

Oral Argument Not Yet Scheduled

**Nos. 16-60034**

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

**EMPLOYERS RESOURCE**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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## STATEMENT REGARDING ORAL ARGUMENT

This case involves issues decided by the Court in *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), *petition for reh'g en banc denied*, 5th Cir. No. 12-60031 (April 16, 2014), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), *enforcement denied in relevant part*, 808 F. 3d 1013 (5th Cir. 2015), *petition for reh'g en banc denied*, 5th Cir. No. 14-60800 (May 13, 2016). Therefore, the Board does not request oral argument.

**TABLE OF CONTENTS**

| <b>Headings</b>   | <b>Page(s)</b> |
|---|----------------|
| Statement of subject matter and appellate jurisdiction.....   | 1              |
| Statement of the issue .....  | 2              |
| Statement of the case.....  | 2              |
| I. The Board’s findings of fact .....   | 2              |
| II. Procedural history .....  | 5              |
| III. The Board’s conclusions and Order .....  | 5              |
| Summary of argument.....  | 6              |
| Standard of review .....  | 8              |
| Argument.....   | 10             |
| The Company violated Section 8(a)(1) of the NLRA by enforcing the agreement so as to bar employees from concertedly pursuing work-related claims .....                | 10             |
| A. Introduction .....   | 10             |
| B. The Company violated Section 8(a)(1) of the NLRA by enforcing the agreement in a way that interferes with employees’ Section 7 rights.....                         | 12             |
| C. The FAA does not mandate enforcement of arbitration agreements that violate the NLRA by prospectively waiving Section 7 rights.....                                | 17             |
| 1. Because an employee cannot prospectively waive Section 7 rights in any contract, the Agreement fits within the FAA’s savings-clause exception to enforcement ..... | 18             |
| 2. This Court erred in finding that the Supreme Court’s FAA jurisprudence requires rejection of the Board’s <i>D.R. Horton</i> and <i>Murphy Oil</i> decisions .....  | 23             |

**TABLE OF CONTENTS**

| <b>Headings-Cont'd</b>   | <b>Page(s)</b> |
|--|----------------|
| a. FAA precedent does not support enforcing an arbitration agreement that violates a co-equal federal statute .....                | 24             |
| b. This Court erroneously held that <i>Concepcion</i> mandates enforcement of an arbitration agreement that violates the NLRA..... | 29             |
| D. The Company’s enforcement of the agreement is not protected petitioning under the First Amendment.....                          | 32             |
| E. The Company’s remaining contentions are meritless .....   | 34             |
| Conclusion .....   | 39             |

**TABLE OF AUTHORITIES**

| <b>Cases</b>  | <b>Page(s)</b>                 |
|---|--------------------------------|
| <i>127 Rest. Corp.</i> ,<br>331 NLRB 269 (2000) .....                                   | 16                             |
| <i>Alexander v. Sandoval</i> ,<br>532 U.S. 275 (2001) .....                             | 24                             |
| <i>Allentown Mack Sales &amp; Serv., Inc. v. NLRB</i> ,<br>522 U.S. 359 (1998) .....    | 9                              |
| <i>Altex Ready Mixed Concrete Corp. v. NLRB</i> ,<br>542 F.2d 295 (5th Cir. 1976) ..... | 13                             |
| <i>Am. Express Co. v. Italian Colors Rest.</i> ,<br>133 S. Ct. 2304 (2013) .....        | 28, 30                         |
| <i>AT&amp;T Mobility LLC v. Concepcion</i> ,<br>563 U.S. 333 (2011) .....               | 18, 19, 20, 23, 26, 29, 30, 31 |
| <i>Barrentine v. Arkansas-Best Freight Sys., Inc.</i> ,<br>450 U.S. 728 (1981) .....    | 26                             |
| <i>BE &amp; K Constr. Co. v. NLRB</i> ,<br>536 U.S. 516 (2002) .....                    | 33                             |
| <i>Bethany Med. Ctr.</i> ,<br>328 NLRB 1094 (1999) .....                                | 20                             |
| <i>Beyoglu</i> ,<br>362 NLRB No. 152, 2015 WL 4572913 (July 29, 2015) .....             | 14                             |
| <i>Bill Johnson’s Rests. v. NLRB</i> ,<br>461 U.S. 731 (1983) .....                     | 32, 34                         |
| <i>Bon Harbor Nursing &amp; Rehab. Ctr.</i> ,<br>348 NLRB 1062 (2006) .....             | 15, 20                         |

**TABLE OF AUTHORITIES**

| <b>Cases -Cont'd</b>  | <b>Page(s)</b> |
|---|----------------|
| <i>Brady v. Nat'l Football League</i> ,<br>644 F.3d 661 (8th Cir. 2011) .....   | 13, 16         |
| <i>Can-Am Plumbing, Inc. v. NLRB</i> ,<br>321 F.3d 145 (D.C. Cir. 2003).....  | 33             |
| <i>Carey v. Westinghouse Elec. Corp.</i> ,<br>375 U.S. 261 (1964).....  | 20             |
| <i>Cellular Sales of Missouri, LLC v. NLRB</i> ,<br>No. 15-1620, 2016 WL 3093363 (8 <sup>th</sup> Cir. June 2, 2016)..... | 26             |
| <i>Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.</i> ,<br>467 U.S. 837 (1984).....                                | 8, 27          |
| <i>Circuit City Stores, Inc. v. Adams</i> ,<br>532 U.S. 105 (2001).....   | 31             |
| <i>City of Arlington v. FCC</i> ,<br>133 S. Ct. 1863 (2013).....  | 8, 27          |
| <i>CompuCredit Corp. v. Greenwood</i> ,<br>132 S. Ct. 665 (2012).....   | 23, 25         |
| <i>Control Servs.</i> ,<br>305 NLRB 435 (1991), <i>enforced mem.</i> ,<br>961 F.2d 1568 (3d Cir. 1992) .....              | 35             |
| <i>Convergys Corp.</i> ,<br>363 NLRB No. 51, 2015 WL 7750753 (Nov. 30, 2015).....   | 20             |
| <i>Countrywide Fin. Corp.</i> ,<br>362 NLRB No. 165, 2015 WL 4882655 (Aug. 14, 2015).....                                 | 16             |
| <i>Courier-Citizen Co. v. Boston Electrotypers Union No. 11</i> ,<br>702 F.2d 273 (1st Cir. 1983).....                    | 19             |

**TABLE OF AUTHORITIES**

| <b>Cases -Cont'd</b>  | <b>Page(s)</b>                       |
|---|--------------------------------------|
| <i>D.R. Horton, Inc.</i> ,<br>357 NLRB 2277 (2012), <i>enforcement denied in relevant part</i> ,<br>737 F.3d 344 (5th Cir. 2013)..... | 5, 6, 17, 18, 21, 22, 25, 26, 31, 32 |
| <i>D.R. Horton, Inc. v. NLRB</i> ,<br>737 F.3d 344 (5th Cir. 2013) .....  | 7-8, 10, 13, 15, 16, 17, 23, 25      |
| <i>Dynasteel Corp. v. NLRB</i> ,<br>476 F.3d 253 (5th Cir. 2007) .....  | 9                                    |
| <i>E.I. du Pont de Nemours &amp; Co. v. Train</i> ,<br>430 U.S. 112 (1977).....   | 11                                   |
| <i>Eastex, Inc. v. NLRB</i> ,<br>437 U.S. 556 (1978).....   | 8, 13, 14, 27                        |
| <i>Eddyleon Chocolate Co.</i> ,<br>301 NLRB 887 (1991) .....  | 15                                   |
| <i>Fibreboard Paper Prods. Corp. v. NLRB</i> ,<br>379 U.S. 203 (1964).....  | 33                                   |
| <i>First Legal Support Servs.</i> ,<br>342 NLRB 350 (2004) .....  | 15                                   |
| <i>Flex Frac Logistics, LLC v. NLRB</i> ,<br>746 F.3d 205 (5th Cir. 2014) .....   | 13                                   |
| <i>Garner v. Teamsters Chauffeurs &amp; Helpers Local 776</i> ,<br>346 U.S. 485 (1953).....   | 7, 27                                |
| <i>Gilmer v. Interstate/Johnson Lane Corp.</i> ,<br>500 U.S. 20 (1991).....   | 23, 24-25, 28                        |

