Nos. 16-10341-AA & 16-10625

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

EVERGLADES COLLEGE, INC., D/B/A KEISER UNIVERSITY AND EVERGLADES UNIVERSITY

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

LISA K. FIKKI

Intervenor

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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	)	
Petitioner/Cross-Respondent	)	
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v.	)	**Nos. 16-10341-AA**
	)	**16-10625**
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
LISA K. FIKKI	)	
	)	
Intervenor	)	
_____	)	

Certificate of Interested Persons

Pursuant to Federal Rule of Appellate Procedure 26 and Local Rule 26.1-2(b), the National Labor Relations Board, by its Deputy Associate General Counsel, hereby certifies that the Certificate of Interested Persons contained in Everglades College, Inc.'s opening brief is complete.

/s/ Linda Dreeben
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Dated at Washington, D.C.
this 1st day of July, 2016

STATEMENT REGARDING ORAL ARGUMENT

The Board agrees with Petitioner/Cross-Respondent Everglades College, Inc. that oral argument will aid the Court in deciding the exceptionally important issue presented in this case. The Board requests to participate and submits that 15 minutes per side would be sufficient.

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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

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Everglades College, Inc., d/b/a Keiser University and Everglades University ("Everglades") for review, and

the cross-application of the Board for enforcement, of a Board Order issued against Everglades, reported at 363 NLRB No. 73, 2015 WL 9460023 (Dec. 23, 2015) ("D&O" 1-10).[1] Lisa K. Fikki, who was the charging party before the Board, has intervened on the Board's behalf.

The Board had jurisdiction over this matter under Section 10(a) of the National Labor Relations Act ("the NLRA," 29 U.S.C. §§ 151, 160(a)). The Board's Decision and Order is final under Section 10(e) and (f) of the NLRA, which provides the basis for this Court's jurisdiction. 29 U.S.C. § 160(e) and (f). Venue is proper pursuant to Section 10(e) and (f) because Everglades transacts business in Florida. The petition and cross-application were timely; the NLRA imposes no time limit on such filings.

STATEMENT OF THE ISSUES

1. Did the Board reasonably find that Everglades violated Section 8(a)(1) of the NLRA by maintaining, as a condition of employment, an arbitration

[1] "D&O" refers to the consecutively paginated decisions of the Board and the administrative law judge, which can be found in Volume III of the record. "Tr." refers to the transcript of the unfair-labor-practice hearing, contained in Volume I of the record. "GCX" refers to the General Counsel's exhibits and "RX" refers to Everglades's exhibits, all of which are contained in Volume II of the record. "Br." refers to Everglades's opening brief, and "Chamber Br." cites are to the brief of amicus curiae Chamber of Commerce. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

agreement in which employees waived the right to maintain class or collective actions in any forum, arbitral or judicial?

2. Did the Board reasonably find that Everglades violated Section 8(a)(1) by maintaining an arbitration agreement that employees would reasonably construe as restricting their right to file unfair-labor-practice charges with the Board?

3. Did the Board reasonably find that Everglades violated Section 8(a)(1) by discharging Fikki for failing to complete its re-boarding process, which included signing the unlawful arbitration agreement?

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

A. Everglades Requires that Employees Sign an Agreement Requiring Individual Arbitration of All Work-Related Claims

Everglades operates a private, not-for-profit university in Fort Lauderdale, Florida. Everglades' employees are required to complete an "on-boarding" process when hired, which includes reviewing and electronically signing numerous documents and policies, including an Employee Arbitration Agreement ("the Agreement"). (D&O 4, 5; GCX 13.) In June 2012, after deciding to eliminate paper personnel records, Everglades required existing employees, as a condition of continued employment, to "re-board" by completing the electronic on-boarding process. (D&O 5; Tr. 109-10, GCX 16.)

The Agreement contains the following provision:

> 6. *Arbitration of Claims.* Any controversy or claim arising out of or relating to Employee's employment, Employee's separation from employment, and this Agreement, including, but not limited to, claims or actions brought pursuant to federal, state, or local laws regarding payment of wages, tort, discrimination, harassment and retaliation, except where specifically prohibited by law, shall be referred to and finally resolved exclusively by binding arbitration . . . . Employee agrees that there will be no right or authority, and hereby waives any right or authority, for any claims within the scope of this Agreement to be brought, heard or arbitrated as a class or collective action, or in a representative or private attorney general capacity on behalf of a class of persons or the general public.

(D&O 5; GCX 4.)

B. Everglades Discharges Fikki For Failing To Complete the Re-Boarding Process

Everglades employed Lisa Fikki as a graduate-admissions counselor. (D&O 5; Tr. 22.) On June 15, Everglades notified Fikki and other employees by email that they were required to go through the re-boarding process by June 22, later extended to June 29. (D&O 5; Tr. 24-25, 51, GCX 2.)

On June 27, Everglades held a mandatory meeting for all employees who had not completed the re-boarding process. (D&O 5; GCX 8.) During that meeting, Fikki asked Associate Vice Chancellor of Human Resources Johanna Arnett whether the terms of the documents were negotiable. Arnett responded that the documents needed to be signed electronically, and that Dr. Arthur Keiser, Everglades's Chancellor and Chief Executive Officer, would be available to answer employees' questions. Fikki also asked whether signing the documents

was a condition of continuing employment; Arnett confirmed that it was. (D&O 5-6; Tr. 46.)

