

Nos. 15-73921 & 16-70336

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

**NIJJAR REALTY, INC.,
A CALIFORNIA CORPORATION, dba PAMA MANAGEMENT**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition for review of Nijjar Realty, Inc., a California corporation, dba PAMA Management (“Nijjar”), and the cross-application for enforcement of the National Labor Relations Board (“the Board”), of a Board Order issued against Nijjar. The Board’s Decision and Order, reported at 363 NLRB No. 38 (Nov. 20, 2015), is final under Section 10(e) and (f) of the

National Labor Relations Act (“the NLRA”), as amended, 29 U.S.C. § 151, et seq., 160(e) and (f).

The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the NLRA, which empowers the Board to prevent unfair labor practices. *Id.* § 160(a). Nijjar’s petition for review and the Board’s cross-application for enforcement are timely, as the NLRA places no time limitation on such filings. This Court has jurisdiction over these proceedings pursuant to Section 10(e) and (f) of the NLRA, and venue is proper because Nijjar transacts business in California.

STATEMENT OF ISSUES

1. Whether the Board reasonably found that Nijjar violated Section 8(a)(1) of the NLRA by imposing, as a condition of employment, an agreement barring employees from concertedly pursuing work-related claims in any forum, arbitral or judicial.
2. Whether the Board reasonably found that Nijjar violated Section 8(a)(1) of the NLRA by enforcing the unlawful agreement.

RELEVANT STATUTORY PROVISIONS

Relevant statutes are contained in the statutory addendum to this brief, except for those already included in the addendum to Nijjar’s opening brief.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Nijjar is a property-management company based in El Monte, California. (ER.6; ER.36.)¹ In December 2011, Nijjar hired a contractor, Emplicity, to handle employment paperwork and payroll for its employees. (ER.9; ER.32-33, 250-56.) Emplicity developed an application packet containing various mandatory employment documents. (ER.9; ER.33.)

Two of the required employment forms contain provisions that bind employees to individual arbitration of work-related claims (collectively “the Agreement”). (ER.7-8; ER.192-93.) Specifically, the “Comprehensive Agreement” states, in relevant part, “Employee, Emplicity and Company, agree to utilize binding arbitration as the sole and exclusive means to resolve all disputes that may arise out of or be related in any way to Employee’s employment.” (ER.7; ER.192.) The “Applicant’s Statement and Agreement” provides, in relevant part, “Emplicity, the Worksite Employer, and I [the employee] will utilize binding arbitration to resolve all disputes that may arise out of the employment context.” (ER.8; ER.193.) Both provisions further clarify that the employee waives any right

¹ Citations are to the Excerpts of Record (ER) filed with Nijjar’s opening brief and Supplemental Excerpts of Record (SER) filed with this brief. Where applicable, references preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to Nijjar’s opening brief; “C-Br.” refers to the brief filed by the Chamber of Commerce (“the Chamber”) as *Amicus Curiae*.

to bring claims against Nijjar in court. (ER.7-8; ER.192-93.) The provision in the Comprehensive Agreement also contains the following waiver of concerted claims:

4. This binding arbitration agreement shall not be construed to allow or permit the consolidation or joinder of other claims or controversies involving any other employees, and will not proceed as a class action, collective action, private attorney general action or any similar representative action. No arbitrator shall have the authority under this agreement to order any such class of representative action. I further understand and acknowledge that the terms of this Agreement include a waiver of any substantive or procedural rights that I may have to bring an action on a class, collective, private attorney general, representative or other similar basis. However, due to the nature of this waiver, the Company has provided me with the ability to choose to retain these rights by affirmatively checking the box at the end of this paragraph. Accordingly, I expressly agree to waive any right I may have to bring an action on a class, collective, private attorney general, representative or other similar basis, unless I check this box [].

(ER.8; ER.192.)

Charging party Gerardo Haro applied to work for Nijjar as a maintenance worker on August 24, 2011, and was hired on September 1. (ER.7; ER.16, 23, 156-60, SER.1.) On December 29, after the contract between Nijjar and Emplicity entered into effect, Haro and about 20 other maintenance employees were told to sign the Emplicity application packet, including the Comprehensive Agreement and the Applicant's Statement and Agreement, as a condition of their continued employment. (ER.1 & n.1, 7; ER.17-18, 20-21, SER.2, 4.) Haro signed the documents as ordered, binding himself to the Agreement. (ER.7; ER.18, 192-93.) Haro left his employment with Nijjar in January 2012. (ER.7; SER.3, 5.)

On June 29, 2012, Haro sued Nijjar in Superior Court for the State of California on behalf of himself and all others similarly situated, alleging various violations of California labor law and asserting claims under the California Private Attorney General Act. (ER.1 n.3, 8; ER.228-49.) Nijjar sought to enforce the Agreement by petitioning the court to compel arbitration of Haro's claims. (ER.1, 8-9; ER.166-227.) On March 6, 2013, the state court severed and stayed Haro's Private Attorney General Act claims and compelled individual arbitration of his remaining claims. (ER.9; ER.65.)

II. PROCEDURAL HISTORY

Haro filed an unfair-labor-practice charge with the Board on October 25, 2012, pursuant to which the Board's Acting General Counsel issued a complaint alleging that Nijjar violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by maintaining and enforcing an agreement requiring employees, as a condition of employment, to waive their right to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. (ER.54-63.) On December 4, 2013, Administrative Law Judge William Nelson Cates issued a decision finding that Nijjar violated the NLRA as alleged. (ER.6-14.)

III. THE BOARD'S DECISION AND ORDER

On November 20, 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 adopted as modified the judge's rulings, findings, conclusions, and remedy, finding that Nijjar violated Section 8(a)(1) as alleged. (ER.1-3.)

The Board's Order requires that Nijjar cease and desist from the unfair labor practices 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, 29 U.S.C. § 157. (ER.2.) Affirmatively, the Order requires Nijjar to: rescind the Agreement in all of its forms, or revise it in all of its forms to make clear that the Agreement does not constitute a waiver of employees' right to maintain employment-related joint, class, or collective actions in all forums; notify all applicants, and current and former employees who were bound by the Agreement, of the change; notify the Superior Court of California of the change, and that Nijjar no longer opposes Haro's action based on the Agreement; reimburse Haro's attorneys' fees and expenses incurred in opposing Nijjar's motion to compel arbitration; and post a remedial notice. (ER.1 n.4, 2-3, 14.)

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 Nijjar’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 concerted. It also makes clear that individual agreements that prospectively waive Section 7 rights are unlawful. Such waivers violate Section 8(a)(1) of the NLRA, which bars interference with Section 7 rights. Accordingly, Nijjar’s maintenance and enforcement of the Agreement, which requires employees to arbitrate all employment-related disputes individually, violates the NLRA. The presence of an opt-out procedure does not save the Agreement, as the restriction of Section 7 rights remains in place, and the opt-out requirement imposes additional burdens on those rights.

The Board also correctly found that the FAA itself does not mandate enforcement of the Agreement. Because the Agreement violates the NLRA, it is exempted from enforcement under the FAA’s savings clause, which provides that arbitration agreements are subject to general contract defenses such as illegality.