**TABLE OF AUTHORITIES**

| <b>Cases -Cont'd</b>   | <b>Page(s)</b>     |
|--|--------------------|
| <i>Guard Publ’g Co.</i> ,<br>351 NLRB 1110 (2007), <i>enforced</i> ,<br>571 F.3d 53, 59 (D.C. Cir. 2009).....    | 35                 |
| <i>Hitachi Capital Am. Corp.</i> ,<br>361 NLRB No. 19, 2014 WL 3897175 (Aug. 8, 2014).....                       | 16                 |
| <i>Hoffman Plastic Compounds, Inc. v. NLRB</i> ,<br>535 U.S. 137 (2002).....                                     | 8                  |
| <i>Holly Farms Corp. v. NLRB</i> ,<br>517 U.S. 392 (1996).....   | 8                  |
| <i>Hudgens v. NLRB</i> ,<br>424 U.S. 507 (1976).....   | 36                 |
| <i>Ishikawa Gasket Am., Inc.</i> ,<br>337 NLRB 175(2001), <i>enforced</i> ,<br>354 F.3d 534 (6th Cir. 2004)..... | 15, 20             |
| <i>J.I. Case Co. v. NLRB</i> ,<br>321 U.S. 332 (1944).....   | 14, 36             |
| <i>Kaiser Steel Corp. v. Mullins</i> ,<br>455 U.S. 72 (1982).....  | 19                 |
| <i>Lewis v. Epic Sys. Corp.</i> ,<br>No. 15-2997, 2016 WL 3029464 (7th Cir. May 26, 2016).....                   | 13, 15, 22, 23, 29 |
| <i>Local Lodge No. 1424 v. NLRB</i> ,<br>362 U.S. 411 (1960).....  | 35                 |
| <i>Logisticare Solutions, Inc.</i> ,<br>383 NLRB No. 85, 2015 WL 9460027 (Dec. 24, 2015) .....                   | 20                 |

**TABLE OF AUTHORITIES**

| <b>Cases -Cont'd</b>   | <b>Page(s)</b>                           |
|--|--|
| <i>Lutheran Heritage Vill.-Livonia,</i><br>343 NLRB 646 (2004) .....   | 12, 13, 16                               |
| <i>Manno Elec., Inc.,</i><br>321 NLRB 278 (1996), <i>enforced mem.</i> ,<br>127 F.3d 34 (5th Cir. 1997).....   | 33                                       |
| <i>McKesson Drug Co.,</i><br>337 NLRB 935 (2002) .....   | 15                                       |
| <i>Merchants Truck Line v. NLRB,</i><br>577 F.2d 1011 (5th Cir. 1978) .....  | 9  |
| <i>Meyers Indus.,</i><br>281 NLRB 882 (1986), <i>enforced sub nom.</i> ,<br><i>Prill v. NLRB</i> , 835 F.2d 1481 (D.C. Cir. 1987).....                                     | 14                                       |
| <i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,</i><br>473 U.S. 614 (1985).....   | 25                                       |
| <i>Mohave Elec. Coop., Inc. v. NLRB,</i><br>206 F.3d 1183 (D.C. Cir. 2000).....  | 14                                       |
| <i>Morton v. Mancari,</i><br>417 U.S. 535 (1974).....  | 18, 23, 24                               |
| <i>Murphy Oil USA, Inc.,</i><br>361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), <i>enforcement denied in<br/>relevant part</i> ,<br>808 F. 3d 1013 (5th Cir. 2015) ..... | 5, 6, 13, 17, 18, 22, 23, 26, 27, 28, 33 |
| <i>Murphy Oil USA, Inc. v. NLRB,</i><br>808 F.3d 1013 (5th Cir. 2015) .....  | 8, 10, 17, 23                            |

**TABLE OF AUTHORITIES**

| <b>Cases -Cont'd</b>   | <b>Page(s)</b> |
|--|----------------|
| <i>Nat'l Licorice Co. v. NLRB</i> ,<br>309 U.S. 350 (1940).....  | 14-15, 19, 36  |
| <i>New York New York Hotel &amp; Casino</i> ,<br>356 NLRB No. 119, 2011 WL 1113038 (Mar. 25, 2011), <i>enforced</i> ,<br>676 F.3d 193 (D.C. Cir. 2012) .....                       | 35-36          |
| <i>NLRB v. Allied Aviation Fueling</i> ,<br>490 F.3d 374 (5th Cir. 2007) .....   | 9              |
| <i>NLRB v. City Disposal Sys. Inc.</i> ,<br>465 U.S. 822 (1984).....   | 8, 14, 16, 27  |
| <i>NLRB v. J. Weingarten, Inc.</i> ,<br>420 U.S. 251 (1975).....   | 28             |
| <i>NLRB v. Jones &amp; Laughlin Steel Corp.</i> ,<br>301 U.S. 1 (1937).....  | 26             |
| <i>NLRB v. Laredo Coca Cola Bottling Co.</i> ,<br>613 F.2d 1338 (5th Cir. 1980) .....  | 12             |
| <i>NLRB v. Port Gibson Veneer &amp; Box Co.</i> ,<br>167 F.2d 144 (5th Cir. 1948) .....  | 15             |
| <i>NLRB v. Stone</i> ,<br>125 F.2d 752 (7th Cir. 1942) .....   | 15             |
| <i>NLRB v. Town &amp; Country Elec., Inc.</i> ,<br>516 U.S. 85 (1995).....   | 11             |
| <i>On Assignment</i> ,<br>362 NLRB No. 189, 2015 WL 5113231 (Aug. 27, 2015), <i>enforcement denied</i> ,<br><i>on other grounds</i> ,<br>5th Cir. No. 15-60642 (June 6, 2016)..... | 36             |

**TABLE OF AUTHORITIES**

| <b>Cases -Cont'd</b>   | <b>Page(s)</b> |
|--|----------------|
| <i>Owen v. Bristol Care, Inc.</i> ,<br>702 F.3d 1050 (8th Cir. 2013) .....             | 26             |
| <i>POM Wonderful LLC v. Coca-Cola Co.</i> ,<br>134 S. Ct. 2228 (2014).....             | 18             |
| <i>Prill v. NLRB</i> ,<br>835 F.2d 1481 (D.C. Cir. 1987) .....                         | 14             |
| <i>Prima Paint Corp. v. Flood &amp; Conklin Mfg. Co.</i> ,<br>388 U.S. 395 (1967)..... | 19             |
| <i>Reef Indus., Inc. v. NLRB</i> ,<br>952 F.2d 830 (5th Cir. 1991) .....               | 8              |
| <i>Rodriguez de Quijas v. Shearson/Am. Express, Inc.</i> ,<br>490 U.S. 477 (1989)..... | 23, 25         |
| <i>SEIU Local 32B-32J v. NLRB</i> ,<br>68 F.3d 490 (D.C. Cir. 1995).....               | 33-34          |
| <i>Shearson/Am. Express, Inc. v. McMahon</i> ,<br>482 U.S. 220 (1987).....             | 25             |
| <i>Spandsco Oil &amp; Royalty Co.</i> ,<br>42 NLRB 942 (1942) .....                    | 14             |
| <i>Stolt-Nielsen, S.A. v. Animal Feeds Int’l Corp.</i> ,<br>559 U.S. 662 (2010).....   | 21             |
| <i>Sutherland v. Ernst &amp; Young LLP</i> ,<br>726 F.3d 290 (2d Cir. 2013).....       | 26             |
| <i>Teamsters Local 776 v. NLRB</i> ,<br>973 F.2d 230 (3d Cir. 1992).....               | 33             |