At a meeting later that day, Dr. Keiser asked Fikki what her problem was with completing the re-boarding process. Fikki responded that she wanted to seek legal advice. Dr. Keiser responded that employees could have more time if they provided a letter from an attorney by the June 29 deadline, verifying that they had set up an appointment. (D&O 6; Tr. 49-51.) Fikki provided a letter by June 29 stating that the attorney she had selected could not meet until July 18. (D&O 6; Tr. 51-52, GCX 10.) Arnett responded by stating that the deadline was extended for all employees, including Fikki, to July 10. (D&O 6; GCX 11, 12.) Fikki did not meet with an attorney or complete the re-boarding process by July 10. Everglades discharged her on July 12 for failing to complete the re-boarding process. (D&O 5- 6; Tr. 55-56.)

II. PROCEDURAL HISTORY

Pursuant to charges filed by Fikki, the Board's Acting General Counsel issued a complaint alleging that Everglades violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by maintaining the Agreement, which requires employees, as a condition of employment, to waive their right to engage in concerted legal activity protected by Section 7 of the NLRA, 29 U.S.C. § 157; and because employees would reasonably understand the Agreement as barring unfair-labor-

practice charges. (D&O 4.) The complaint further alleged that Everglades violated Section 8(a)(1) by discharging Fikki for refusing to sign the Agreement. (D&O 4.)

After conducting a hearing, an administrative law judge issued a decision and recommended order finding that Everglades violated the NLRA as alleged. (D&O 9.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On December 23, 2015, the Board (Chairman Pearce and Member McFerran; Member Miscimarra, dissenting) issued a Decision and Order. Applying its decisions in *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), *petition for reh'g en banc denied*, 5th Cir. No. 12-60031 (April 16, 2014), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), *enforcement denied in relevant part*, 808 F. 3d 1013 (5th Cir. 2015), *petition for reh'g en banc denied*, 5th Cir. No. 14-60800 (May 13, 2016), the Board found that Everglades violated Section 8(a)(1) as alleged.

To remedy those violations, the Board ordered Everglades to cease and desist from the unfair labor practices found and from any like or related interference with employees' Section 7 rights. (D&O 1.) Affirmatively, the Board ordered Everglades to rescind or revise the Agreement to make clear that it does

not constitute a waiver of employees' right to maintain employment-related joint, class, or collective actions in all forums and that it does not bar or restrict employees' right to file Board charges; notify all applicants and current and former employees who signed the Agreement that it has been rescinded or revised; offer Fikki full reinstatement and make her whole for any loss of earnings or other benefits she suffered; remove from its records any reference to Fikki's unlawful discharge; and post a remedial notice. (D&O 1-2.)

SUMMARY OF ARGUMENT

This case arises at the intersection of two federal statutes: the NLRA and the Federal Arbitration Act ("the FAA," 9 U.S.C. § 1, et. seq.). The Board reasonably held that Everglades's Agreement violates the NLRA, and correctly found that its unfair-labor-practice finding does not offend the FAA's general mandate to enforce arbitration agreements according to their terms.

Longstanding Supreme Court and Board precedent establishes that Section 7 of the NLRA protects employees' right to pursue work-related legal claims concertedly. It also makes clear that employers may not restrict Section 7 rights through work rules, or induce employees to waive those rights prospectively in individual agreements. Such restrictions or waivers violate Section 8(a)(1), which bars interference with Section 7 rights. Accordingly, Everglades's maintenance of

the Agreement, which requires its employees to arbitrate all employment-related disputes individually, violates the NLRA.

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

Everglades's maintenance of the Agreement also independently violates Section 8(a)(1) because employees would reasonably construe it as restricting their Section 7 right to file charges with the Board. As the Board found, employees would understand the Agreement's broad statement that any employment-related claim is subject to arbitration as prohibiting them from filing charges with the

Board, and would not understand the Agreement's ambiguous exemption of certain claims as allowing such charges.

Finally, Everglades violated Section 8(a)(1) by discharging Fikki for failing to complete the re-boarding process, which would have required her to sign the unlawful Agreement.

STANDARD OF REVIEW

In enacting the NLRA, Congress established the Board and charged it with the primary authority to interpret and apply the statute. *See Garner v. Teamsters Chauffeurs & Helpers Local 776*, 346 U.S. 485, 490 (1953). Accordingly, the Board's reasonable interpretation of the NLRA is entitled to affirmance. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1868-71 (2013) (to reject agency interpretation of statute within its expertise requires showing that "the statutory text forecloses" agency's interpretation) (reaffirming *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996) (Board "need not show that its construction is the *best* way to read the statute"); *Visiting Nurse Health Sys., Inc. v. NLRB*, 108 F.3d 1358, 1360 (11th Cir. 1997) (court affords "considerable deference to the Board's expertise in applying the . . . [NLRA] to the labor controversies that come before it"). Questions of law regarding other statutes are reviewed *de novo*. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002).

ARGUMENT

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

A. Section 7 of the NLRA Protects Concerted Legal Activity for Mutual Aid or Protection

Section 7 guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other concerted activities* for the purpose of collective bargaining or other *mutual aid or protection*, and . . . to refrain from any or all of such activities." 29 U.S.C. § 157 (emphasis added). As explained below, courts have long upheld the Board's construction of Section 7 as protecting concerted pursuit of work-related legal claims, consistent with the language and purposes of the NLRA. That construction falls squarely within the Board's expertise and its responsibility for delineating federal labor law generally, and Section 7 in particular. *See NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (noting that "the task of defining the scope of [Section] 7 'is for the Board to perform in the first instance as it considers the wide variety of cases that come before it'") (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978)); *accord Venetian Casino Resort, LLC v. NLRB*, 484 F.3d 601, 606 (D.C. Cir. 2007).

