to make arbitration agreements as enforceable as other contracts, but not more so”).

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

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

The FAA’s savings clause is an express limitation on the FAA’s mandate to enforce arbitration agreements as written and, consequently, on the broad federal

policy favoring arbitration. Under the savings clause, general defenses that would serve to nullify any contract also bar enforcement of arbitration agreements.

Conversely, defenses that affect only arbitration agreements conflict with the FAA, as do ostensibly general defenses “that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Concepcion*, 563 U.S. at 339.

One well-established general contract defense is illegality. As the Supreme Court explained in *Kaiser Steel Corp. v. Mullins*, “a federal court has a duty to determine whether a contract violates federal law before enforcing it.” 455 U.S. 72, 83-84 (1982). Giving effect to that principle, the Court held that if a contract required an employer to cease doing business with another company in violation of the NLRA, it would be unenforceable. *Id.* at 84-86; *see also Courier-Citizen Co. v. Boston Electrotypers Union No. 11*, 702 F.2d 273, 276 n.6 (1st Cir. 1983) (explaining that “the federal courts may not enforce a contractual provision that violates section 8 of the [NLRA]”).

As described above, *supra* pp. 18-21, the Board, with court approval, has consistently rejected, as unlawful under the NLRA, a variety of individual contracts that are unrelated to arbitration because they prospectively restrict Section 7 rights. *Nat’l Licorice*, 309 U.S. at 360-61, 364. It has set aside settlement agreements that require employees to agree not to engage in concerted protests, *Bon Harbor Nursing & Rehab. Ctr.*, 348 NLRB at 1078; *Bethany Med.*

Ctr., 328 NLRB at 1105-06, and has found unlawful a separation agreement that was conditioned on the departing employee's agreement not to help other employees in workplace disputes, *Ishikawa Gasket Am.*, 337 NLRB at 175-76. The Board has also found waivers of an employee's right to engage in concerted legal action are unlawful in contracts or other legal documents that do not provide for arbitration. *See Convergys Corp.*, 363 NLRB No. 51, 2015 WL 7750753, at *1 & n.3 (2015) (application for employment), *petition for review filed*, 5th Cir. No. 15-60860; *Logisticare Solutions, Inc.*, 383 NLRB No. 85, 2015 WL 9460027, at *1 (2015) (employee handbook), *petition for review filed*, 5th Cir. No. 15-60029. That unbroken line of precedent, dating from shortly after the NLRA's enactment, demonstrates that illegality under the NLRA has consistently served to invalidate a variety of contracts, not just arbitration agreements, and does not derive its meaning from arbitration.

Moreover, unlike the courts, whose hostility to arbitration prompted enactment of the FAA, *Concepcion*, 563 U.S. at 339, the Board harbors no prejudice against arbitration, *see Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 271 (1964) (discussing the Board's policies favoring arbitration as means of peacefully resolving workplace disputes). Nothing in the Board's *D.R. Horton* decision prohibits an employer from requiring arbitration of all *individual* work-related claims; as the Board explained, "[e]mployers remain free to insist that

arbitral proceedings be conducted on an individual basis.”¹² 357 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.

¹² There is, accordingly, no basis for amicus curiae Chamber of Commerce to opine that “conditioning the enforcement of arbitration provisions on the availability of class procedures would lead employers to abandon arbitration altogether—to the detriment of employees, businesses, and the economy as a whole.” Amicus 27.

To the extent the Chamber maintains (Amicus 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 in 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”).

Indeed, consistent with the Board’s analysis in *D.R. Horton* and *Murphy Oil*, the Seventh Circuit recently held that arbitration policies 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 3029646, at *6. In coming to that conclusion, the court agreed with the Board that contracts restricting Section 7 activity are illegal. *Id.* at *4, *6. It also noted that, rather than embodying hostility, the NLRA “does not disfavor arbitration” as a mechanism of dispute resolution. *Id.* at *7.