**TABLE OF AUTHORITIES**

| <b>Cases -Cont'd</b>   | <b>Page(s)</b>                                  |
|--|---|
| <i>United Steelworkers of Am. v. Warrior &amp; Gulf Navigation Co.</i> ,<br>363 U.S. 574 (1960)..... | 32  |
| <i>Universal Camera Corp. v. NLRB</i> ,<br>340 U.S. 474 (1951).....                                  | 9   |
| <i>Valmont Indus., Inc. v. NLRB</i> ,<br>244 F.3d 454 (5th Cir. 2001) .....                          | 9   |
| <br><b>Statutes:</b>   |   |
| Age Discrimination in Employment Act<br>(29 U.S.C. § 621 et. seq.)                                   |   |
| 29 U.S.C. § 621(b) .....   | 25  |
| Fair Labor Standards Act<br>(29 U.S.C. § 201 et seq.).....   | 14  |
| Federal Arbitration Act<br>(9 U.S.C. § 1 et seq.)  |   |
| Section 2 (9 U.S.C. § 2) .....   | 18  |
| National Labor Relations Act, as amended<br>(29 U.S.C. § 151 et seq.)                                |   |
| Section 1 (29 U.S.C. § 151) .....  | 2   |
| Section 2(2) (29 U.S.C. § 152(2)).....   | 35  |
| Section 7 (29 U.S.C. § 157) .....  | 5-8, 11-19, 21-23, 26-29, 31-33, 36             |
| Section 8 (29 U.S.C. § 158) .....  | 19, 27  |
| Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....   | 2, 5-7, 10, 12, 14, 15, 17,<br>22-24, 29-31, 36 |
| Section 9 (29 U.S.C. § 159) .....  | 27  |
| Section 10 (29 U.S.C. § 160) .....   | 27  |
| Section 10(a) (29 U.S.C. § 160(a)) .....   | 2   |

**TABLE OF AUTHORITIES**

| <b>Statutes-Cont’d</b>  | <b>Page(s)</b> |
|---|----------------|
| Section 10(b) (29 U.S.C. § 160(b)).....   | 34             |
| Section 10(e) (29 U.S.C. § 160(e)) .....  | 2, 9           |
| Section 10(f) (29 U.S.C. § 160(f)).....   | 2, 10          |
| <br>Norris-LaGuardia Act<br>(29 U.S.C. § 101 et. seq.)  |                |
| Section 102 (29 U.S.C. § 102).....  | 28             |
| Section 103 (29 U.S.C. § 103).....  | 28             |
| Section 104 (29 U.S.C. § 104).....  | 28             |
| <br><b>Rules:</b>   |                |
| Rule 10(a) of the Rules of the Supreme Court of the United States.....  | 11             |
| Federal Rule of Civil Procedure 23 .....  | 28, 29         |
| Fifth Circuit IOP 35.....   | 12             |
| <br><b>Other Authorities:</b>   |                |
| <i>Deference and the Federal Arbitration Act: The NLRB’s Determination of<br/>Substantive Statutory Rights,</i><br>128 HARV. L .REV. 907 (2015) ..... | 27             |
| <i>Nonacquiescence by Federal Administrative Agencies,</i><br>98 YALE L.J. 679 (1989) .....   | 10             |
| <i>The National Labor Relations Board and the Supreme Court, LABOR LAW<br/>DEVELOPMENTS 6-5.....</i>  | 11             |

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

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**STATEMENT OF SUBJECT MATTER AND  
APPELLATE JURISDICTION**

This case is before the Court on the petition of Employers Resource (“the Company”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued against the Company on December 17, 2015, and reported at 363 NLRB No. 59.

(ROA 397-405.)<sup>1</sup> The Board had subject-matter jurisdiction over the proceeding below under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended (“NLRA”), 29 U.S.C. § 151, et seq. The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the NLRA, 29 U.S.C. § 160(e) and (f), because the Board’s Order is final and the Company transacts business in this circuit. The Company’s petition and the Board’s cross-application were timely because the NLRA places no time limit on the initiation of review or enforcement proceedings.

### **STATEMENT OF THE ISSUE**

Whether the Board reasonably found that the Company violated Section 8(a)(1) of the NLRA by enforcing an arbitration agreement in a manner that requires employees to waive their right to maintain class or collective actions in any forum, arbitral or judicial.

### **STATEMENT OF THE CASE**

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

The Company is a professional employer organization that provides payroll and other personnel services to employers. (ROA 401; Tr. 49-50.) Beth’s Kitchen,

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<sup>1</sup> “ROA” references are to the record on appeal, whereas “Tr.” references the hearing transcript. “Br.” references are to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

Inc. (“BK”), a California restaurant, was one of the Company’s clients. (ROA 401; Tr. 55.) The Company and BK executed a “Client Service Agreement” under which the Company became “a contractual co-employer of [BK’s] employees.” (ROA 402; ROA 181-97, Tr. 54-55.) BK remained the “primary or worksite employer.” (ROA 402; ROA 181.) As part of its services, the Company provided BK with an enrollment packet for use with new employees. The Client Service Agreement provided that “no employee of [BK] will be covered by this Agreement, or will become a co-employee of [the Company], until [BK] has completed and delivered to [the Respondent], an enrollment packet for that individual.” (ROA 402; ROA 181.)

The enrollment packet included various forms and a standard “Employment Agreement.” (ROA 401; ROA 200, 204-26, 229-31, Tr. 50.) BK could not alter the terms of the employment agreement without the Company’s written authorization. (ROA 402; ROA 231.) Among other terms, the Employment Agreement contained an arbitration provision that required employees to submit “any claim” against the Company or BK for determination “exclusively by binding arbitration” (“the Agreement”). (ROA 401; ROA 231.) The Company was a party to the Agreement. (ROA 230.) The enrollment packet’s cover page instructed the employee to “sign” the “Employment Agreement . . . prior to starting work” and stated that the Company would be “unable to process payroll” unless the

Employment Agreement was properly completed; BK told new hires to do as the cover page instructed. (ROA 402; ROA 204, Tr. 20, 23.)

Talina Torres began working for BK as a server in September 2009. (ROA 401; Tr. 18.) Before starting work, a BK manager told Torres she had to sign the Agreement in order to get paid, which she did. (ROA 403; Tr. 19-20, 23.) In June 2011, Torres was laid off for lack of work. (ROA 401; Tr. 19.)

In July 2012, Torres filed a wage and hour suit against BK and the Company in California state court “on behalf of herself and all other persons similarly situated.” (ROA 401; ROA 235-54.) On January 8, 2013, the Company, relying on the Agreement, filed a motion with the state court to stay the case and to compel individual arbitration of Torres’ class-action suit, arguing that an implicit agreement to authorize class arbitration may not be inferred from a contract’s silence on the issue. (ROA 401; ROA 255-78.) In its motion to compel individual arbitration, the Company contended that the parties never agreed to any class arbitration. (ROA 397 n.2; ROA 274.) The state court granted the Company’s motion and dismissed the case against the Company.<sup>2</sup> (ROA 401; ROA 312-30.)