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

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

Indeed, as *Eastex* notes, for decades the Board has held concerted legal activity to be protected. *Id*. at 565-66 & n.15. That line of cases dates back to *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-50 (1942), in which the Board found protected three employees' joint lawsuit filed under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq. It continues, unbroken and with court approval, through modern NLRA jurisprudence. *See, e.g.*, *Lewis v. Epic Sys. Corp.*, __F.3d__, 2016 WL 3029464, at *2-4 (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 . . . .");

Mohave Elec. Coop., Inc. v. NLRB, 206 F.3d 1183, 1188-89 (D.C. Cir. 2000) (concerted petitions for injunctions against workplace harassment).[2]

The Board's holding that Section 7 protects concerted legal activity furthers the policy objectives that guided Congress in passing 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

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[2] *Accord Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) ("Generally, filing by employees of a labor related civil action is protected activity under section 7 of the NLRA unless the employees acted in bad faith."); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (same); *Harco Trucking, LLC*, 344 NLRB 478, 478-79 (2005) (wage-related class action); *Le Madri Rest.*, 331 NLRB 269, 275 (2000) (concerted lawsuit alleging unlawful pay policies); *United Parcel Serv., Inc.*, 252 NLRB 1015, 1018, 1026 & n.26 (1980) (wage-related class action), *enforced*, 677 F.2d 421 (6th Cir. 1982); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975) (concerted lawsuit for contract violation and unpaid wages), *enforced mem.*, 567 F.2d 391 (7th Cir. 1977).

Everglades erroneously claims (Br. 36) that the cases cited by the Board as establishing Section 7 protection of legal activity are inapposite because they involved *retaliation*. That argument confuses the scope of Section 7's protection of concerted activity and the scope of Section 8's definition of the kinds of interference with Section 7 rights that the NLRA proscribes. Thus, whether an employer violates Section 8 by retaliating against employees for engaging in concerted litigation activity or by interfering with the employees' right to engage in future concerted litigation activity does not affect the scope of Section 7's protection of concerted litigation activity.

disruptive protests. D.R. Hor*ton*, 357 NLRB at 2279-80; *see Salt River Valley Water Users' Ass'n v. NLRB*, 206 F.2d 325, 328 (9th Cir. 1953) (in response to dissatisfaction with wages, employee collected signatures to represent coworkers in negotiations or FLSA litigation). Conversely, denying employees access to concerted litigation "would only tend to frustrate the policy of the [NLRA] to protect the right of workers to act together to better their working conditions." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

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. Indeed, recognizing that concerted activity "is often an effective weapon for obtaining [benefits] to which [employees] . . . are already 'legally' entitled," the Ninth Circuit upheld the Board's holding that Section 7 protected employees' effort to exert group pressure on the employer to redress their work-related claims through resort to legal processes. *Salt River*, 206 F.3d at 328. Similarly, the Supreme Court has acknowledged a long history of statutory employees exercising 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 Eastex*, 437 U.S. at 565-66 & n.15. Such collective legal action seeks to unite workers generally and to lay a foundation for more effective

collective bargaining. *Id.* at 569-70; *see also 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" by enacting the NLRA) (quoting 79 Cong. Rec. 2371 (1935)).

As the Board has emphasized, what Section 7 protects in this context is statutory 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 Everglades's assertion, it is immaterial "that a litigant's access to class procedures [under Federal Rule of Civil Procedure 23] is procedural only." (Br. 34.) The source of employees' substantive right to pursue their legal claims concertedly is the NLRA, not Rule 23 (or the FLSA's collective-action provision).[3] What the NLRA prohibits "is unilateral action, by an employer, that purports to completely deny employees access to class, collective, or group

[3] Everglades's narrow focus on Rule 23 and the FLSA's collective-action provision (Br. 34) should not create the impression that concerted legal action is a recent development anachronistically imported into labor law. Joint and collective claims of various forms long predate Rule 23, *Lewis*, 2016 WL 3029464, at *3-4, as do the Board's earliest decisions finding that Section 7 protects the collective legal pursuit of work-related claims. *See* p. 12-13. In any event, the NLRA was drafted to allow the Board to respond to new developments in interpreting the rights it creates and conduct it proscribes. *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").

procedures that are otherwise available to them under statute or rule." *Murphy Oil*, 2014 WL 5465454, at *18.[4]

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

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

An employer violates Section 8(a)(1) of the NLRA by "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in section [7]." 29 U.S.C. § 158(a)(1). A workplace rule or policy that explicitly restricts Section 7 activity is unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004); *accord Cintas Corp. v. NLRB*, 482 F.3d 463, 467-68

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[4] Everglades contends that the Supreme Court has rejected the idea that all litigants have a generalized "nonwaivable opportunity" to use class mechanisms. (Br. 32, 35 (quoting *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013)). But the quoted language is not inconsistent with the Supreme Court's recognition in *Eastex* that *some* litigants – those covered by the NLRA – have a Section 7 right to engage in concerted litigation activity. *Italian Colors* thus does not undermine the Board's interpretation of the NLRA as providing a right to access collective procedures without employer interference.

(D.C. Cir. 2007). It does not matter whether the employer has applied or enforced the policy – mere maintenance constitutes an unfair labor practice. *Lutheran Heritage*, 343 NLRB at 649; *Cintas Corp.*, 482 F.3d at 467-68. Here, because Everglades imposed the Agreement on all employees as a condition of employment, which carries an "implicit threat" that failure to comply will result in loss of employment, the Board appropriately utilized the work-rule standard. D.R. Hor*ton*, 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 (D&O 1) that Everglades's maintenance of the Agreement violates Section 8(a)(1).