In sum, because the defense that a contract is illegal under the NLRA is unrelated to the fact that an agreement to arbitrate is at issue, that defense falls comfortably within the FAA’s savings-clause exception. The Board thus adhered to the FAA policy of enforcing arbitration agreements on the same terms as other contracts in finding that the Company violated the NLRA by maintaining a program that requires arbitration of all work-related claims on an individual basis.¹³ There is no conflict between either the express statutory requirements, or

¹³ 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., CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 672-73 (2012) (consumer claims under Credit Repair Organization Act); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20,

animating policy considerations, of the FAA and NLRA with respect to that unfair labor practice.¹⁴

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. 24-28) that the Board has “misconstrued” Supreme Court precedent. The Supreme Court has never considered whether agreements requiring individual arbitration must be enforced

23 (1991) (age-discrimination claim by manager); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 482-83 (1989) (investor claims under Securities Act). For the same reasons, the Company is wrong by contending (Br. 25, 30), for the first time on appeal (pp. 8-10), that the Board is unlawfully inserting procedures into other statutes or interfering with FLSA procedures. Rather, the Board is, as discussed above, ensuring that employees are able to exercise their NLRA rights collectively to invoke whatever procedures courts and legislatures have made available to them to improve their lot as employees. *Murphy Oil*, 2014 WL 5465454, at *2 (at issue is the employees’ Section 7 right to act in concert “to *pursue* joint, class, or collective claims *if and as available*, without the interference of an employer-imposed restraint.”) (Second emphasis added).

¹⁴ For that reason, it is unnecessary to reach the question, which the Company (Br. 38-44) and the Chamber address (Amicus 17-20), of whether the NLRA clearly contains a “contrary congressional command” overriding the FAA. That inquiry is designed to determine which statutory command controls when another federal statute conflicts with the FAA and the two cannot be reconciled. Here, there is no conflict between the statutes; both can – and should – be given effect. *Morton*, 417 U.S. at 551; *accord Lewis*, 2016 WL 3029646, at *6 (finding “no conflict between the NLRA and the FAA, let alone an irreconcilable one”). Nevertheless, it is evident that Section 8(a)(1) of the NLRA expressly commands employers not to interfere with their employees’ Section 7 right to engage in concerted activity for mutual aid or protection. To the extent an arbitration agreement bars concerted pursuit of claims in any forum, whether arbitral or judicial, its enforcement under the FAA would “inherent[ly] conflict” with those NLRA provisions. *Gilmer*, 500 U.S. at 26.

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 Program violates Section 8(a)(1). For a court to find that a contract that violates the NLRA does not fit within the FAA's savings clause would be to fail to give effect to the settled principle that courts should regard two co-equal statutes as effective. *Morton*, 417 U.S. at 551.

None of the Supreme Court FAA cases that the Company cites (Br. 27) involve arbitration agreements that impair core provisions of another federal statute, much less directly violate such a statute. Instead, the Court has enforced arbitration agreements over challenges based on statutory provisions only where the agreements were consistent with the animating purposes of those particular statutes. For example, in *Gilmer*, 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. at 27 (internal quotations omitted). Because the substantive rights of individual employees to be free of age-based discrimination could be adequately vindicated in individual arbitration, the Court held that an arbitration agreement could be enforced. The Court rejected arguments that ADEA provisions affording a judicial forum and an optional

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

Unlike the statutory provisions at issue in the Supreme Court’s FAA cases – where protecting collective action against individual employee waiver is not an objective of the statutes – the NLRA provisions protecting collective action are foundational, underlying the entire architecture of federal labor law and policy. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (characterizing the rights protected by Section 7 as “fundamental”). Under the mode of statutory analysis used in cases like *Gilmer*, that is a crucial distinction. As the Board explained in *Murphy Oil*, “[t]he core objective of the [NLRA] is the protection of workers’ ability to act in concert, in support of one another.” 2014 WL 5465454, at *1; *see also Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739

¹⁵ The Supreme Court has consistently maintained that same analytical focus on statutory purpose when assessing challenges to the enforcement of arbitration agreements based on provisions in other federal statutes. *See, e.g., CompuCredit*, 132 S. Ct. at 670-71 (judicial-forum provision not “principal substantive provision[]” of Credit Repair Organizations Act); *Rodriguez de Quijas*, 490 U.S. at 481 (judicial-forum and venue provisions in Securities Act not “so critical that they cannot be waived”); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 235-36 (1987) (Exchange Act provision not intended to bar regulation when “chief aim” was to preserve exchanges’ power to self-regulate).