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<sup>2</sup> Torres’ lawsuit against BK proceeded over BK’s motion to compel arbitration because the state court found that the mandatory arbitration provision was procedurally and substantively unconscionable under California law with respect to

## II. PROCEDURAL HISTORY

Based on a charge filed by Torres, the Board's General Counsel issued a complaint alleging that the Company, by filing its motion to compel, had violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by maintaining and enforcing a mandatory arbitration agreement in a manner that interfered with, restrained, and coerced employees in the exercise of their rights guaranteed in Section 7 of the NLRA, 29 U.S.C. § 157. (ROA 398.) Following a one-day hearing, an administrative law judge found that the Company had violated Section 8(a)(1) as alleged in the complaint. (ROA 404.)

## III. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Pearce and Member McFerran; Member Miscimarra, dissenting in part) affirmed the judge's unfair-labor-practice finding, pursuant to its decisions in *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), *petition for reh'g en banc denied*, 5th Cir. No. 12-60031 (April 16, 2014), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), *enforcement denied in relevant part*, 808 F. 3d 1013 (5th Cir. 2015), *petition for reh'g en banc denied*, 5th Cir. No. 14-60800 (May 13, 2016). (ROA 397.)

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BK. (ROA 403 n.11.) The court did not reach whether the Agreement barred class or collective action against BK.

The Board's Order requires the Company to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the NLRA. (ROA 398.) Affirmatively, the Order requires the Company to rescind or revise the Agreement, notify all applicants and current and former employees that it has done so, notify the California state court that it no longer opposes Torres' lawsuit on the basis of the Agreement, and reimburse Torres for any attorneys' fees and litigation expenses incurred in opposing the Company's motion. (ROA 398.) Finally, the Order requires that the Company mail and post a remedial notice. (ROA 398.)

### **SUMMARY OF ARGUMENT**

The Board applied its *D.R. Horton* and *Murphy Oil* decisions, both of which this Court has rejected, to find that the Company violated Section 8(a)(1) of the NLRA by enforcing the Agreement through its motion to compel individual arbitration. As this Court has recognized, the Board's continuing to apply its own precedents on a nationwide basis except where bound by a contrary final judgment involving the same parties is not a gesture of disrespect but a practical necessity born of the NLRA's venue provision. That provision allows review to be sought in multiple forums and precludes the Board from knowing with certainty which circuit's law will apply on review. In addition, the Board's adherence to its

precedents is a practical necessity if it is going to establish a basis for Supreme Court review.

With respect to the merits of the violation found, it is well established under Supreme Court precedent that: (1) concerted pursuit of work-related legal claims is protected by Section 7 of the NLRA, and (2) an individual contract purporting to waive Section 7 rights prospectively violates Section 8(a)(1) of the Act and is, therefore, unenforceable. Accordingly, the Board reasonably found the Company's enforcement of the Agreement through its motion to compel individual arbitration, which effectively precluded employees from pursuing collective actions in any forum, arbitral or judicial, is illegal under the NLRA.

Because the Agreement is illegal under the NLRA, it is exempted from enforcement under the Federal Arbitration Act by the terms of the FAA's savings clause. For that reason, the Board reasonably concluded that its construction of the NLRA is not in conflict with the FAA. The Board's construction effectuates the congressional intent animating those two co-equal statutes and is consistent with Supreme Court precedent interpreting both. This Court's contrary holding erroneously reads certain Supreme Court cases as mandating resolution of an issue that Court has never considered or addressed.

## STANDARD OF REVIEW

When Congress enacted the NLRA, it conferred upon the Board the primary authority to interpret and apply the statute. *See Garner v. Teamsters Chauffeurs & Helpers Local 776*, 346 U.S. 485, 490 (1953); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 349 (5th Cir. 2013) (recognizing “Board’s expertise in labor law”). The Board’s exercise of its primary authority to interpret the NLRA is entitled to affirmance so long as it is reasonable, even if the Court might decide the issue differently *de novo*. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1868-71 (2013) (reaffirming *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996) (courts “must respect” Board’s reasonable judgment; “it need not show that its construction is the *best* way to read the statute”); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1017 (5th Cir. 2015) (“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.” (Internal quotation and citation omitted)). The Court also defers to the Board’s plausible inferences, findings of fact, and application of the statute. *D.R. Horton*, 737 F.3d at 349, 356. More specifically, “the task of defining the scope of [Section] 7 ‘is for the Board to perform in the first instance as it considers the wide variety of cases that come before it . . . .’” *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (quoting *Eastex, Inc. v.*

*NLRB*, 437 U.S. 556, 568 (1978)); accord *D.R. Horton, Inc.*, 737 F.3d at 356; *Reef Indus., Inc. v. NLRB*, 952 F.2d 830, 838 (5th Cir. 1991). Courts are not required to defer to the Board's interpretation of statutes other than the NLRA. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143-44 (2002) (observing that the Court afforded Board no deference in its interpretation of another statute because it was "so far removed from its expertise").

The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Merchants Truck Line v. NLRB*, 577 F.2d 1011, 1014 (5th Cir. 1978). The "substantial evidence" test requires the degree of evidence that could satisfy a reasonable factfinder. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 377 (1998); *Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 463 (5th Cir. 2001). "In determining whether the Board's factual findings are supported by the record, [the Court does] not make credibility determinations or reweigh the evidence." *NLRB v. Allied Aviation Fueling*, 490 F.3d 374, 378 (5th Cir. 2007). The Board's adoption of the administrative law judge's credibility determinations must be upheld absent a showing that they are unreasonable, self-contradictory, based upon inadequate reasons or no reason, or unjustified. *Dynasteel Corp. v. NLRB*, 476 F.3d 253, 257 (5th Cir. 2007).

**ARGUMENT****THE COMPANY VIOLATED SECTION 8(a)(1) OF THE NLRA BY ENFORCING THE AGREEMENT SO AS TO BAR EMPLOYEES FROM CONCERTEDLY PURSUING WORK-RELATED CLAIMS****A. Introduction**

The Board acknowledges that its decision contravenes this Court’s decisions in *D.R. Horton* and *Murphy Oil*. The Board’s policy not to automatically acquiesce to the adverse decision of a circuit court except where bound by a contrary final judgment involving the same parties does not manifest disrespect but is a practical necessity given the NLRA’s broad venue provision. That provision permits an aggrieved party to seek review “in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia . . . .” 29 U.S.C. § 160(f). As this Court recently recognized, the breadth of that provision precludes the Board from knowing with any certainty which circuit’s law will be applied on review. *Murphy Oil*, 808 F.3d at 1018 (citing Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 706 (1989)). For that reason, this Court has properly refused to “condemn” the Board’s refusal to acquiesce to prior circuit precedent. *Id.*

The Board's adhering to its precedents on a nationwide basis while they are undergoing review in various circuits is also a practical necessity because Supreme Court review is generally available to government agencies only when there is a conflict in the circuits over an important and recurring issue. *See NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 88 (1995) (noting that certiorari granted to resolve conflict in circuits); Rule 10(a) of the Rules of the Supreme Court of the United States; *see also* Rosemary M. Collyer, *The National Labor Relations Board and the Supreme Court*, in LABOR LAW DEVELOPMENTS 6-5 (Southwestern Legal Foundation 1986). If the Board were required to abandon its legal position in response to contrary court decisions, it would forfeit the opportunity for "difficult issues to mature through full consideration by the courts of appeals," *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977), in order to facilitate Supreme Court review.