As the Board found, the Agreement 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 co-equal statutes can be harmonized, courts should give effect to both.

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. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996) (Board “need not show that its construction is the best way to read the statute”); *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 515 F.3d 942, 945 (9th Cir. 2008) (Board’s decision is “accorded considerable

deference as long as it is rational and consistent with the statute”) (internal quotations omitted). The Court does not defer to the Board’s interpretation of statutes other than the NLRA. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002).

ARGUMENT

I. NIJJAR VIOLATED SECTION 8(a)(1) OF THE NLRA BY MAINTAINING AN AGREEMENT THAT BARS 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 (emphases added). As explained below, courts have long upheld the Board’s construction of Section 7 as protecting the concerted pursuit of work-related legal claims, consistent with the language and purposes of the NLRA. That construction falls squarely within the Board’s expertise and its responsibility for delineating federal labor law generally, and Section 7 in particular. *See NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (noting that “the task of defining the scope of [Section] 7 ‘is for the Board to perform in the first instance as it considers the wide variety of cases that come

before it” (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978)); accord *NLRB v. Calkins*, 187 F.3d 1080, 1089 (9th Cir. 1999) (“The Board has the responsibility in the first instance to delineate the precise boundaries of Section 7’s mutual aid or protection clause.” (citation omitted)).

Central to this case is the Board’s holding that the right of employees to engage in concerted activity for mutual aid or protection—the “basic premise” upon which our national labor policy has been built, *Murphy Oil*, 2014 WL 5465454, at *1—includes concerted *legal* activity. The reasonableness of the Board’s view was confirmed by the Supreme Court in *Eastex*, 437 U.S. at 565-66 & nn.15-16. In that case, the Court recognized that Section 7’s broad guarantee reaches beyond immediate workplace disputes to encompass employees’ efforts “to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship,” including “through resort to administrative and judicial forums.” *Id.* at 565-66 & n.15.²

² Contrary to the Chamber’s claim (C-Br. 14 n.6), the Board did not misread *Eastex*; rather, *Eastex* bears more resemblance to this case than the Chamber acknowledges. First, *Eastex* is not a retaliation case (which would fall under Section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3)), but a Section 8(a)(1) case, just like this one. 437 U.S. at 561. And second, the employer in *Eastex* prospectively barred employees from engaging in Section 7 activity—just as Nijjar did here. *See id.* (banning employees from distributing protected literature). Furthermore, the Board has never claimed that *Eastex* guarantees employees “an absolute right” to pursue collective actions under other statutes. (C-Br. 14 n.6

Indeed, as *Eastex* notes, for decades the Board has held concerted legal activity to be protected. *Id.* 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”). 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 (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”).³

(emphasis omitted.) *Eastex* simply found that employees have the right to pursue collective means of legal redress, and to do so *free from employer interference*. 437 U.S. at 565-67. Thus, the Board’s finding that Nijjar violated Section 8(a)(1) by prospectively restricting its employees’ right to engage in collective legal action over their working conditions is entirely consistent with, and flows from, *Eastex*.

³ *Accord Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188-89 (D.C. Cir. 2000) (concerted petitions for injunctions against workplace harassment protected by Section 7); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) (“Generally, filing by employees of a labor related civil action is protected activity under Section 7 of the NLRA unless the employees acted in bad faith.”); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (same); *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

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 disruptive protests. *Horton*, 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. Wash. 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’

contract violation and unpaid wages), *enforced mem.*, 567 F.2d 391 (7th Cir. 1977).

entitled,” this Court in *Salt River* upheld the Board’s holding that Section 7 protected employees’ efforts to exert group pressure on the employer to redress their work-related claims through resort to legal processes. 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 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). Thus, 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). No more availing is Nijjar’s assertion

(Br. 15; *see also* C-Br. 15-16) that Rule 23 is merely a “procedural device.” It is the NLRA, not Rule 23, that creates the right to engage in concerted activity.⁴ As the Board has explained, what the NLRA prohibits “is unilateral action, by an employer, that purports to completely deny employees access to class, collective, or group procedures that are otherwise available to them under statute or rule.”

Murphy Oil, 2014 WL 5465454, at *18.⁵

In sum, the Board has reasonably construed Section 7 as guaranteeing employees the option of resorting to concerted pursuit of legal claims to advance

⁴ Nor does it matter that modern class-action procedures were not available to employees in 1935 when the NLRA was enacted, as Nijjar and the Chamber both claim. (Br. 18; C-Br. 13-15 & n.7). First, Nijjar’s Agreement would preclude its employees from pursuing not only class but also joint claims. Second, Nijjar’s narrow focus on class procedures (Br. 2, 14-15, 18, 20, 22-23) should not create the impression that concerted legal action is a recent development anachronistically imported into labor law. The procedural device of joinder existed in 1935, and collective claims of various forms long predate Rule 23, *Lewis*, 2016 WL 3029464, at *3, as do the Board’s earliest decisions finding that Section 7 protects the collective legal pursuit of work-related claims. *See supra* p. 11. In any event, the NLRA was drafted to allow the Board to respond to new developments when 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”).

⁵ The Chamber also argues that the Supreme Court has rejected the notion that *all* litigants have a generalized “nonwaivable . . . opportunity” to use class mechanisms. (C-Br. 16 n.8 (quoting *Italian Colors*, 133 S. Ct. at 2310)). But the quoted language is not inconsistent with the Supreme Court’s recognition in *Eastex* that *some* litigants—those covered by the NLRA—have a Section 7 right to engage in concerted legal 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.

work-related concerns. That construction is supported by longstanding Board and court precedent. It also reflects the Board’s sound judgment that concerted legal activity is a particularly effective means to advance Congress’s goal of avoiding labor strife and economic disruptions. And that judgment falls squarely within the Board’s area of expertise and responsibility. *City Disposal*, 465 U.S. at 829; *accord Lewis*, 2016 WL 3029464, at *3 (holding that “even if Section 7 were ambiguous—and it is not,” the Board’s interpretation that employers may not “mak[e] agreements with individual employees barring access to class and collective remedies” is entitled to judicial deference).

B. The Agreement Restricts Employees’ Section 7 Right to Engage in Concerted Action, Which Violates Section 8(a)(1) of the NLRA

By prospectively restricting employees’ Section 7 right to engage in concerted legal action, the Agreement violates Section 8(a)(1) of the NLRA. The presence of an opt-out procedure does not render the Agreement lawful, as it does not alleviate the underlying impact on Section 7 rights and imposes its own burden on employees’ exercise of those rights. *See infra* pp. 23-26.