1. The Agreement unlawfully restricts Section 7 activity

The Agreement facially and indisputably restricts employees' Section 7 rights because it prohibits employees from pursuing *any* concerted legal claims, without exception. Specifically, it provides that "[a]ny controversy or claim arising out of or relating to Employee's employment, Employee's separation from employment, and this Agreement," must be submitted to arbitration. (D&O 5; GCX 4.) Moreover, it states that the signatory employee "hereby waives any right or authority" to have any claim "brought, heard or arbitrated as a class or collective

action, or in a representative or private attorney general capacity . . . ." *Id*. By explicitly requiring that employees individually arbitrate all work-related claims, the Agreement violates Section 8(a)(1) by restraining employees from exercising in any forum their long-recognized right concertedly to enforce employment laws.

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

As the Board explained in D.R. Hor*ton*, 357 NLRB at 2280-81, and *Murphy Oil*, 2014 WL 5465454, at *1, 6, restrictions on Section 7 rights are unlawful even if, like here, 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 "a continuing means of thwarting the policy of the [NLRA]." 309 U.S. 350, 360-61 (1940); *accord Lewis*, 2016 WL 3029464, at *4. 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." *Nat'l Licorice*, 309 U.S. 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); *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").

Consistent with those long established principles, the Board in a variety of contexts unrelated to arbitration has held that Section 8(a)(1) bars individual contracts that prospectively waive Section 7 rights. *See, e.g.*, *First Legal Support Servs., LLC*, 342 NLRB 350, 362-63 (2004) (unlawful to have employees sign contracts stripping them of right to organize); *McKesson Drug Co.*, 337 NLRB 935, 938 (2002) (unlawful to insist that employee signs, as condition of avoiding discharge, broad waiver of rights, both present and future, to file any lawsuit, unfair-labor-practice charges, or other legal action).[5]

The principle 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. Protected concerted activity – of unorganized workers, in particular – often arises spontaneously when employees are presented with actual workplace problems and have to decide

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[5] 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. Hor*ton*, 357 NLRB at 2286.

among themselves how to respond. *See, e.g.*, *Washington Aluminum Co.*, 370 U.S. at 14-15 (concerted activity spurred by extreme cold in plant); *Salt River Valley*, 206 F.2d at 328 (concerted activity prompted by violations of minimum-wage laws). The decision whether collectively to walk out of a cold plant or to join other employees in a wage-and-hour lawsuit 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.

In other words, as the Supreme Court has recognized, "the vitality of [Section] 7 requires that the [employee] be free to refrain in November from the actions he endorsed in May." *NLRB v. Granite State Joint Board, Textile Workers Local 1029*, 409 U.S. 213, 217-18 (1972) (Section 7 protects right of employees who resign from union not to take part in strike they once supported). By the same token, employees must be able to decide whether "to engage in … concerted activity which they decide is appropriate," *Plastilite Corp.*, 153 NLRB 180, 183 (1965), *enforced in relevant part*, 375 F.2d 343 (8th Cir. 1967); *see also*

Serendippity-Un-Ltd., 263 NLRB 768, 775 (1982) (same), when the opportunity for such activity arises, even after previously deciding not to do so when circumstances were different. *See Pattern Makers' League of N. Am. v. NLRB*, 473 U.S. 95, 101-07 (1985) (union could not maintain rule prospectively restricting employee resignations); *Mission Valley Ford Truck Sales*, 295 NLRB 889, 892 (1989) (employer could not hold employee to "earlier unconditional promises to refrain from organizational activity"). 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, at the appropriate time, whether to participate in concerted activity.

The fact that Section 7 also protects employees' "right to refrain" from concerted activity does not change that calculus. Like 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 their workplace claims individually, *D.R. Horton* does not compel *employees* to pursue their claims concertedly.").

Prospective waivers of Section 7 rights are unlawful not only because they impair the rights of employees who sign them, but also because they preemptively deprive non-signatory employees of any meaningful opportunity to enlist signatory employees' aid and support when an actual dispute arises. That impairment occurs because collective action does not occur in a vacuum, but results from real-time employee interactions. *See NLRB v. Babcock & Wilcox Co.*, 351 U. S. 105, 113 (1956) ("The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others."); *Harlan Fuel Co.*, 8 NLRB 25, 32 (1938) (rights guaranteed to employees by Section 7 include "full freedom to receive aid, advice and information from others concerning [their self-organization] rights"). An employee's ability to engage in concerted activity depends on her ability to communicate with and appeal to fellow employees to join in that action. *See, e.g.*, *Signature Flight Support*, 333 NLRB 1250, 1260 (2001) (finding employee efforts "to persuade other employees to engage in concerted activities" protected), *enforced mem.*, 31 F. App'x 931 (11th Cir. 2002); *Am. Fed'n of Gov't Emps.*, 278 NLRB 378, 382 (1986) (describing as "indisputable" that one employee "had a Section 7 right to appeal to [another employee] to join" in protected activity). But such appeals are futile if his fellow employees have already committed to abstaining from concerted activity.

Finally, where, as here, the prospective waiver of Section 7 rights operates to bar only concerted *legal* activity, the result is to limit the employees' options to comparatively more disruptive forms of concerted activity at a time when workplace tensions are high and employees are deciding which, if any, concerted response to pursue. As the Board has explained, *D.R. Horton*, 357 NLRB at 2279-80, the peaceful resolution of labor disputes is a core objective of the NLRA, and that objective is ill-served by individual arbitration agreements that prospectively waive employees' right to consider the option of concerted legal action along with other collective means of advancing their interests as employees.