In the case before this Court, there are issues on review about which the Board and this Court agree – namely, that employees have a substantive right to engage in collective legal activity (pp. 12-14) and that contracts interfering with employees' Section 7 rights are unlawful (pp. 14-15). The Board, however, acknowledges this Court's disagreement with the Board's view that the FAA does not mandate enforcement of arbitration agreements that violate the NLRA by prospectively waiving employees' Section 7 rights to pursue work-related claims

collectively. Nonetheless, consistent with its litigating position in this and other circuits, and in response to the Court’s order directing the parties to file briefs, the Board respectfully submits that the following legal principles should govern the outcome of this case.<sup>3</sup>

**B. The Company Violated Section 8(a)(1) of the NLRA by Enforcing the Agreement in a Way that Interferes with Employees’ Section 7 Rights**

Section 7 of the NLRA 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). Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), prohibits employers from engaging in conduct that “reasonably tends to interfere with, restrain or coerce employees” in the exercise of rights guaranteed by Section 7. *NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338, 1340-41 (5th Cir. 1980). Under well-established Board precedent, approved by this Court, a work rule is unlawful under Section 8(a)(1) if it explicitly restricts, or is applied to restrict, activities protected by Section 7. *Lutheran Heritage Vill.-Livonia*, 343 NLRB 646, 646-47 (2004);

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<sup>3</sup> While circuit law stands in the way of the panel’s acceptance of the Board’s arguments, it is open to the panel to suggest to the full Court the appropriateness of en banc review to reconsider circuit law. *See* 5th Cir. IOP 35.

*Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 208-09 (5th Cir. 2014); *see also D.R. Horton*, 737 F.3d at 363 (applying *Lutheran Heritage* to assess whether arbitration agreement interfered with employees' right to file Board charges).

Central to this case is the Board's court-approved interpretation of Section 7 as protecting the right of employees to engage in concerted legal activity as part of the broader right to engage in concerted activity for mutual aid or protection. *Eastex*, 437 U.S. at 565-66 & nn.15-16 (1978) (recognizing that Section 7 encompasses not only collective bargaining but also other concerted activity, both in the workplace and in legislative and judicial forums); *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454, \*1 (Oct. 28, 2014) (quoting *Eastex* and noting Supreme Court's agreement that "Section 7 protects employees 'when they seek to improve working conditions through resort to administrative and judicial forums'"); *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."); *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.").<sup>4</sup> Courts have recognized that the Board's construction falls

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<sup>4</sup> *See also 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 . . . .")

squarely within its expertise and its responsibility for delineating federal labor law, generally, and Section 7 in particular. *See City Disposal*, 465 U.S. at 829 (noting that “the task of defining the scope of [Section] 7 ‘is for the Board to perform in the first instance as it considers the wide variety of cases that come before it’”) (quoting *Eastex*, 437 U.S. at 568).

Equally rooted in longstanding Board and judicial precedent is the principle that 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 Co. v. NLRB*, 321 U.S. 332, 337 (1944); *Nat’l Licorice Co. v.*

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(emphasis in original); *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188-89 (D.C. Cir. 2000) (concerted petitions for injunctions against workplace harassment); *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-50 (1942) (finding protected three employees’ joint lawsuit filed under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201, et seq.

The Company’s insistence (Br. 66-69) that Torres’ wage-related lawsuit was not “concerted” because she filed it as a single plaintiff on behalf of similarly situated employees is without merit. As the Board observed: “‘the filing of an employment-related class or collective action by an individual is an attempt to initiate, to induce, or to prepare the group for action and is therefore conduct protected by Section 7.’” ROA 397 n.2, quoting *Beyoglu*, 362 NLRB No. 152, 2015 WL 4572913 (July 29, 2015); accord *Meyers Indus.*, 281 NLRB 882, 887 (1986) (concerted activity “encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action . . .”), enforced *sub nom.*, *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). By filing her lawsuit as a putative collective action, Torres signaled her intent to proceed collectively, and sought to induce participation of similarly situated employees. Thus, contrary to the Company’s characterization (Br. 68), Torres’ filing of the complaint was not the isolated conduct of a single employee, but, rather, the inchoate stages of concerted activity.

*NLRB*, 309 U.S. 350, 364 (1940) (“[E]mployers cannot set at naught the [NLRA] by inducing their workmen to agree not to demand performance of the duties which the [statute] imposes.”); *Lewis*, 2016 WL 3029464, at \*4 (agreeing with longstanding precedent finding contracts requiring employees to renounce Section 7 rights are unlawful); *NLRB v. Port Gibson Veneer & Box Co.*, 167 F.2d 144, 146 (5th Cir. 1948) (employers “may not require individual employees to sign employment contracts which, though not unlawful in their terms, are used to deter self-organization”); *First Legal Support Servs.*, 342 NLRB 350, 362-63 (2004) (unlawful to have employees sign contracts stripping them of right to organize).<sup>5</sup>

This Court’s decision in *D.R. Horton* did not undermine those fundamental, longstanding principles. Indeed, this Court acknowledged that the Board’s interpretation of Section 7 finds support in Supreme Court and circuit precedent.

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<sup>5</sup> See also *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942) (finding that individual contracts requiring employees to adjust their grievances with their employer individually violate the NLRA, even without coercion); *Eddyleon Chocolate Co.*, 301 NLRB 887, 887 (1991) (unlawful to ask job applicant to agree not to join union); *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); *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); *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).

*D.R. Horton*, 737 F.3d at 356-57 (citing *City Disposal*, 465 U.S. at 831-82, 835-36; *Brady*, 644 F.3d at 673; *127 Rest. Corp.*, 331 NLRB 269, 275-76 (2000)).

Under the well-accepted principles set forth above, the Board properly found (ROA 397 n.2) that the Company's application of the Agreement to curb employees' Section 7 rights rendered the Agreement unlawful under *Lutheran Heritage*. 343 NLRB at 647 (rule unlawful if applied to restrict Section 7 rights). It is the rule's application to protected conduct that establishes its unlawfulness. It does not matter that the rule or policy itself does not explicitly restrict Section 7 activity; enforcement alone is an unfair labor practice. *See Countrywide Fin. Corp.*, 362 NLRB No. 165, 2015 WL 4882655, at \*4-6 (Aug. 14, 2015), *petition for review filed*, 9th Cir. 15-72700, 15-73222; *Hitachi Capital Am. Corp.*, 361 NLRB No. 19, 2014 WL 3897175, at \*3 (Aug. 8, 2014).

Here, the Company defended against Torres' lawsuit by arguing that the court "must enforce [the Agreement] by its express terms and not impose any class arbitration, 'which was never agreed to by the parties.'" ROA 397 n.2. The Company's motion to stay the collective lawsuit and compel individual arbitration laid bare the interpretation of the Agreement that it enforces against its employees and thus is effectively a rule of the workplace: that collective action in *any* forum was unavailable. Indeed, the Company continues to contend (Br. 59-60) that the Agreement only allows individual arbitration.

Thus, through its motion, the Company attempted to simultaneously preclude collective action in the judicial forum (by moving to compel arbitration of the employees' collective claims) and the arbitral forum (by moving to compel *individual* arbitration). As the Board explained, "such conduct is precisely what the Board enjoined in *D.R. Horton and Murphy Oil*." A 397 n.2.; see *D.R. Horton*, 357 NLRB at 2288 ("[E]mployers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial."). Therefore, the Company violated Section 8(a)(1) of the NLRA by interpreting and applying the Agreement to restrict activity protected by Section 7.<sup>6</sup> As explained more fully below, such an unlawful agreement is not entitled to enforcement under the FAA.