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

Section 8(a)(1) of the NLRA makes it unlawful for employers to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” 29 U.S.C. § 158(a)(1). Employer conduct is thus unlawful if it

“reasonably tends to restrain” the exercise of Section 7 rights. *Penasquitos Vill., Inc., v. NLRB*, 565 F.2d 1074, 1080 (9th Cir. 1977). The Agreement forces signatory employees to submit all work-related claims to binding arbitration and bars the consolidation or joinder of claims, as well as class actions, collective actions, “or any similar representative action.” (ER.8; ER.192.) By maintaining the Agreement, which explicitly waives employees’ ability to pursue any kind of collective legal action in favor of individual arbitration, Nijjar restricts their long-recognized Section 7 right to concertedly enforce employment laws. *See supra* pp. 9-15; *see also Lutheran Heritage Vill.-Livonia*, 343 NLRB 646, 646 (2004) (facial restrictions on Section 7 activity unlawful).⁶

Moreover, as the Board explained in *Horton*, 357 NLRB at 2280-81, and *Murphy Oil*, 2014 WL 5465454, at *1, 6, longstanding Board and court precedent establish that restrictions on Section 7 rights are unlawful even if they take the form of agreements between employers and employees. In *National Licorice Co.*

⁶ Nijjar’s brief treats the Comprehensive Agreement and the Applicant’s Statement of Agreement as separate and distinct arbitration agreements. (Br. 27-29.) However, the Board expressly found that they constitute “one inextricably intertwined employment application” because Nijjar required employees to “sign both . . . at the same time, as part of the same set of documents, and as a condition of continuing employment.” (ER.1 n.1.) Because Nijjar failed either to directly contest the Board’s factual finding or to provide a theory supporting its contrary assumption, much less dispute the substantial evidence supporting that finding, it has lost the opportunity to challenge it here. *See Fed. R. App. P. 28(a)(8)(A); Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996) (“an issue . . . not discussed in the body of the opening brief is deemed waived,” and cannot be raised for the first time in reply brief).

v. NLRB, the Supreme Court held that individual contracts in which employees prospectively relinquish their right to present grievances “in any way except personally,” or otherwise “stipulate[] for the renunciation . . . of rights guaranteed by the [NLRA]” are unenforceable, and are “a continuing means of thwarting the policy of the [NLRA].” 309 U.S. 350, 360-61 (1940); *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; *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 sign, 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).⁷ Similarly, in *NLRB v. Stone*, the Seventh Circuit held that individual contracts requiring employees to adjust their grievances with their employer individually “constitute[] a violation of

⁷ 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; *Horton*, 357 NLRB at 2286.

the [NLRA] per se,” 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”).

The principle that individual prospective waivers of Section 7 rights are unlawful applies even if those waivers are “not a condition of employment,” such that “the status of individual employees [is not] affected by reason of signing or failing to sign.” *J.I. Case*, 321 U.S. at 333; *accord Stone*, 125 F.2d at 756; *On Assignment Staffing Servs., Inc.*, 362 NLRB No. 189, 2015 WL 5113231, at *5-11 (Aug. 27, 2015), *enforcement denied*, No. 15-60642 (5th Cir. June 6, 2016) (summary disposition). Accordingly, an employee’s Section 7 rights cannot prospectively be “traded away” through an individual agreement with his employer, even if the employee himself was “responsible for instigating” the agreement. *Mandel Sec. Bureau, Inc.*, 202 NLRB 117, 119 (1973). Indeed, courts have recognized that an employee “can be coerced and restrained by a condition voluntarily accepted when compliance with that condition would interfere with . . . exercise of his Section 7 rights.” *NLRB v. Local 73, Sheet Metal Workers’ Int’l Ass’n*, 840 F.2d 501, 506 (7th Cir. 1988) (emphasis omitted); *see also, e.g., NLRB v. Bratten Pontiac Corp.*, 406 F.2d 349, 350-51 (4th Cir. 1969) (employer violated Section 8(a)(1) by offering employees an optional “pay plan” that included an

agreement not to engage in concerted activity); *accord United Mine Workers*, 305 NLRB 516, 520 (1991) (rejecting argument that when employees “voluntarily undertake a contractual commitment[,] . . . holding them to that promise cannot be considered ‘restraint or coercion’” of Section 7 rights); *Eddyleon Chocolate Co.*, 301 NLRB 887, 887 (1991) (employer violated Section 8(a)(1) by “request[ing]” that job applicant agree not to join union).⁸

Individual contracts that prospectively waive Section 7 rights thus violate Section 8(a)(1) regardless whether they are voluntary. That proposition flows from the unique characteristics of Section 7 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 among themselves how to respond. *See, e.g., Wash. Aluminum*, 370 U.S. at 14-15 (concerted activity spurred by extreme cold in plant); *Salt River Valley*, 206 F.2d at 328 (concerted activity prompted by violations of minimum-wage laws). The decision whether to collectively walk out

⁸ Contrary to the Chamber’s claim (C-Br. 19), individual agreements that wholly foreclose one avenue of Section 7 activity violate Section 8(a)(1) regardless of whether employees can engage in other types of concerted activity. *See Serendipity-Un-Ltd.*, 263 NLRB 768, 775 (1982) (employees have the right “to engage in concerted activity which they decide is appropriate,” even if “alternative methods of solving the problems” are available (internal quotations omitted)). Therefore, the ability of employees to take some concerted actions does not justify or excuse restriction of other Section 7 activity. Here, for example, employees’ ability to collaborate before filing legal claims does not validate the Agreement’s explicit infringement of their Section 7 right to pursue those claims concertedly.

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. (ER.11 (noting that employees are given the Agreement to sign “at a time when [they] are unlikely to have an awareness of employment issues that may now, or in the future, be best addressed by collective or class action”).)

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 Bd., Textile Workers Local 1029*, 409 U.S. 213, 214-18 (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 361-62, impair the “full freedom” of the signatory employees to decide, at the appropriate time, whether to participate in concerted activity. 29 U.S.C. § 151.

Contrary to Nijjar’s suggestion (Br. 20), the fact that Section 7 preserves employees’ “right to refrain” from concerted activity does not undermine the Board’s rationale. *Id.* § 157. Like the choice to engage in concerted activity, the right to refrain belongs to the employee to exercise in the context of a concrete workplace dispute, free from employer interference. Under the Board’s rule, employees remain free to refrain from concerted action, either by choosing not to participate in a particular concerted legal action, or by pursuing their grievances individually against the employer. *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.”).⁹

⁹ Nor, contrary to Nijjar’s suggestion (Br. 20), does Section 9(a) of the NLRA, 29 U.S.C. § 159(a), create a distinct employee right to adjust grievances individually. *Murphy Oil*, 2014 WL 5465454, at *23. Section 9(a) confers on a union the status of exclusive-bargaining representative and its proviso—that employees “shall have the right at any time to present grievances to the employer and to have such grievances adjusted . . . ,” *id.*—allows employers to entertain individual grievances from union-represented employees without engaging in direct dealing in violation

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 happen 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 his ability to communicate with and appeal to fellow employees to join in such action. *See, e.g., Signature Flight Support*, 333 NLRB 1250, 1260 (2001) (finding employee efforts “to persuade other employees to engage in concerted activities” protected), *enforced mem.*, 31 F. App’x 931 (11th Cir. 2002); *Am. Fed’n of Gov’t Emps.*, 278 NLRB 378, 382 (1986) (describing as “indisputable” that one employee “had a Section 7 right to appeal to [another employee] to join” in

of Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5). *See Emporium Capwell*, 420 U.S. at 61 n.12. In short, that proviso merely carves out an exception to Section 9(a)’s rule of union exclusivity. *Murphy Oil*, 2014 WL 5465454, at *23 n.95 (citing *Black-Clawson Co. v. Int’l Ass’n of Machinists Lodge 355*, 313 F.2d 179, 185 (2d Cir. 1962)).

protected activity). But such appeals are futile if other employees have already committed to abstaining from such 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, *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 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. Because Nijjar's Agreement violates the express provisions of the NLRA and stands contrary to its underlying policies, the Board reasonably found it unlawful.