In sum, the Agreement's express bar on a key form of concerted activity violates Section 8(a)(1) of the NLRA. And it is no less unlawful for being styled an agreement, in light of the longstanding prohibition on individual contracts that prospectively waive Section 7 rights. That Everglades used the particular vehicle of an arbitration agreement subject to the FAA to impose that prospective bar likewise does not excuse its restriction of Section 7 rights; it cannot "attempt 'to achieve through arbitration what Congress has expressly forbidden'" under the NLRA. *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 676 (4th Cir. 2016) (quoting *Graham Oil v. ARCO Prods. Co.*, 43 F.3d 1244, 1249 (9th Cir. 1994)). As explained more fully below, such agreements thus are not entitled to enforcement under the FAA.

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

Everglades's principal defense is that the FAA precludes enforcement of the Board's Order. 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 (1972); *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 saving 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 saving-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 saving-clause exception, "reflect[s] both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is

a matter of contract." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). "[C]ourts must [therefore] place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *Id*. (internal quotations omitted); *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 saving 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 and do not apply to prevent enforcement. 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. 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 (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 (p. 18-19), the Board, with court approval, has consistently found unlawful under the NLRA individual contracts that prospectively restrict Section 7 rights. Illegality under the NLRA serves to invalidate a variety of contracts, not just arbitration agreements. The Board has set aside settlement agreements that require employees to agree not to engage in concerted protests. *Bon Harbor Nursing & Rehab. Ctr.*, 348 NLRB 1062, 1078 (2006); *Bethany Med. Ctr.*, 328 NLRB 1094, 1105-06 (1999). It 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., Inc.*, 337 NLRB 175, 175-76 (2001), *enforced*, 354 F.3d 534 (6th Cir. 2004). The Board has also found that waivers of an employee's right to engage in concerted legal action are unlawful even when unconnected to an agreement to arbitrate. *See Logisticare Solutions, Inc.*, 363 NLRB No. 85, 2015 WL 9460027, at *1 (Dec. 24, 2015) (employee handbook), *petition for review filed*, 5th Cir. No. 15-60029; *Convergys Corp.*, 363 NLRB No. 51, 2015 WL 7750753, at *1 & n.3 (Nov. 30, 2015) (application for employment), *petition for review filed*, 5th Cir. No. 15-60860. That unbroken line of precedent dates from shortly after the NLRA's enactment. *See, e.g.*, Nat'l Licorice, 309 U.S. at 360-61, 364. Those

cases demonstrate that the rule does not either affect only arbitration agreements or "derive [its] meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 562 U.S. at 339.

Moreover, unlike the courts, whose hostility to arbitration prompted enactment of the FAA, *see id.*, 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. Hor*ton* decision prohibits an employer from requiring arbitration of all *individual* work-related claims. 357 NLRB at 2288 ("Employers remain free to insist that *arbitral* proceedings be conducted on an individual basis."). 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 to join others in seeking to enforce their employment rights. Id. at 2278-80.

Consistent with the Board's analysis in D.R. Hor*ton* and *Murphy Oil*, the Seventh Circuit recently held that an arbitration agreement similar to Everglades's "[met] the criteria of the FAA's savings clause for nonenforcement." *Lewis*, 2016 WL 3029464, at *6. In coming to that conclusion, the court agreed with the Board that contracts restricting Section 7 activity are illegal. *Id.* at *10, 14. It also

noted that, rather than embodying hostility, the NLRA "does not disfavor arbitration" as a mechanism of dispute resolution. *Id*. at *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 meets the criteria of the FAA's saving-clause exception. In other words, the Board's finding that Everglades violated the NLRA by maintaining the Agreement, which requires arbitration of all work-related claims on an individual basis, adheres to the FAA policy of enforcing arbitration agreements on the same terms as other contracts. There is no conflict between either the express statutory requirements, or animating policy considerations, of the FAA and NLRA with respect to that unfair labor practice.[6]

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[6] For that reason, it is unnecessary to reach the question, raised by Everglades (Br. 37-39, 41-42, 46-47) and amicus Chamber of Commerce (Chamber Br. 10-12), of whether the NLRA clearly contains a "contrary congressional command" overruling 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 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 the NLRA. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1331 (11th Cir. 2014).

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

Everglades is mistaken in its contention (Br. 31-33) that the Board's position is foreclosed by Supreme Court precedent enforcing agreements that require individual arbitration in other contexts. The Supreme Court has never considered whether such agreements must be enforced under the FAA despite the NLRA's protection of the right of statutory employees to pursue work-related claims concertedly. Nor has the Court ever found enforceable an arbitration agreement that violates a federal statute – as the Agreement violates Section 8(a)(1). For a court to find that a contract that violates the NLRA does not fit within the FAA's saving 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 Everglades cites (Br. 31-33) involve arbitration agreements that impair core provisions of another federal statute, much less directly violate such a statute. Instead, the Court has enforced arbitration agreements over challenges based on statutory provisions only where the agreements were consistent with the animating purposes of those particular statutes. For example, in *Gilmer v. Interstate/Johnson Lane Corp.*, which involved a challenge to arbitration of claims under the Age Discrimination in Employment Act ("ADEA"), the Court determined that Congress' purpose in enacting the ADEA was "to prohibit arbitrary age discrimination in employment." 500 U.S. 20,

27 (1991). 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 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).[7]

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's protection of collective action is 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

[7] The Supreme Court has consistently maintained that same analytical focus on statutory purpose when assessing challenges to arbitration agreements based on other federal statutes. *See, e.g.*, *CompuCredit v. Greenwood*, 132 S. Ct. 665, 670-71 (2012) (judicial-forum provision not "principal substantive provision[]" of Credit Repair Organizations Act); *Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477, 481 (1989) (judicial-forum and venue provisions in Securities Act not "so critical that they cannot be waived"); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 235-36 (1987) (Exchange Act provision not intended to bar regulation when "chief aim" was to preserve exchanges' power to self-regulate).