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

The basis of this Court's holding in *D.R. Horton and Murphy Oil* is that the FAA precludes enforcement of the Board's Order. But that position contravenes

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<sup>6</sup> The Company misses the mark by asserting (Br. 66) that its enforcement of the Agreement does not interfere with its employees' Section 7 rights because Torres is still pursuing a class action lawsuit against BK. The collective lawsuit against BK does nothing to lessen or negate the coercive effect of the Company's enforcement of the Agreement. As the Board explained, "[w]hether [the Company] violated the Act as alleged turns on its own actions, not BK's actions or the State court's rulings." ROA 403 n.11. Accordingly, the Board reasonably found that the Company's motion interfered with Torres' Section 7 activity and violated Section 8(a)(1), regardless of whether the state court allowed Torres' collective lawsuit against BK to continue.

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 (2014). As demonstrated below, agreements that are unlawful under the NLRA are exempted from enforcement by the FAA’s savings clause. 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. There is thus no difficulty in fully enforcing each statute according to its terms.

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

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) (citations and 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.* (citations omitted); *accord 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”).

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. The same is true of ostensibly neutral defenses “that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Concepcion*, 563 U.S. 339.

One well-established general contract defense is illegality. As the Supreme Court explained in *Kaiser Steel Corp. v. Mullins*, “a federal court has a duty to determine whether a contract violates federal law before enforcing it.” 455 U.S. 72, 83 (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 discussed above (pp. 14-15), the Board, with court approval, has consistently found unlawful under the NLRA a variety of individual contracts that 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 1094, 1105-06 (1999), 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 that waivers of an employee's right to engage in concerted legal action are unlawful in contracts that do not provide for arbitration. *See Convergys Corp.*, 363 NLRB No. 51, 2015 WL 7750753, at \*1 & n.3 (Nov. 30, 2015), *petition for review filed*, 5th Cir. No. 15-60860; *Logisticare Solutions, Inc.*, 383 NLRB No. 85, 2015 WL 9460027, at \*1 (Dec. 24, 2015), *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. For that reason, the Board precedent at issue does not affect only arbitration agreements or "derive [its] meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. 339.

Moreover, unlike the courts, whose hostility to arbitration prompted enactment of the FAA, *see Concepcion*, 563 U.S. at 339, the Board harbors no prejudice against arbitration, *see Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 271 (1964) (discussing 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." *D.R. Horton*, 357 NLRB at 2288. What violates the NLRA is an agreement that prospectively forecloses the concerted pursuit of work-related claims in any forum, arbitral or judicial. Such an agreement unlawfully restricts employees' Section 7 right to decide for themselves, at the time an actual workplace dispute arises, whether or not to join with others in seeking to enforce their employment rights. *Id.* at 2278-80.

For the reasons just stated, the Company mischaracterizes the Board's *D.R. Horton* decision when it represents (Br. 60-61) that the Board failed to heed the principle that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." *Stolt-Nielsen, S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 684-87 (2010). As just shown, nothing in the *D.R. Horton* decision requires the Company to submit to class arbitration. To the contrary, the Company is "free to insist that *arbitral* proceedings be conducted on an individual basis." *D.R. Horton*, 357 NLRB at 2288. The Company was not free, however, to apply the Agreement in a

manner that required employees to waive their right to maintain employment-related collective actions in all forums, whether arbitral or judicial.

Consistent with the Board's analysis in *D.R. Horton* and *Murphy Oil*, the Seventh Circuit recently held that arbitration agreements similar to the Company's "meet[] the criteria of the FAA's savings clause for nonenforcement" because they waive employees' Section 7-protected right to engage in concerted action in violation of Section 8(a)(1). *Lewis*, 2016 WL 3029464, at \*7. In coming to that conclusion, the court agreed with the Board that contracts restricting Section 7 activity are illegal. *Id.* at \*4, \*7. 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 enforcing the Agreement in a manner that would require arbitration of all work-related claims on an individual basis.<sup>7</sup> There is no conflict between either the express statutory

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

requirements, or animating policy considerations, of the FAA and NLRA with respect to that unfair-labor-practice.<sup>8</sup>

**2. This Court Erred in Finding that the Supreme Court’s FAA Jurisprudence Requires Rejection of the Board’s *D.R. Horton* and *Murphy Oil* Decisions**

The Court erroneously held in *D.R. Horton* and *Murphy Oil* that the Supreme Court’s decisions in *Gilmer* and *Concepcion* foreclosed the Board’s position. Neither of those cases decided any NLRA issue, much less considered the issue presented here: whether agreements requiring individual arbitration and

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

<sup>8</sup> For that reason, it is unnecessary to reach the question, addressed by this Court and raised by the Company (Br. 23), of whether the NLRA clearly contains a “contrary congressional command” overruling the FAA. *D.R. Horton*, 737 F.3d at 360-62. 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 3029464, 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.

precluding collective claims in any forum must be enforced under the FAA despite the NLRA's protection of the right of statutory employees to pursue work-related claims concertedly. Indeed, the Supreme Court has never considered that question. Nor has it ever found enforceable an arbitration agreement that violates a federal statute as the Agreement violates Section 8(a)(1). This Court thus overreads Supreme Court jurisprudence in holding that a contract that violates the NLRA does not fit within the FAA's savings clause. *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). It also fails to give effect to the settled principle that courts should regard two co-equal statutes as effective. *Morton*, 417 U.S. at 551.

**a. FAA precedent does not support enforcing an arbitration agreement that violates a co-equal federal statute**

None of the Supreme Court's FAA cases 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 at 27 (quoting 29 U.S.C. § 621(b)). Because the substantive rights of individual employees to be free of age-based discrimination could be adequately vindicated in individual arbitration, the Court held that an arbitration agreement could be enforced. The Court rejected arguments that ADEA provisions affording a judicial forum and an optional collective-action procedure precluded enforcement of an arbitration agreement, explaining that Congress did not “intend[] the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum.” *Id.* at 29, 32 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).<sup>9</sup>

In rejecting the Board’s rationale in *D.R. Horton*, this Court misapprehends the Supreme Court’s FAA cases as dispositive of the issue here. While this 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,” *D.R. Horton*, 737 F.3d at 357, those cases do not answer the materially

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<sup>9</sup> The Supreme Court has consistently maintained that same analytical focus on statutory purpose when assessing challenges to the enforcement of arbitration agreements based on provisions in other federal statutes. *See, e.g., CompuCredit*, 132 S. Ct. at 670-71 (judicial-forum provision not “principal substantive provision[]” of Credit Repair Organizations Act); *Rodriguez de Quijas*, 490 U.S. at 477 (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).

different question of whether the NLRA protects such a right.<sup>10</sup> Unlike the statutory provisions at issue in the Supreme Court’s FAA cases – involving statutes whose objectives do not include protecting collective action against individual employee waiver – 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 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 (1981) (describing NLRA as “designed to ... encourag[e] employees to promote their interests *collectively*”) (emphasis in original).