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

Consistent with the fundamental status of Section 7 – and of particular relevance to the savings-clause inquiry – Section 8 expressly prohibits restriction of Section 7 rights. 29 U.S.C. § 158(a), (b). And other NLRA provisions further demonstrate the central role Section 7 rights play in federal labor policy and the importance of Section 8’s proscription of interference with those rights. Section 9 establishes procedures, such as elections and exclusive representation, to implement representational Section 7 rights. 29 U.S.C. § 159. And Section 10 empowers the Board to prevent violations of Section 8. 29 U.S.C. § 160. Thus, the NLRA’s various provisions all lead back to Section 7’s guarantee of employees’ right to join together “to improve terms and conditions of employment or otherwise improve their lot as employees.” *Eastex*, 437 U.S. at 565.¹⁶

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

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

In sum, unlike in *Gilmer* and similar cases cited by the Company and the Chamber, 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.

The Company's (Br. 20-22) and the Chamber's reliance (Amicus 20) on *Concepcion* is also flawed. Unlike the Company's Program, the arbitration agreement in that case did not directly violate a co-equal federal law. In *Concepcion* the rule alleged to preclude enforcement of an agreement under the FAA's savings clause was a judicial interpretation of state unconscionability principles. It was intended to ensure prosecution of low-value claims arising under other statutes by enabling consumers to bring them collectively. 563 U.S. at 340.¹⁷ 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

¹⁷ Similarly, in *Italian Colors*, the Supreme Court applied *Concepcion* to strike down a federal-court-imposed requirement that collective litigation must be available when individual arbitration would be prohibitively expensive, ensuring an "affordable procedural path" to vindicate claims. 133 S. Ct. at 2308-09.

policy of facilitating particular claims, low-value or otherwise, brought under other laws. *Cf. Concepcion*, 563 U.S. at 340; *Italian Colors*, 133 S. Ct. 2312 & n.5.

That the Supreme Court declined to read the savings clause as protecting such judicially created defenses, which “stand as an obstacle to the accomplishment of the FAA’s objectives,” *Concepcion*, 563 U.S. at 343, does not suggest that the savings clause does not encompass a defense of contract illegality based on the NLRA, a co-equal federal law.¹⁸

Contrary to the Company’s implication (Br. 35-37), 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.¹⁹ Moreover, the Board has not applied the statutory ban on restrictions of Section 7 rights in a manner

¹⁸ The Company also cites (Br. 22) *Quilloin v. Tenet Health System Phila., Inc.*, wherein this Court relied exclusively on *Concepcion* to find that the FAA pre-empted a state law barring certain class action waivers. 673 F.3d 221, 232-33 (3d Cir. 2012). The Company’s reliance on *Quilloin* is flawed for the same reasons as its reliance on *Concepcion*.

¹⁹ 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).

disproportionately impacting arbitration agreements. *Cf. Concepcion*, 563 U.S. at 342; *see also id.* (“[I]t is worth noting that California’s courts have been more likely to hold contracts to arbitrate unconscionable than other contracts.”). Indeed, unlike California courts, the Board has never required that an employer allow employees the opportunity to arbitrate as a class. Rather, as noted above, the Board acknowledges an employer’s right “to insist that *arbitral* proceedings be conducted on an individual basis,” so long as employees remain free to bring concerted actions in another forum. *D.R. Horton*, 357 NLRB at 2288 (emphasis in original). 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 (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*. That court cited prior FAA cases like *Gilmer* for the proposition that

“there is no substantive right to class procedures under the [ADEA]” or “to proceed collectively under the FLSA.” 737 F.3d at 357. But those cases do not answer the materially different question of whether the NLRA protects such a right.²⁰ 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.²¹ The Seventh Circuit, by contrast, held that *Concepcion* does not govern because, unlike the rule in that case, the Board’s “general principle” barring the prospective waiver of Section 7 activity “extends