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 (1981) (describing NLRA as "designed to … encourag[e] employees to promote their interests *collectively*").[8]

The structure of the NLRA further demonstrates that fundamental nature. As the Seventh Circuit recently observed, "[e]very other provision of the statute serves to enforce the rights Section 7 protects." *Lewis*, 2016 WL 3029464, at *9. Consistent with the fundamental status of Section 7 – and of particular relevance to

[8] Contrary to Everglades's broad assertion (Br. 26) that "[t]his Court owes no deference to the Board's Decision and Order," the Board's findings that Section 7 is critical to the NLRA and encompasses concerted legal activity, and that agreements restricting that right are unlawful under Section 8(a)(1), are each entitled to considerable deference. *See NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (Board has prerogative to define Section 7); *Garner v. Teamsters Chauffeurs & Helpers Local 776*, 346 U.S. 485, 490 (1953) (Board has primary authority to interpret and apply NLRA); *see also City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 (2013) (statutory interpretation within agency's expertise should be accepted unless "foreclose[d]" by the statutory text); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see generally* Note, *Deference and the Federal Arbitration Act: The NLRB's Determination of Substantive Statutory Rights*, 128 HARV.L.REV. 907, 919 (2015) (explaining that "[t]h[e] [FAA] context does not alter the conclusion that … the NLRB's determination is an interpretation of the statute the agency administers and is thus within *Chevron*'s scope").

the saving-clause inquiry – Section 8 expressly prohibits restriction of Section 7 rights. 29 U.S.C. § 158(a)(1), (b)(1). 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, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).[9]

Concerted activity under the NLRA is thus not merely a procedural means of vindicating a statutory right; it is itself a core, substantive statutory right. *See* Horton, 357 NLRB at 2286; *accord Lewis*, 2016 WL 3029464, at *9. And Congress expressly protected that right from employer interference in Section

[9] 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.

8(a)(1). Therefore, an arbitration agreement that precludes employees covered by the NLRA from engaging in concerted legal action is analogous to a contract providing that employees can be fired on the basis of age contrary to the ADEA, or paid less than the minimum wage dictated by the FLSA. The Supreme Court has never held that an arbitration agreement may waive substantive rights or violate the statutes that create and protect them.

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. Because a different right is at stake when a statutory employee asserts his Section 7 rights than in *Gilmer* and similar cases cited by Everglades as enforcing individual-arbitration agreements, a different result is warranted.

Concepcion, upon which Everglades (Br. 39-41) and amicus Chamber of Commerce (Chamber Br. 8-10) rely to challenge the Board's saving-clause analysis, is also flawed. The arbitration agreement in *Concepcion* was not alleged to violate a co-equal federal statute, but rather a judge-made California contract-law rule. 563 U.S. at 340. That rule, which was based on an interpretation of state unconscionability principles, allowed concerted litigation procedures to facilitate

prosecution of low-value consumer claims.[10] *Id.* The result of the judge-made rule was to effectively bar class-action waivers in most arbitration agreements in consumer contracts of adhesion. *Id.* at 346-47. 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 saving 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 saving 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

[10] Similarly, in *American Express Co. v. Italian Colors Restaurant*, the Supreme Court applied *Concepcion* to strike down a federal-court requirement that collective litigation be available when individual arbitration would be prohibitively expensive, ensuring an "affordable procedural path" to vindicate claims. 133 S. Ct. 2304, 2308-09 (2013).

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

Nor does the Board's rule take 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.[11] 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

[11] 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).

employees remain free to bring concerted actions in another forum.[12] D.R. Hor*ton*, 357 NLRB at 2288. And, far from 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)).

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[12] There is, accordingly, no basis for the Chamber's claim (Chamber Br. 26-27) 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." Moreover, to the extent the Chamber maintains (*id*. at 28-30) that arbitration is a better means of resolving workplace disputes for employees, as well as employers, its views of employees' best interests are appropriately discounted. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) ("[t]he Board is entitled to suspicion" regarding employer's "benevolence as its workers' champion").

In any event, nothing in the Board's rule precludes employees from deciding for themselves, when a claim or grievance arises, whether arbitration or collective litigation is the better 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").

Everglades thus misreads 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* when it relied on FAA cases 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 (citing *Gilmer*, 500 U.S. at 32; *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004)); *see also Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1334 (11th Cir. 2014). Those cases do not answer the materially different question of whether the NLRA protects such a right. And the Fifth Circuit's saving-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.[13] The Seventh Circuit, by contrast,

[13] Likewise, other circuits' decisions rejecting the Board's *D.R. Horton* position in non-Board cases misread 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 saving-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

held that *Concepcion* does not govern because, unlike the rule in that case, the Board's "general principle" barring the prospective waiver of Section 7 activity "extends far beyond collective litigation or arbitration" and is not hostile to the arbitral process. *Lewis*, 2016 WL 3029464, at *7.