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<sup>10</sup> Likewise, other circuits’ decisions rejecting the Board’s *D.R. Horton* position in non-Board cases overread Supreme Court precedent and reflect a misunderstanding of the Board’s position. *See Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013) (finding *Concepcion* resolved savings-clause issue, and FLSA did not contain congressional command barring enforcement of arbitration agreement); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) (per curiam) (rejecting citation to Board’s *D.R. Horton* decision based on *Owen*, without analysis). The Eighth Circuit’s decision in *Cellular Sales of Missouri, LLC v. NLRB*, relied on *Owen* to deny enforcement in a Board case, but added no new rationale. No. 15-1620, 2016 WL 3093363 (8th Cir. June 2, 2016). None of those decisions addresses the Board’s savings-clause argument. District court decisions rejecting the Board’s position suffer from the same analytical flaws.

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. And other NLRA provisions further demonstrate the central role Section 7 rights play in federal labor policy and the importance of Section 8’s proscription of interference with those rights. Section 9 establishes procedures, such as elections and exclusive representation, to implement representational Section 7 rights. 29 U.S.C. § 159. And Section 10 empowers the Board to prevent violations of Section 8. 29 U.S.C. § 160. Thus, the NLRA’s various provisions all lead back to Section 7’s guarantee of employees’ right to join together “to improve terms and conditions of employment or otherwise improve their lot as employees.” *Eastex*, 437 U.S. at 565.<sup>11</sup>

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-

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<sup>11</sup> The Board’s determination that Section 7 is critical to the NLRA is entitled to considerable deference. *See City Disposal*, 465 U.S. at 829 (Board has prerogative to define Section 7); *Garner*, 346 U.S. at 490 (Board has primary authority to interpret and apply NLRA); *see also City of Arlington*, 133 S. Ct. at 1871 (statutory interpretation within agency’s expertise should be accepted unless “foreclose[d]” by the statutory text); *Chevron*, 467 U.S. at 842-43; *see generally* Note, *Deference and the Federal Arbitration Act: The NLRB’s Determination of Substantive Statutory Rights*, 128 HARV. L. REV. 907, 921 (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”).

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 Supreme Court and circuit cases, concerted activity under the NLRA is not merely a procedural means of vindicating a statutory right; it is itself a core, substantive statutory right.<sup>12</sup> And

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<sup>12</sup> As the Board has emphasized, what Section 7 protects in this context is the employees’ right to act in concert “to *pursue* joint, class, or collective claims *if and as available*, without the interference of an employer-imposed restraint.” *Murphy Oil*, 2014 WL 5465454, at \*2 (second emphasis added). Accordingly, the Board’s position is not impaired by recognizing that Federal Rule of Civil Procedure 23, which governs class actions, does not “establish an entitlement to class proceedings for the vindication of statutory rights.” *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

Nor does it matter, as the Company contends (Br. 34) that modern class-action procedures were not available to employees in 1935 when the NLRA was enacted. 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. The Company’s arbitration agreement, in any event, would preclude its employees from pursuing joint claims, notwithstanding that the procedural device of joinder existed in 1935. And no more availing is the Company’s assertion (Br. 47-49) that Rule 23 is a procedural device. It is the NLRA, not Rule 23, that creates the

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.

**b. This Court erroneously held that *Concepcion* mandates enforcement of an arbitration agreement that violates the NLRA**

This Court's reliance on *Concepcion*, 563 U.S. at 358-60, to reject the Board's savings-clause analysis is also flawed. It fails to recognize the material differences between the Board's application of longstanding NLRA principles and the judge-made California rule in that case. Thus, unlike the Company's Agreement, the arbitration agreement in that case did not directly violate a co-equal federal law. The rule asserted in *Concepcion* as precluding enforcement of the agreement under the FAA's savings clause was a judicial interpretation of state

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substantive right to engage in concerted legal action; Rule 23 is just one mechanism for exercising a Section 7 right, an alternative to carrying a picket sign or distributing a handbill. See *Lewis*, 2016 WL 3029464, at \*9 (“Rule 23 is not the source of the collective right here; Section 7 of the NLRA is.”).

unconscionability principles. It was intended to ensure prosecution of low-value consumer claims by enabling litigants to bring them collectively. 563 U.S. at 340.<sup>13</sup> That interpretation barred class-action waivers in most arbitration agreements in consumer contracts of adhesion. Employing a preemption analysis, the Supreme Court found that the rule “interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA.” *Id.* at 344, 346-52. It found, moreover, that the unconscionability law was “applied in a fashion that disfavors arbitration.” *Id.* at 341.

By contrast, the Board’s rule fits within the savings clause because it bars enforcement of arbitration agreements that violate Section 8(a)(1) of the NLRA, a specific federal statutory proscription. The Board’s rule is intended to effectuate the NLRA, not to implement non-statutory policies such as the judicially created policy of facilitating particular claims, low-value or otherwise, brought under other laws. *Cf. Concepcion*, 563 U.S. at 340; *Italian Colors*, 133 S. Ct. at 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

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<sup>13</sup> Similarly, in *Italian Colors*, the Supreme Court applied *Concepcion* to strike down a federal-court-imposed requirement that collective litigation must be available when individual arbitration would be prohibitively expensive in order to ensure an “affordable procedural path” to vindicate claims. *Italian Colors*, 133 S. Ct. at 2308-09.

savings clause precludes a defense of contract illegality based on the NLRA, a co-equal federal law.

Nor has the Board taken aim at arbitration. Rather, it has applied a longstanding NLRA interpretation, endorsed by the Supreme Court, to find unlawful *all* individual contracts, including arbitration agreements, that prospectively waive Section 7 rights in violation of Section 8(a)(1). That illegality defense developed outside of the arbitration context and was recognized by the Board and courts well before the advent of agreements mandating individual arbitration of employment disputes.<sup>14</sup> Moreover, the Board has not applied the statutory ban on restrictions of Section 7 rights in a manner disproportionately impacting arbitration agreements. *Cf. Concepcion*, 563 U.S. at 342 (“it is worth noting that California’s courts have been more likely to hold contracts to arbitrate unconscionable than other contracts”). Indeed, unlike California courts, the Board has never required that an employer allow employees the opportunity to arbitrate as a class. Rather, as noted above, the Board 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. And, far from being hostile to arbitration as a means of

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<sup>14</sup> It was not until 2001 that the Supreme Court definitively ruled that the FAA applied to employment contracts. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

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)).

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.

**D. The Company’s Enforcement of the Agreement Is Not Protected Petitioning under the First Amendment**

Contrary to the Company’s contention (Br. 70-73), the Board’s Decision and Order do not implicate the Company’s constitutional right to petition the Government for redress of grievances because the Supreme Court has explained that the First Amendment does not protect petitioning that “has an objective that is illegal under federal law.” *Bill Johnson’s Rests. v. NLRB*, 461 U.S. 731, 737 n.5 (1983). Under that exception, court action constitutes an unfair labor practice if

“[o]n the surface” it “seek[s] objectives which [are] illegal under federal law.”

*Teamsters Local 776 v. NLRB*, 973 F.2d 230, 236 (3d Cir. 1992).<sup>15</sup>

Consequently, under settled law, the Board may restrain litigation that has the objective of enforcing an illegal contract, even if the suit is otherwise meritorious. *Id.*; *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003); *see also Murphy Oil*, 2014 WL 5465454, at \*27-28 (and cases cited therein). Because the Company unlawfully applied the Agreement by seeking to stay a protected, concerted lawsuit and to compel individual arbitration, the Company’s efforts had an illegal objective and thus fell outside the protection of the First Amendment. *See Manno Elec., Inc.*, 321 NLRB 278, 296-97 (1996) (halting employer lawsuit alleging that employees violated state law by engaging in Section 7-protected conduct), *enforced mem.*, 127 F.3d 34 (5th Cir. 1997).