2. The Agreement's opt-out provision does not render its prospective waiver of Section 7 rights lawful

The Board reasonably found (ER.2) that the Agreement's prospective waiver of the right to engage in concerted legal action is unlawful regardless of whether employees have an initial opportunity to opt out. *See generally On Assignment*, 2015 WL 5113231, at *5-11. That is because 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 and the NLRA's goal of fostering industrial peace is the same regardless of whether an agreement is mandatory or voluntary. *See supra* pp. 20-23. 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. 2015 WL 5113231, at *9.

Indeed, rather than eliminate the Agreement's impact on Section 7 rights, as Nijjar suggests (Br. 27-29), the opt-out procedure imposes additional burdens on their exercise. *See On Assignment*, 2015 WL 5113231, at *5-7. Because employees are required to participate in Nijjar's arbitration program unless they opt out, the Agreement forces them to take affirmative action to preserve their statutory rights, or else lose those rights irrevocably. The opt-out requirement thus resembles the type of employer-imposed precondition to engaging in concerted activity that the Board has found to violate Section 8(a)(1). *See, e.g., Chromalloy Gas Turbine Corp.*, 331 NLRB 858, 858 (2000) (unlawful to require employees to seek permission before engaging in concerted activity), *enforced*, 262 F.3d 184 (2d Cir. 2001); *Savage Gateway Supermarket, Inc.*, 286 NLRB 180, 183 (1987) (unlawful to require employees to notify employer before engaging in concerted activity), *enforced*, 865 F.2d 1269 (6th Cir. 1989).

The opt-out provision also impairs Section 7 rights by requiring employees who wish to retain those rights to "make 'an observable choice that demonstrates

their support for or rejection of’ concerted activity.” *On Assignment*, 2015 WL 5113231, at *6 (quoting *Allegheny Ludlum Corp.*, 333 NLRB 734, 740 (2001), *enforced*, 301 F.3d 167 (3d Cir. 2002)). That runs counter to well-established Board law providing that employees are entitled to keep private from employers their views and sympathies about unionism and collective action. *Id.*; *see also Stoner Lumber, Inc.*, 187 NLRB 923, 930 (1971) (“Employees’ right to remain silent . . . to protect the secrecy of their concerted activities[] is protected by Section 7 of the Act.”), *enforced mem.*, 1972 WL 3035 (6th Cir. May 26, 1972).

Moreover, given the collective nature of Section 7 rights, *see supra* pp. 19-23, even those employees who opt out of the Agreement are affected by its irrevocable waiver of signatory employees’ rights. For example, an employee who opts out of the Agreement and attempts to pursue claims concertedly will not retain the ability to meaningfully exercise his “Section 7 right to appeal to” his co-workers who signed the Agreement, *Am. Fed’n of Gov’t Emps.*, 278 NLRB at 382, or to “persuade [those] other employees” to join his suit, *Signature Flight Support*, 333 NLRB at 1260. For all of those reasons, the Agreement violates Section 8(a)(1) by “interfer[ing]” with Section 7 rights, 29 U.S.C. § 158(a)(1), even if it does not wholly restrict them.

Finally, Nijjar cites (Br. 28-29) this Court’s decision in *Johnmohammadi v. Bloomingdale’s, Inc.*, 755 F.3d 1072, 1075-77 (9th Cir. 2014), which held that an

opt-out agreement waiving the right to bring concerted legal claims did not “interfere with, restrain, or coerce” employees within the meaning of Section 8(a)(1). But, as explained above, the Board has reasonably concluded otherwise. The Court in *Johnmohammadi* did not have the benefit of the Board’s subsequent decision in *On Assignment*, 2015 WL 5113231, in which the Board articulated its rationale for finding that prospective bans on concerted legal action violate Section 8(a)(1) even if employees can opt out; at the time of *Johnmohammadi*, the Board had expressly reserved judgment on the issue, *see Horton*, 357 NLRB at 2289 n.28. The matter of deference to the Board on that point thus was not before the Court. Further, the Court did not hold that its reading of Section 8(a)(1) was the only permissible one, and “[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation . . . displaces a conflicting agency construction” that issues after the court’s decision. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005). Here, unlike in *Johnmohammadi*, the Court is reviewing the Board’s interpretation of Section 8(a)(1), an issue as to which the Board receives significant deference. *Garner*, 346 U.S. at 490.

3. Haro's unfair-labor-practice charge is not time-barred

Nijjar is mistaken when it claims (Br. 23-25) that Haro's unfair-labor-practice charge is time-barred by Section 10(b) of the NLRA, 29 U.S.C. § 160(b). Section 10(b) requires that charges be filed within 6 months of an alleged violation—in this case, the period from April 26 to October 25, 2012, the date of Haro's charge. Evert Miller, Nijjar's Chief Financial Officer, testified that Nijjar required employees to sign the Agreement until December 2012, when its contract with Emplicity expired. (ER.9; SER.8-9.) Everett also testified that Nijjar made no effort thereafter to rescind, withdraw or otherwise eliminate the Agreement's requirement that employees waive their right to collective action or class-related arbitration. (ER.9; SER.10-11.) Based on that evidence, the Board reasonably found that Nijjar unlawfully maintained the Agreement up to and during the 6-month period preceding Haro's charge. (ER.1, 9.)

Nijjar's argument is based on the fallacy that Haro alleged Nijjar acted unlawfully by requiring him to *sign* the Agreement. (Br. 23.) However, Haro did not attack, and the Board did not find unlawful, the Agreement's formation; rather, he alleged, and the Board found, that Nijjar unlawfully required employees to waive their Section 7 right to participate in class and representative actions as a condition of their employment. (ER.6; ER.63.) As the Board explained, the mere *maintenance* of such a requirement constitutes a "continuing violation" of the

NLRA. (ER.1.) In other words, the violation is tied to the Agreement's existence and continuing application during the relevant period, not to the moment Haro or any other employee signed it. *See Guard Publ'g Co.*, 351 NLRB 1110, 1110 n.2 (2007) ("The maintenance during the 10(b) period of a rule that transgresses employee rights is itself a violation of Sec. 8(a)(1)." (citations omitted)), *enforced*, 571 F.3d 53, 59 (D.C. Cir. 2009), *overruled on other grounds by Purple Commc'ns, Inc.*, 361 NLRB No. 126, 2014 WL 6989135 (Dec. 11, 2014); *Control Servs., Inc.*, 305 NLRB 435, 435 n.2, 442 (1991) (maintenance of unlawful rule timely alleged, even if rule was promulgated outside 10(b) period), *enforced mem.*, 961 F.2d 1568 (3d Cir. 1992).