In sum, 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 Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 72 (1975); *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

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Circuit's decision in *Cellular Sales of Missouri, LLC v. NLRB*, relies on *Owen* to reject *Horton* in a Board case, but added no new rationale. See *Cellular Sales of Missouri, LLC v. NLRB*, _F.3d_, 2016 WL 3093363, at *2 (8th Cir. June 2, 2016). Everglades (Br. 45) also cites *Richards v. Ernst & Young, LLP*, but the court in that case held that the plaintiff had waived her argument based on the Board's *D.R. Horton* rationale, and then cited decisions both rejecting and applying that rationale. 744 F.3d 1075 & n.3 (9th Cir. 2013). 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.

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

II. THE AGREEMENT VIOLATES SECTION 8(a)(1) BECAUSE EMPLOYEES WOULD REASONABLY CONSTRUE IT AS BARRING UNFAIR-LABOR-PRACTICE CHARGES

Employees have an unquestionable Section 7 right to file and pursue charges before the Board. *See Util. Vault Co.*, 345 NLRB 79, 82 (2005). The mere maintenance of a workplace rule that employees would "reasonably construe" as restricting that right is unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004); *Cintas Corp. v. NLRB*, 482 F.3d 463, 467-68 (D.C. Cir. 2007). To determine whether a rule would lend itself to an unlawful interpretation, the Board reads the rule from the position of non-lawyer employees. *U-Haul Co. of Cal.*, 347 NLRB 375, 378 (2006), *enforced mem.*, 255 F. App'x 527 (D.C. Cir. 2007). Finally, any ambiguity in a work rule is construed against the employer as the rule's promulgator. *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999); *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132 (2012) ("Board law is settled that ambiguous employer rules – rules that reasonably could be read to have a coercive meaning – are construed against the employer."), *enforced*, 746 F.3d 205 (5th Cir. 2014). As the Board has explained, "[t]his principle follows from the Act's goal of preventing employees from being chilled in the exercise of their Section 7 rights – whether or

not that is the intent of the employer – instead of waiting until that chill is manifest, when the Board must undertake the difficult task of dispelling it." *Flex Frac*, 358 NLRB at 1132; *see also NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 483 (1st Cir. 2011) (affirming that "the Board's rule is intended to be prophylactic and . . . is subject to deference").

The Agreement requires employees to individually arbitrate "[a]ny controversy or claim . . . relating to Employee's employment . . . except where specifically prohibited by law." The Board reasonably found (D&O 6) that employees would construe that broad language as requiring individual arbitration of alleged unfair labor practices, thereby prohibiting them from filing charges with the Board. That finding is reasonably defensible and consistent with the Board's court-approved findings in similar cases. In *Murphy Oil USA, Inc. v. NLRB*, for instance, the Fifth Circuit agreed with the Board that requiring employees to arbitrate "any and all disputes or claims [employees] may have . . . which relate in any manner . . . to . . . employment" could be construed as barring employees from filing Board charges. 808 F.3d 1013, 1019 (5th Cir. 2015) ("[t]he problem is that broad 'any claims' language can create '[t]he reasonable impression . . . that an employee is waiving not just [her] trial rights, but [her] administrative rights as well'") (quoting *D.R. Horton*, 737 F.3d at 363-64); *see also Cellular Sales of Missouri, LLC v. NLRB*, __F.3d__, 2016 WL 3093363, at *4 (8th Cir. June 2,

2016) (deferring to Board's finding that requirement that employees individually arbitrate "[a]ll claims, disputes, or controversies" was unlawful under work-rule standard).

Everglades argues (Br. 51-52) that the Agreement could not be reasonably construed as prohibiting employees from filing Board charges, because it does not apply "where specifically prohibited by law." The Board reasonably rejected that argument (D&O 6), explaining that this exception is ambiguous, which must be held against Everglades. *See Lafayette Park*, 326 NLRB at 828. That finding is consistent with *2 Sisters Food Group, Inc.*, in which the Board found that a broad "all claims" arbitration agreement was not rendered lawful by providing it only applies to claims "that may be lawfully submitted to arbitration," explaining "'most nonlawyer employees" would not be sufficiently familiar with the limitations the Act imposes on mandatory arbitration for the language to be effective." 357 NLRB 1816, 1817 (2011); *see also U-Haul Co.*, 347 NLRB at 377 (finding layperson would reasonably construe "disputes, claims or controversies that a court of law would be authorized to entertain" as including Board charges). Here, excepting claims "specifically prohibited by law" is too technical to ensure laypersons will necessarily understand that Board charges are not subject to mandatory arbitration, and insufficient to counter the otherwise all-encompassing

requirement that employees submit "[a]ny claim or controversy" to individual arbitration.

Everglades misconstrues the applicable legal standard by stating (Br. 49) that "evidence beyond the language of the Agreement" is necessary to establish that an employee would construe the Agreement as prohibiting her from filing Board charges. The Board has flatly rejected that argument. *See, e.g.*, *Hills & Dales Gen. Hosp.*, 360 NLRB No. 70, 2014 WL 1309713, at *1 (Apr. 1, 2014) ("extrinsic evidence is not required to find that a work rule is unlawfully overbroad and ambiguous by its terms"); *Lutheran Heritage*, at 343 NLRB at 650; *see also Cintas*, 482 F.3d at 467-68 ("Board is under no obligation to consider" evidence of enforcement against Section 7 activity).[14]

Likewise, Fikki's filing of charges with the Board, and other employees' filing of other administrative claims, did not, as Everglades insists (Br. 53), provide "compelling evidence" of how the Agreement would reasonably be construed. The Section 8(a)(1) standard is objective, measuring the tendency of