²⁰ Nor does this Court’s observation in *Vilches v. The Traveler’s Cos.*, that the FLSA does not “confer a nonwaivable right to a class action under that statute,” answer the materially different question presented here. 413 F. App’x 487, 494 n.4 (3d Cir. 2011). Like *Gilmer*, *Vilches* does not involve the NLRA, which as discussed above, is a critical distinction. As the Seventh Circuit recently explained, “The NLRA ... is not the ADEA or the FLSA. While the FLSA and ADEA allow class or collective actions, they do not guarantee collective process . . . The NLRA does.” *Lewis*, 2016 WL 3029646, at *9

²¹ The Company (Br. 18) points to other circuits’ decisions rejecting the Board’s *D.R. Horton* position in non-Board cases, but they likewise overread Supreme Court precedent and reflect a misunderstanding of the Board’s position. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053-55 (8th Cir. 2013) (finding *Concepcion* resolved savings-clause issue, and FLSA did not contain congressional command barring enforcement of arbitration agreement); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013) (per curiam) (rejecting citation to Board’s *D.R. Horton* decision based on *Owen*, without analysis). The Company also cites (Br. 18, 30) to *Walthour v. Chipio Windshield Repair, LLC*, but there the court did not reach the NLRA issue. 745 F.3d 1326, 1330 (11th Cir. 2014). None of those decisions address the Board’s saving clause argument. District court decisions rejecting the Board’s position suffer from the same analytical flaws.

far beyond collective litigation or arbitration” and is not hostile to the arbitral process. *Lewis*, 2016 WL 3029646, at *7.

In sum, because a different right is at stake when a statutory employee asserts his Section 7 rights than in any of the Supreme Court cases that have enforced agreements requiring individual arbitration, a different result is warranted. Even in cases brought to vindicate individual workplace rights under other statutes, employees covered by the NLRA carry into court not only those individual rights but also the separate Section 7 right to act concertedly. Those employees thus may properly be entitled to more relief than plaintiffs who either do not enjoy or fail to assert that additional right.

Prospective waivers of the right to bring concerted legal action are unlawful under the NLRA even if they do not offend the ADEA or other statutes granting individual rights. Just because an employer’s action is not prohibited by one statute “does not mean that [it] is immune from attack on other statutory grounds in an appropriate case.” *Emporium Capwell*, 420 U.S. at 71-72; *see also New York Shipping Ass’n, Inc. v. Fed. Mar. Comm’n*, 854 F.2d 1338, 1367 (D.C. Cir. 1988) (“[T]here is no anomaly if conduct privileged under one statute is nonetheless condemned by another; we expect persons in a complex regulatory state to conform their behavior to the dictates of many laws, each serving its own special purpose.”). The NLRA’s protection of, and prohibition on interference with,

concerted activity is what distinguishes it from other employment statutes and what renders agreements that require *individual* arbitration unlawful under the NLRA and unenforceable under the FAA.

II. THE COMPANY VIOLATED SECTION 8(a)(1) OF THE NLRA BY FORCING EMPLOYEES TO SIGN A DISPUTE RESOLUTION POLICY 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. 16), 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 Cintas Corp. v. NLRB*, 482 F.3d 463, 468 (D.C. Cir. 2007). The Board properly found (A. 4 n.1) that employees would reasonably read the Program to restrict their right to file charges with the Board. That finding is “reasonably defensible” and thus entitled to “considerable deference.” *See Cintas*, 482 F.3d at 469.

The Program informs employees that the policy is “**A CONDITION OF YOUR EMPLOYMENT AND IS THE MANDATORY AND EXCLUSIVE MEANS BY WHICH [ALL COVERED WORK-PLACE DISPUTES] MAY BE RESOLVED.**” (A. 10; A 70.) The Program requires mandatory arbitration of “all those legal claims . . . against the Company . . . whether or not arising out of

your employment,” including claims of wrongful termination, discrimination, and retaliation “under any law, statute, regulation or ordinance,” and for wages. (A. 10; A. 73.) Because the Program “repeatedly states” that it constitutes “the exclusive means of resolving workplace problems, and it defines the types of matters subject to the program very broadly, as ‘all legal claims’” (A. 10), the Board reasonably concluded that the employees would construe the Agreement as disallowing employees from filing charges with the Board. *See Cintas*, 483 F.3d at 468-49; *Cellular Sales of Mo., LLC v. NLRB*, No. 15-1620, 2016 WL 3093363 (8th Cir. June 2, 2016); *U-Haul Co.*, 347 NLRB at 377 (finding unlawful an arbitration agreement that applied to all “disputes, claims or controversies that a court of law would be authorized to entertain”).