Local Lodge No. 1424 v. NLRB, on which Nijjar relies (Br. 24), is not to the contrary. 362 U.S. 411 (1960). There, the Supreme Court held that the validity of contract's *execution* cannot be challenged outside the 10(b) period. *Id.* at 417-19. However, the Court distinguished cases where the unfair labor practice alleged is independent from the contract's execution, such as when an agreement is invalid on its face, or unlawfully administered. *Id.* at 423. That is exactly what happened here: the Board made no finding regarding the Agreement's execution, but found

instead that it “clearly inhibits and interferes with Section 7 conduct,” and that Nijjar unlawfully maintained it within the Section 10(b) period.¹⁰ (ER.1, 11.)

In sum, Nijjar’s ongoing maintenance of the Agreement, which expressly bars a key form of concerted activity, violates Section 8(a)(1) of the NLRA. And it is no less unlawful because the Agreement contains an opt-out procedure, in light of the longstanding prohibition on individual contracts that prospectively waive Section 7 rights and on other policies burdening Section 7 activities. That Nijjar used the particular vehicle of an arbitration agreement subject to the FAA likewise does not excuse its restriction of Section 7 rights; Nijjar cannot “attempt . . . to achieve through arbitration what Congress has expressly forbidden” under the NLRA. *Graham Oil v. ARCO Prods. Co., Div. Atl. Richfield Co.*, 43 F.3d 1244,

¹⁰ Similarly, the Section 10(b) period for the violation based on Nijjar’s enforcement of the Agreement (discussed below, pp. 45-53) runs not from the date Haro signed the Agreement, as Nijjar argues (Br. 24-25), but from December 13, 2013, when Nijjar petitioned to dismiss Haro’s lawsuit and compel individual arbitration of his claims. *See Local Lodge No. 1424*, 362 U.S. at 423 (10(b) period for violation based on enforcement of facially invalid agreement runs from date of enforcement, not from date of execution).

Before the Board (but not before this Court), Nijjar argued that the unlawful-enforcement allegation was time barred because it was not included in the charge but first appeared in the complaint. (ER.1.) The Board found that allegation timely because it was of the “same class” as, dependent on, and plainly related to the maintenance violation, and emerged out of the investigation of the timely maintenance-violation charge. (ER.1-2 (citing *NLRB v. Fant Milling Co.*, 360 U.S. 301, 306-09 (1959); *Cellular Sales of Mo., LLC*, 362 NLRB No. 27, 2015 WL 1205241, at *1 n.9 (Mar. 16, 2015), *enforcement denied on other grounds*, ___ F.3d ___, 2016 WL 3093363 (8th Cir. June 2, 2016)).)

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

Nijjar’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 (1974); *see also POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236-39 (2014). As demonstrated below, agreements that are unlawful under the NLRA are exempted from enforcement by the FAA’s savings clause. The Board’s holding to that effect in *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) (internal quotations omitted). “[C]ourts must [therefore] place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms.” *Id.*; see also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (FAA’s purpose is “to make arbitration agreements as enforceable as other contracts, but not more so”). 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, 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, 83-84 (1982). Giving effect to that principle, the Court held that if a contract required an employer to cease doing business with another company in violation of the NLRA, it would be unenforceable. *Id.* at 84-86; see also *Courier-Citizen Co. v. Boston Electrotypers Union No. 11*, 702 F.2d 273, 276 n.6 (1st Cir. 1983)

(explaining that “federal courts may not enforce a contractual provision that violates section 8 of the [NLRA]”).

As described above (pp. 16-19), 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 Sols., Inc.*, 363 NLRB No. 85, 2015 WL 9460027, at *1 (Dec. 24, 2015), *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), *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. 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 Congress to enact the FAA, *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 *Horton* 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 *Horton* and *Murphy Oil*, the Seventh Circuit recently held that an arbitration agreement that, similar to Nijjar’s, waived employees’ Section 7 right to engage in concerted action “[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 *4, 6. It also noted that, rather than embodying

hostility, the NLRA “does not disfavor arbitration” as a mechanism of dispute resolution. *Id.* at *7.

In sum, because the defense that a contract is illegal under the NLRA is unrelated to the fact that an agreement to arbitrate is at issue, that defense falls comfortably within the FAA’s savings-clause exception. In other words, the Board’s finding that Nijjar violated the NLRA by maintaining the Agreement, which requires individual arbitration of all work-related claims, 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 on this point.¹¹

2. The Board’s *Horton* and *Murphy Oil* decisions are consistent with the Supreme Court’s FAA jurisprudence

Nijjar mistakenly asserts that the Supreme Court’s FAA jurisprudence forecloses the Board’s position. (Br. 13-16; *see also* C-Br. 4.) What it fails to

¹¹ For that reason, it is unnecessary to reach arguments that the NLRA does not contain a “contrary congressional command” overriding the FAA. (Br. 16-20; C-Br. 10-26.) 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).

mention is that the Supreme Court has never considered whether agreements requiring individual arbitration must be enforced under the FAA despite the NLRA's protection of statutory employees' right to pursue work-related claims concerted. 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 an unlawful contract under the NLRA does not fit within the FAA's savings clause would be to fail to give effect to the settled principle that courts should regard two co-equal statutes as effective. *Morton*, 417 U.S. at 551.

None of the Supreme Court FAA cases cited by Nijjar (Br. 13-23) 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 statutory challenges 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) (internal quotations omitted). Because the substantive rights of individual employees to be free of age-based discrimination could be adequately vindicated in individual arbitration, the Court held that an arbitration agreement could be enforced. The

Court rejected arguments that ADEA provisions affording a judicial forum and an optional collective-action procedure precluded enforcing 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 (second alteration in original) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).¹²

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 Section 7 rights as “fundamental”). Under the mode of statutory analysis used in cases like *Gilmer*, that is a crucial distinction. As the Board explained in *Murphy Oil*, “[t]he core objective of the [NLRA] is the protection of workers’ ability to act

¹² 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 Corp. v. Greenwood*, 132 S. Ct. 665, 670-71 (2012) (judicial-forum provision is not “principal substantive provision[]” of Credit Repair Organizations Act); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (judicial-forum and venue provisions in Securities Act are not “so critical that they cannot be waived”); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 235-36 (1987) (Exchange Act provision not intended to bar regulation when “chief aim” was to preserve exchanges’ power to self-regulate); *accord Kuehner v. Dickinson & Co.*, 84 F.3d 316, 320 (9th Cir. 1996) (FLSA jury-trial procedure not necessary to ensure availability of full range of statute’s remedies).

in concert, in support of one another.” 2014 WL 5465454, at *1; *see also Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (describing NLRA as “designed to . . . encourag[e] employees to promote their interests collectively”).¹³

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 the savings-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, *id.* § 159, and Section 10 empowers the Board to prevent violations of Section 8, *id.* § 160. Thus, the NLRA’s various

¹³ 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 & the Federal Arbitration Act: The NLRB’s Determination of Substantive Statutory Rights*, 128 HARV. L. REV. 907, 921 (2015) (“[The 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.”).