[14] Neither *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209 (D.C. Cir. 1996), nor *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001), support Everglades's contention (Br. 52-53) that such evidence is required. As the D.C. Circuit explained in *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 376 (D.C. Cir. 2007), in both of those cases the court only considered whether there was evidence that the employers actually applied the challenged rules to restrict Section 7 activity after first finding that the rules did not "explicitly or through reasonable interpretation" do so.

the employer's action to restrict or coerce Section 7 rights. As the Fifth Circuit explained in enforcing a similar finding in Murphy Oil, "the actual practice of employees is not determinative" of whether an employer has committed an unfair labor practice. *See Murphy Oil*, 808 F.3d at 1019 (quoting *Flex Frac Logistics*, 746 F.3d at 209) (employee's filing of Board charges challenging rule does not establish that rule cannot reasonably be interpreted as preventing Board charges); *accord Cellular Sales*, 2016 WL 3093363, at *3 n.2 (same); *Cintas*, 482 F.3d at 467.

III. EVERGLADES VIOLATED SECTION 8(a)(1) BY DISCHARGING FIKKI FOR FAILING TO COMPLETE THE RE-BOARDING PROCESS, WHICH INCLUDED SIGNING THE UNLAWFUL AGREEMENT

The Board has long held that an employer violates Section 8(a)(1) of the NLRA by disciplining or discharging an employee for refusing to agree to an employer's unlawful rule or order. *See Long Island Ass'n for AIDS Care, Inc.*, 364 NLRB No. 28, 2016 WL 3269544, at *1 (June 14, 2016) (violation of 8(a)(1) to discharge employee for refusing to sign unlawful confidentiality statement); *Kolkka Tables*, 335 NLRB 844, 849 (2001) (violation to suspend employee for refusing unlawful order restricting Section 7 rights); *Denson Elec. Co.*, 133 NLRB 122, 131 (1961) (violation to threaten discharge unless employees agreed to unlawful condition that they not support union). As set forth above, Everglades's Agreement violates Section 8(a)(1) of the NLRA both because it interferes with

employees' Section 7 right to engage in the concerted pursuit of work-related disputes, and because employees would reasonably construe the Agreement as prohibiting employees from filing Board charges. Accordingly, the Board reasonably found (D&O 7-8) that Everglades violated 8(a)(1) by discharging Fikki when she failed to complete the re-boarding process, which included signing the unlawful Agreement.[15]

Everglades argues (Br. 54-55), that Fikki was discharged for failing to complete the re-boarding process in the time allotted, not for failing to sign the Agreement. But it acknowledged (D&O 7; Tr. 121-22) that employees could not complete that process without signing the Agreement. Because re-boarding was signing the unlawful Agreement was a condition precedent to successfully re-boarding, it was unlawful for Everglades to insist that she complete that process. *Cf. Ralphs Grocery Co.*, 361 NLRB No. 9, 2014 WL 3778350, at *1 (July 31, 2014) (discharging employee for refusing order was "inextricably linked" to employee's assertion of protected right and thus unlawful).

[15] Because this discharge violation is independently supported by each of the unfair labor practices based on the Agreement's restriction of Section 7 rights, it would not be affected should the Court deny enforcement of just one of the two. *See* D&O 2-3 (Member Miscimarra, dissenting in part) (joining ruling that Everglades violated Section 8(a)(1) by discharging Fikki for refusing to sign Agreement, because Agreement unlawfully interfered with the filing of Board charges).

Everglades also asserts (Br. 55-56) that the Board improperly failed to apply its *Wright Line* mixed-motive analysis to determine whether Everglades was unlawfully motivated when it discharged Fikki.[16] But as the Board explained (D&O 7-8), *Wright Line* is applicable when there is a dispute over an employer's motivation for an adverse action. Because Everglades admits that it discharged Fikki for failing to complete the re-boarding process, its motivation is not in dispute and it was unnecessary to apply *Wright Line*. *See NLRB v. Allied Aviation Fueling of Dallas LP*, 490 F.3d 374, 379 (5th Cir. 2007) (*Wright Line* analysis unnecessary where employer's motivation not at issue); *Phoenix Transit Sys.*, 337 NLRB 510, 510 (2002) (same), *enforced mem.*, 63 F. App'x 524, 524 (D.C. Cir. 2003).[17]

Finally, Everglades states (Br. 55) that there is a lack of evidence establishing that Fikki refused to complete the re-boarding process because of her objections to the unlawful agreement. But as the Board explained (D&O 7 n.10), Fikki's subjective motivation is irrelevant. Having found the Agreement unlawful, as a restraint upon both concerted legal activity and employees' right to pursue

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[16] *See Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981).

[17] For that reason, Everglades does not advance its case by citing (Br. 56-57) decisions in which the Board found, pursuant to *Wright Line*, that employers were motivated to take adverse action based on *valid* work rules rather than employees' protected activity.

Board charges, it was reasonable for the Board to find that discharging an employee for failing to consent to the Agreement violated Section 8(a)(1), regardless of whether Fikki understood that it violated federal law. An employer may not violate the NLRA with impunity whether or not employees are aware of unlawful conduct.

CONCLUSION

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

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National Labor Relations Board
July 2016

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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Petitioner/Cross-Respondent	*	
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NATIONAL LABOR RELATIONS BOARD	*	Board Case No. 12-CA-096026
Respondent/Cross-Petitioner	*	
and	*	
LISA K. FIKKI	*	
Intervenor	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 10,955 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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this 1st day of July, 2016

UNITED STATES COURT OF APPEALS
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and	*	
LISA K. FIKKI	*	
Intervenor	*	

CERTIFICATE OF SERVICE

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

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