In the main, the Company contends (Br. 45-48) that the Board’s interpretation is unreasonable because the Program contains a single sentence on the final page that tells employees that “the Program will not prevent you from filing a charge with any state or federal administrative agency.” (A. 74.) The fact that the Program contains this single reference in an “obscure section at the end of the booklet” that is seven pages long (A. 13), however, does not compel the conclusion that it would be unreasonable to construe the otherwise broad and repeated language of the Program as precluding an employee from filing Board charges. As the Board observed, the disclaimer on which the Company relies is

“immediately followed by a sentence reiterating that the program is the mandatory and exclusive means to resolve all covered workplace claims.” (A. 13.) Adding to the confusion, the Agreement and Receipt that employees sign provides that “all legal claims or disputes” between the Company and its employees “must be submitted to binding arbitration,” and notably omits the disclaimer. (A. 77-78.) Under these circumstances, the Board reasonably determined that the disclaimer “would confuse employees, and that ambiguity is held against [the Company].” (A. 13.) *See Lafayette Park Hotel*, 326 NLRB 824, 828 (1996), *enforced*, 203 F.3d 52 (D.C. Cir. 1999) (ambiguities in employment policy are construed against promulgator of policy). Given the considerable deference accorded to the Board’s determination, the Company has failed to show that the Court should disturb it.

Nor does the Company’s reliance on *Murphy Oil* (Br. 49) compel the Court to find that the Board’s conclusion is unreasonable. The Program’s language creates ambiguity and confusion not present in the *Murphy Oil* agreement. For example, the *Murphy Oil* disclaimer was neither buried at the end of a seven-page booklet nor under an obscure heading. And it was not immediately followed by a confusing and seemingly countermanding statement that all workplace claims are subject to final resolution under the Program’s arbitration process. It was therefore reasonable for the Board to conclude that an employee would understand the Program in this case as encompassing Board charges.

CONCLUSION

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

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June 2016

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

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THE ROSE GROUP D/B/A APPLEBEE'S)	
RESTAURANT,)	
)	
Petitioner/Cross Respondent)	
)	Nos. 15-4092, 16-1212
v.)	
)	
NATIONAL LABOR RELATIONS BOARD,)	
)	
Respondent/Cross Petitioner)	
)	
and)	
)	
JEFF ARMSTRONG,)	
Intervenor)	
<hr/>)	

CERTIFICATION OF BAR MEMBERSHIP

In accordance with Third Circuit L.A.R. 28.3(d) and 46.1(e), Board counsel Barbara A. Sheehy certifies that she is a member in good standing of the bars of the District of Columbia and the States of New York and Connecticut. She is not required to be a member of this Court's bar because she is representing the federal government in this case.

s/ Linda Dreeben
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Dated at Washington, DC
this 23rd day of June, 2016

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

THE ROSE GROUP D/B/A APPLEBEE'S	*	
RESTAURANT	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 15-4092
	*	16-1212
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	5-CA-135360
	*	
Respondent/Cross-Petitioner	*	
	*	
and	*	
	*	
JEFF ARMSTRONG	*	
	*	
Intervenor	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 11,560 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010. Board counsel further certifies that: the electronic version of the Board's brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel; and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.2015.2015 and is virus-free according to that program.

s/ Linda Dreeben

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Dated at Washington, DC
this 23rd day of June, 2016

**UNITED STATES COURT OF APPEALS
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THE ROSE GROUP D/B/A APPLEBEE'S RESTAURANT	*	
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v.	*	
	*	Board Case No.
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	*	
Respondent/Cross-Petitioner	*	
	*	
and	*	
	*	
JEFF ARMSTRONG	*	
	*	
Intervenor	*	

CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users and, if not, a paper copy was served on all those parties or their counsel of record at the addresses listed below:

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