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 565.¹⁴

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 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. *See Lewis*, 2016 WL 3029464, at *9 (observing that "[c]ourts routinely invalidate arbitration provisions that interfere with substantive statutory rights" (citing cases)).

¹⁴ 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. *Id.* § 104.

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 Nijjar as enforcing individual-arbitration agreements, a different result is warranted.

Nijjar’s (Br. 21-23) reliance on *Concepcion* to challenge the Board’s savings-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.¹⁵ *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

¹⁵ Similarly, in *Italian Colors*, the Supreme Court applied *Concepcion* to strike down a federal-court requirement that collective litigation be available when individual arbitration would be prohibitively expensive, so as to ensure an “affordable procedural path” to vindicate claims. 133 S. Ct. at 2308-09.

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

Nor has the Board taken aim at arbitration. Rather, it has applied a longstanding interpretation of the NLRA, which the Supreme Court endorsed, 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.¹⁶ 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 (“[I]t is worth noting that California’s courts have been more likely to hold contracts to arbitrate unconscionable than other contracts.”). Indeed, unlike California courts, the Board has never required that an employer allow employees the opportunity to arbitrate as a class. Rather, as noted above, the Board acknowledges an employer’s right “to insist that *arbitral* proceedings be conducted on an individual basis,” so long as employees remain free to bring concerted actions in another forum. *Horton*, 357 NLRB at 2288.¹⁷ And, far from being hostile to arbitration as a means of enforcing

¹⁶ 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).

¹⁷ Thus, there is no basis for the Chamber’s claim 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.” (C-Br. 27.) Moreover, to the extent the Chamber claims that arbitration is really more advantageous to employees (C-Br. 4, 27-31), its views of employees’ best interests are appropriately discounted. *See Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (“The 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 claimed 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

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)).

Nijjar 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 the Court did not decide). The Fifth Circuit made a similar error in rejecting the Board’s rationale in *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)).

Those cases do not answer the materially different question of whether the NLRA

(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); *Chromalloy Gas Turbine*, 331 NLRB at 862-63 (“[A]n employee who espouses the cause of another employee is engaged in concerted activity, protected by Section 7”); *accord NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-06 (2d Cir. 1942) (worker solidarity established by employees aiding 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”).

protects such a right. And the Fifth Circuit’s savings-clause analysis relied solely on *Concepcion*, *id.* at 358-60, while failing to recognize the material differences between the Board’s application of longstanding NLRA principles and the recent, judge-made California rule in that case.¹⁸ The Seventh Circuit, by contrast, held that *Concepcion* does not govern because, unlike the California rule, 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. This Court has yet to rule on the validity of the Board’s *Horton/Murphy Oil* rationale.¹⁹

¹⁸ Other circuits’ decisions rejecting the Board’s *Horton* decision in non-Board cases likewise misread Supreme Court precedent and reflect a misunderstanding of the Board’s position. *See Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053-55 (8th Cir. 2013) (finding *Concepcion* resolved savings-clause issue, and FLSA did not contain congressional command barring enforcement of arbitration agreement); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013) (per curiam) (rejecting citation to Board’s *Horton* decision based on *Owen*, without analysis). The Eighth Circuit’s decision in *Cellular Sales of Missouri, LLC v. NLRB*, ___ F.3d ___, 2016 WL 3093363, at *2 (8th Cir. June 2, 2016), relies on *Owen* to reject *Horton* in a Board case, but adds no new rationale. Nijjar also cites (Br. 11) *Walthour v. Chipio Windshield Repair*, but the court in that case did not reach the NLRA issue. 745 F.3d 1326, 1334-36 (11th Cir. 2014) (rejecting claim that FLSA overrides FAA’s enforcement mandate; no NLRA-based argument). None of those decisions addresses the Board’s savings-clause argument. Indeed, only the Fifth Circuit has “engaged substantively with the relevant arguments.” *Lewis*, 2016 WL 3029464, at *8. District court decisions rejecting the Board’s position suffer from the same analytical flaws.

¹⁹ Nijjar also misreads (Br. 32-33) this Court’s decision in *Richards v. Ernst & Young, LLP*, 744 F.3d 1072 (9th Cir. 2013) (per curiam). In *Richards*, this Court enforced an arbitration agreement after finding that the plaintiff had waived her

In sum, prospective waivers of the right to pursue concerted legal action are unlawful under the NLRA even if they do not offend other statutes, like the ADEA or the FLSA, which only grant individual rights. Just because an employer's action is not prohibited by one statute "does not mean that [it] is immune from attack on other statutory grounds in an appropriate case." *Emporium Capwell*, 420 U.S. at 72; *see also N.Y. Shipping Ass'n, Inc. v. Fed. Mar. Comm'n*, 854 F.2d 1338, 1367 (D.C. Cir. 1988) ("[T]here is no anomaly if conduct privileged under one statute is nonetheless condemned by another; we expect persons in a complex regulatory state to conform their behavior to the dictates of many laws, each serving its own special purpose."). The NLRA's protection of, and prohibition on interference with, concerted activity is what distinguishes it from other employment statutes and what renders agreements that preclude any collective action unlawful under the NLRA and unenforceable under the FAA.

defense that it was unlawful under the Board's *Horton* decision. *Id.* at 1075. Although the Court cited various decisions either rejecting or applying *Horton's* rationale, *id.* at n.3, it did not otherwise discuss *Horton* in its analysis.

II. NIJJAR VIOLATED SECTION 8(a)(1) OF THE NLRA BY ENFORCING THE UNLAWFUL WAIVER

As discussed above, Section 8(a)(1) of the NLRA makes it unlawful for employers to “interfere with, restrain, or coerce employees in the exercise of” their Section 7 rights. 29 U.S.C. § 158(a)(1). The Agreement unlawfully restricts Section 7 rights, *see supra* pp. 15-26, and Nijjar enforced the unlawful Agreement to restrict Section 7 activity when it petitioned the state court to compel individual arbitration of Haro’s class-action wage-and-hour claims. (ER.1, 8-9; ER.166-227.) Therefore, the Board reasonably found that Nijjar’s enforcement of the Agreement violated Section 8(a)(1). (ER.1, 12.)

Nijjar claims that Haro’s lawsuit did not meet the definition of “concerted activity” under Section 7, and therefore compelling individual arbitration of his claims did not violate Section 8(a)(1). Alternately, Nijjar argues that the Board’s finding violated its First Amendment right to petition the government. Failing all else, Nijjar challenges the Board’s choice of remedy for this violation. None of those arguments holds water.