Moreover, contrary to the Company’s assertion (Br. 70-73), the Board’s remedy, which requires the Company to award expenses and legal fees and to notify the state court it does not oppose Torres’ lawsuit, is appropriate and well within the Board’s broad remedial discretion. *See, e.g., Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (Board’s authority to issue remedies is a “broad discretionary one, subject to limited judicial review”); *SEIU Local 32B-32J*

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<sup>15</sup> In the absence of an illegal objective, the Board may find a lawsuit unlawful only if it is both objectively baseless *and* subjectively motivated by an unlawful purpose. *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 531 (2002).

*v. NLRB*, 68 F.3d 490, 496 (D.C. Cir. 1995) (attorney’s fees); *cf. Bill Johnson’s*, 461 U.S. at 747 (permitting award of cost of defending baseless, retaliatory lawsuit found to be unfair labor practice). Aside from its conclusory assertion that the remedies are “improper and unenforceable” (Br. 71), the Company cannot show that the Board exceeded its remedial authority.

### **E. The Company’s Remaining Contentions Are Meritless**

In its attempt to escape liability, the Company raises additional challenges, arguing that Torres’ claim is time-barred, that it is not Torres’ common-law employer, that signing the Agreement was not a condition of employment, and that it did not maintain the Agreement. These contentions are contrary to established precedent and to the credited record evidence.

First, the Company’s argument (Br. 70) that Torres failed to meet the 6-month time limitation for filing unfair-labor-practice charges under Section 10(b) of the NLRA, 29 U.S.C. § 160(b), lacks merit.<sup>16</sup> As the Board explained (ROA 397 n.2), the Company sought to enforce the Agreement through its January 8, 2013 motion to compel individual arbitration. It is the date of enforcement that constitutes the operative date in this case because, as the complaint alleged, the Company, by filing its motion to compel, sought to unlawfully maintain and

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<sup>16</sup> Section 10(b), in relevant part, states “[t]hat 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 . . . .”

enforce the Agreement. Torres filed her charge on January 24, 2013, clearly within the six-month period. The Board's determination of timeliness comports with the Board's and courts' treatment of other contracts and work rules. *See Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 423 (1960) (validity of contract's execution cannot be challenged outside 10(b) period; lawfulness of enforcing invalid agreement can be); *Control Servs.*, 305 NLRB 435, 435 n.2, 442 (1991) (maintenance or enforcement of unlawful rule timely charged, even if promulgated outside 10(b) period), *enforced mem.*, 961 F.2d 1568 (3d Cir. 1992); *see also Guard Publ'g Co.*, 351 NLRB 1110, 1110 n.2 (2007) (same), *enforced*, 571 F.3d 53, 59 (D.C. Cir. 2009). Further, because Torres challenges the Company's enforcement of the Agreement and not its formation or her lay off, the date on which she signed the Agreement (September 2009) and on which she left BK's employment (July 2011), are, contrary to the Company's contention (Br. 70), irrelevant.

The Company's argument (Br. 61-63) that it is not liable because it is not Torres' common-law employer ignores applicable precedent. The Board and courts, relying on the Act's broad definition of employer (*see* 29 U.S.C. § 152(2)), have consistently held that a statutory employer "may violate 8(a)(1) not only with respect to its own employees but also by actions affecting employees who do not stand in such an immediate employer/employee relationship." *New York New York*

*Hotel & Casino*, 356 NLRB No. 119, 2011 WL 1113038, at \*6,\*7 (Mar. 25, 2011) (“The Act clearly regulates the relationship between an employer [] and employees of other employers . . .”), *enforced*, 676 F.3d 193 (D.C. Cir. 2012); *accord Hudgens v. NLRB*, 424 U.S. 507, 510 n.3 (1976) (observing that “[t]he Board has held that a statutory ‘employer’ may violate [Section] 8(a)(1) with respect to employees other than his own”). Other than an unsupported contention (Br. 63) that allowing the Board to find liability in the absence of a direct employer-employee relationship unduly expands the Board’s jurisdiction, the Company offers no basis for the Court to depart from the longstanding judicial and Board precedent discussed above.

Contrary to the Company (Br. 63-64), substantial evidence supports the Board’s finding that the Agreement was a condition of employment.<sup>17</sup> The record indisputably establishes that the Client Service Agreement between BK and the Company, made the Company “a contractual co-employer of [BK’s] employees”

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<sup>17</sup> In any event, whether an agreement is a condition of employment does not affect the Board’s conclusion that the Company enforced the Agreement in a manner that restricted Section 7 rights. As discussed above (pp. 14-15, 19-20), the principles articulated in cases like *National Licorice* and *J.I. Case* are not limited to individual contracts imposed as conditions of employment; the effect on employees’ right to choose concerted action is the same regardless of whether the agreement is mandatory or voluntary. As the Board explained in *On Assignment*, “it is the individual *agreement* itself not to engage in concerted activity that threatens the statutory scheme,” not how the agreement was secured. 362 NLRB No. 189, 2015 WL 5113231, at \*9 (Aug. 27, 2015) (emphasis in original), *enforcement denied on other grounds*, 5th Cir. No. 15-60642 (June 6, 2016).

(ROA 402; ROA 181, Tr. 54) and included a standard “Employment Agreement” that required employees to submit “any claim” against the Company or BK for determination “exclusively by binding arbitration.” (ROA 401; ROA 231.) BK could not alter the terms of the employment agreement without the Company’s written authorization. (ROA 402; ROA 181.) The undisputed record further shows that BK provided the Agreement to employees as part of its new hire packet and that the cover page of the packet instructed employees to sign the Agreement prior to starting work or BK would be “unable to process payroll.” (ROA 402.) Moreover, Torres credibly testified, without contradiction, that a BK manager directed her to sign so that she could be paid. (ROA 402, 403 n.11; Tr. 20.) Finally, the Client Service Agreement between BK and the Company stated that “no employee of [BK] will be covered . . . until [BK] has completed and delivered to [the Company] an enrollment packet for that individual.” (ROA 402.) On the basis of these findings, the Board rejected (ROA 402) the Company’s reliance on the self-serving testimony of CEO Keith Kuznitz, who testified that employees did not have to sign the agreement. Indeed, as the Board noted, “[t]he record as a whole clearly establishes otherwise.” (ROA 402.)

Finally, the Court should also reject the Company’s claim (Br. 65-66) that it did not maintain the Agreement but instead “merely provided a form employment agreement . . . which BK was free to use at its option.” The Company’s argument

ignores that it drafted the Agreement and supplied it to clients with two specific instructions: clients could not alter the terms without the Company's authorization, and job applicants had to sign the Agreement to be considered the Company's employee. Moreover, the Company was a party to the Agreement. Such evidence is sufficient to support the Board's finding that the Company maintained the Agreement. The Company offers no evidence to contradict that finding, or to support its conclusory assertion that it merely provided a form.

**CONCLUSION**

The Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board

June 2016

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

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|--------------------------------|------------------|
| EMPLOYERS RESOURCE             | *                |
|                                | *                |
| Petitioner/Cross-Respondent    | *                |
|                                | * No. 16-60034   |
| v.                             | *                |
|                                | * Board Case No. |
| NATIONAL LABOR RELATIONS BOARD | * 31-CA-097189   |
|                                | *                |
| Respondent/Cross-Petitioner    | *                |

**CERTIFICATE OF SERVICE**

I hereby certify that on June 30, 2016, I electronically filed the foregoing document 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 if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC  
this 30th day of June, 2016

**UNITED STATES COURT OF APPEALS  
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|                                | *                |
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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 9,487 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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