A. Haro’s Lawsuit Sought to Initiate Collective Action to Improve the Working Conditions of Nijjar’s Employees and Was Thus Concerted and Protected Within the Meaning of Section 7

Nijjar’s insistence (Br. 25-27) that its enforcement of the Agreement did not restrain “concerted” activity, because Haro filed his wage-and-hour lawsuit as a

single plaintiff without pre-authorization from other employees, is without merit.²⁰ Section 7's protection is not limited to situations in which two or more employees work together to improve their terms and conditions of employment, or where one employee acts pursuant to the express authorization of other employees. *City Disposal Sys.*, 465 U.S. at 831. To the contrary, the Board has long held, with judicial approval, that concerted activity includes actions by individual employees seeking to initiate, induce, or prepare for group action. *See Meyers Indus. (Meyers II)*, 281 NLRB 882, 887 (1986), *enforced sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987); *see also Ontario Knife Co. v. NLRB*, 637 F.2d 840, 845 (2d Cir. 1980) ("Individual activity can be protected . . . if it is 'looking toward group action.'") (quoting *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964))).²¹

²⁰ In fact, Nijjar claims (Br. 12, 27) there can be no violation of the NLRA at all unless Haro's lawsuit is found concerted. That is incorrect. The Board found that Nijjar violated the NLRA by maintaining *and* enforcing the unlawful Agreement. (ER.12.) While the enforcement violation depends on showing that Haro engaged in concerted activity, the maintenance violation does not. *See supra* pp. 15-16. Instead, it suffices to show that Nijjar's conduct of maintaining the Agreement "reasonably tend[ed] to restrain" its employees' exercise of their Section 7 rights. *Penasquitos Vill.*, 565 F.2d at 1080.

²¹ Nijjar misconstrues Board law when it claims that Section 7 only protects conduct engaged in "with or on authority of" other employees. (Br. 25-26.) The quoted language comes from the Board's decision in *Meyers Industries (Meyers I)*, 268 NLRB 493 (1986), *remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985). In *Meyers II*, the Board clarified that the *Meyers I* standard "encompasses those circumstances where individual employees seek to initiate or to induce or to

As the Board found, Haro’s filing of an employment-related lawsuit as a putative class action on behalf of himself and similarly situated coworkers was an attempt to initiate, to induce, or to prepare for group action, and was therefore protected by Section 7. (ER.2 (citing *Beyoglu*, 362 NLRB No. 152, 2015 WL 4572913, at *2 (July 29, 2015) (applying *Meyers II*)).) By filing his lawsuit as a putative class action, Haro signaled his intent to proceed collectively and sought to induce participation of similarly situated employees. *See Horton*, 357 NLRB at 2279 (“Clearly, an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7.”); *accord Lewis*, 2016 WL 3029464, at *1-4 (finding single employee’s FLSA lawsuit, filed as putative collective action, protected by Section 7). The complaint was not the isolated conduct of a single employee, but rather the early stages of concerted activity. Therefore, it is of no moment that Haro did not know whether other employees would join his lawsuit at the time it was filed. What matters is that he laid the groundwork for other employees to consider, and

prepare for group action.” 281 NLRB at 887; *accord Beyoglu*, 362 NLRB No. 152, 2015 WL 4572913, at *2 (July 29, 2015). *Mannington Mills, Inc.*, 272 NLRB 176 (1984), and *Allied Erecting Co.*, 270 NLRB 277 (1984), both cited by Nijjar (Br. 26), are inapposite because they predate *Meyers I* and *II*. Nijjar’s other cases apply the *Meyers II* standard. *See NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 790 (8th Cir. 2013); *Salisbury Hotel*, 283 NLRB 685, 686 (1987).

ultimately join him in, group action.²² Courts have long recognized the necessity of protecting such preparatory conduct in its infancy in order to ensure that concerted activity can develop unhindered. *See NLRB v. United Union of Roofers, Waterproofers & Allied Workers Union No. 81*, 915 F.2d 508, 512 (9th Cir. 1990) (“To protect [Section 7] concerted activities in full bloom, protection must necessarily be extended to intended, contemplated or even referred to group action lest employer retaliation destroy the bud of employee initiative” (citation omitted)); *accord NLRB v. Caval Tool Div.*, 262 F.3d 184, 188 (2d Cir. 2001); *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1347 (3d Cir. 1969).

Finally, Nijjar’s claim (Br. 27) that it was unaware of Haro’s protected conduct not only lacks merit, but also defies common sense. Nijjar does not, and cannot, dispute that it had knowledge of Haro’s class-action lawsuit because it responded by petitioning to compel arbitration of Haro’s claims. (ER.166-227.) In so doing, Nijjar specifically directed the state court to paragraph 4 of the Agreement, stating, “Because Plaintiff did not ‘check the box’ at the end of [paragraph 4], the *waiver of collective claims* contained in the Agreement was agreed to and must be enforced.” (ER.168 (emphasis added).) That plainly demonstrates Nijjar’s awareness of the concerted nature of Haro’s conduct.

²² The evidence reflects, and the Board found, that Haro discussed the lawsuit with various co-workers after it was filed, and that some of them expressed interest in joining the suit. (ER.12; ER.48, SER.6-7.)

B. Nijjar’s Enforcement of the Agreement is Not Protected Petitioning Under the First Amendment

Nijjar is mistaken when it claims (Br. 1, 31-33) that the Board’s finding violates its constitutional right to petition the government. The Supreme Court has recognized 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); accord *Small v. Operative Plasterers’ & Cement Masons’ Int’l Ass’n Local 200, AFL-CIO*, 611 F.3d 483, 491 (9th Cir. 2010). 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). That is true regardless of the merits of the underlying lawsuit. *See id.*²³

Consequently, 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). The Board may also

²³ In the absence of an illegal objective, retaliatory motive does not suffice to remove constitutional protection from a reasonably based lawsuit. *See Small*, 611 F.3d at 491 (citing *Bill Johnson’s*, 461 U.S. at 731). In retaliatory-motive cases, the Board may find a lawsuit unlawful only if it is objectively baseless. *BE & K Const. Co. v. NLRB*, 536 U.S. 516, 531 (2002). Having found that Nijjar proceeded from an illegal objective, the Board did not reach that issue. *See generally Small*, 611 F.3d at 492 (explaining that *BE & K* “left undisturbed” *Bill Johnson’s* statement that lawsuits with illegal objectives under federal law are not protected petitioning).

restrain litigation that is “aimed at achieving a result incompatible with the objectives of the [NLRA].” *Manno Elec., Inc.*, 321 NLRB 278, 296-97 (1996) (halting employer lawsuit alleging that employees violated state law by engaging in union organizing and other Section 7-protected conduct), *enforced mem.*, 127 F.3d 34 (5th Cir. 1997); *see also Wright Elec., Inc. v. NLRB*, 200 F.3d 1162, 1166-67 (8th Cir. 2000) (holding Board could enjoin employer’s discovery request for union-authorization cards in state-court lawsuit because request interfered with employees’ rights to organize under NLRA and thus had illegal objective).

Through its petition to compel arbitration, Nijjar sought to enforce the Agreement, an unlawful contract. It also explicitly sought to prevent Haro’s exercise of his Section 7 right to litigate work-related claims concertedly.

Therefore, Nijjar’s petition had an illegal objective and fell outside the protection of the First Amendment.²⁴

²⁴ Nijjar claims that, because the Board issued its *Horton* decision days after Haro signed the Agreement, the Board “retroactively” applied *Horton* to this case. (Br. 32.) That argument is based on the premise that the violation of Section 8(a)(1) occurred when Haro signed the Agreement; however, as explained above (pp. 15-16, 45), it is Nijjar’s maintenance and enforcement of the Agreement that violated the NLRA. Nijjar continued to maintain the Agreement after *Horton* issued on January 3, 2012, and sought to enforce it on December 14, nearly a year later. (ER.227.) Nor can Nijjar seek refuge in the fact that a few district courts rejected *Horton*’s reasoning in the interim. (Br. 32-33.) At most, that shows Nijjar’s petition was not baseless (which is irrelevant, *see supra* note 23). It does not refute the Board’s finding that Nijjar’s ultimate objective was illegal.

C. The Board Acted Within Its Broad Remedial Discretion by Ordering Nijjar to Reimburse Haro's Attorney's Fees and Cease Relying on the Agreement to Compel Arbitration

The Board Acted Within Its Broad Remedial Discretion by Ordering Nijjar to Reimburse Haro's Attorney's Fees and Cease Reliance on the Agreement to Compel Arbitration

Nijjar's argument (Br. 31) that the Board cannot remedy this well-founded violation also fails. The Board enjoys broad discretion to remedy NLRA violations in a manner effectuating the policies underlying the statute. *See* 29 U.S.C. § 160(c); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *United Steel Workers of Am. AFL-CIO-CLC v. NLRB*, 482 F.3d 1112, 1116 (9th Cir. 2007). Accordingly, this Court will not disturb the Board's remedial order "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Int'l Bhd. of Elec. Workers, Local 21 AFL-CIO v. NLRB*, 563 F.3d 418, 423 (9th Cir. 2009) (quoting *Fibreboard Paper Prods.*, 379 U.S. at 216). Nijjar does not dispute that reimbursement of attorney's fees is among the available remedies for an unlawful lawsuit in violation of Section 8(a)(1). *See Bill Johnson's*, 461 U.S. at 747 (permitting Board to award cost of defending baseless, retaliatory lawsuit found to violate NLRA, and other proper relief that would effectuate policies of NLRA).

The Board also acted well within its remedial discretion in ordering Nijjar to notify the California court that Nijjar has rescinded or revised the unlawful Agreement and will no longer oppose Haro's concerted lawsuit based on the Agreement. That remedy is reasonably tailored to the violations found, of unlawful maintenance of the Agreement, and unlawful enforcement of the Agreement to stop the lawsuit and compel individual arbitration. Contrary to Nijjar's suggestion (Br. 33), the Board did not order Nijjar to withdraw the petition to compel arbitration, only to cease relying on the Agreement in seeking to compel arbitration of Haro's claims. (ER.2.)

Nor, contrary to Nijjar's contention, is the relief ordered futile based on lawful, independent contracts that would "provid[e] an entirely legitimate basis for compelling the individual arbitration of Haro's claims." (Br. 29; *see also* Br. 30, 33-34.) As an initial matter, and as discussed above (p. 16 n.6), the arbitration provisions in the Applicant's Statement and Agreement do not create a distinct arbitration agreement but are intertwined with those in the Comprehensive Agreement, which contains an express, unlawful waiver of Section 7 activity.²⁵ More fundamentally, Nijjar's baseline premise, that it could *lawfully* achieve the same result in Haro's lawsuit by applying an arbitration agreement without an

²⁵ The "Workforce agreement" Nijjar cites (Br. 33-34), imposed in the employment packet distributed by the company that preceded Emplicity (ER.29-31, 82), was not raised to the Board and is not affected by the Board's Order.

express waiver of Section 7 activity, is faulty. Enforcing an agreement to restrict an employee's right to pursue work-related claims concertedly violates the NLRA, *even if* that agreement is silent as to concerted claims. *See Countrywide Fin. Corp.*, 362 NLRB No. 165, 2015 WL 4882655, at *4-6 (Aug. 14, 2015) (employer violated NLRA by using facially lawful agreement to compel individual arbitration of class-action lawsuit), *pet. for review filed*, No. 15-72700 (9th Cir. Aug. 28, 2015); *see also Int'l Union of Elevator Constructors Local No. 3*, 289 NLRB 1095, 1095 (1988) (employer violated NLRA by pursuing grievance based on interpretation of collective-bargaining agreement that violated Section 8(e)); *accord Nelson v. Int'l Bhd. of Elec. Workers, Local Union No. 46, AFL-CIO*, 899 F.2d 1557, 1563 (9th Cir. 1990) (enjoining enforcement of arbitration award that imposed construction of collective-bargaining agreement that violated Section 8(e)). Therefore, Nijjar could not lawfully use such an agreement, any more than the Agreement at issue here, to compel Haro to arbitrate his claims individually and to bar him from proceeding collectively in any forum.²⁶

²⁶ Nijjar's citation to *Stolt-Nielsen, S.A. v. Animal Feeds International Corp.*, 559 U.S. 662 (2010), is not to the contrary. That case holds that "a party may not be compelled . . . to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 684. It does not address or resolve the question of whether compelling individual arbitration of all work-related claims violates the NLRA. As noted above (p. 33), the Board's *Horton/Murphy* rationale does not compel class arbitration.

CONCLUSION

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

STATEMENT OF RELATED CASES

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

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

Countrywide Financial Corp. v. NLRB, 15-72700

Hoot Winc, LLC and Ontario Wings, LLC v. NLRB, 15-72839

Philmar Care, LLC v. NLRB, 16-70069

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

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

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

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

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

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

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

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

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

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

Valley Health System, LLC v. NLRB, 16-71647

Beena Beauty Holding, Inc. d/b/a Planet Beauty v. NLRB, 16-72015

Respectfully submitted,

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July 2016

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NIJJAR REALTY, INC., A CALIFORNIA)	
CORPORATION, dba PAMA MANAGEMENT,)	
)	
Petitioner/Cross-Respondent)	No. 15-73921
)	16-70336
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD,)	21-CA-092054
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,951 words of proportionally spaced, 14-point type, and the word-processing software used was Microsoft Word 2010. The Board further certifies that the electronic version of the Board’s brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel, and that 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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Dated at Washington, DC
this 1st day of July 2016

STATUTORY ADDENDUM

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Norris-LaGuardia Act, 29 U.S.C. § 101, et seq.

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THE NORRIS-LAGUARDIA ACT

29 U.S.C. § 102. Public policy in labor matters declared

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

29 U.S.C. § 103. Nonenforceability of undertakings in conflict with public policy; “yellow dog” contracts

Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

- (a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or
- (b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

29 U.S.C. § 104. Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

- (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
- (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;
- (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
- (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
- (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
- (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
- (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
- (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
- (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

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)	
Respondent/Cross-Petitioner)	
)	

CERTIFICATE OF SERVICE

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

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Dated at Washington, DC
this 1st day of July 2016