

No. 15-60913

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

CITI TRENDS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

KIRA DELLINGER VOL
Supervisory Attorney

JARED D. CANTOR
Attorney

**National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570
(202) 273-0656
(202) 273-0016**

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

STATEMENT REGARDING ORAL ARGUMENT

Because this case involves issues decided by the Court in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), the Board does not request oral argument.

TABLE OF CONTENTS

Headings:	Page(s)
Statement of subject matter and appellate jurisdiction	1
Statement of the issue	2
Statement of the case.....	2
I. The Board’s findings of fact.....	2
II. Procedural history.....	3
III. The Board’s conclusions and Order.....	4
Summary of argument.....	5
Standard of review	6
Argument.....	8
The Company violated Section 8(a)(1) of the NLRA by maintaining an agreement that bars employees from pursuing work-related claims concertedly	8
A. Introduction.....	8
B. The Agreement’s waiver of employees’ Section 7 right to pursue work-related legal claims concertedly violates Section 8(a)(1) of the NLRA	10
C. The FAA does not mandate enforcement of arbitration agreements that violate the NLRA by prospectively waiving Section 7 rights	14
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.....	15

TABLE OF CONTENTS

Headings-Cont'd:	Page(s)
2. This Court erred in finding that the Supreme Court’s FAA jurisprudence requires rejection of the Board’s <i>D.R. Horton</i> and <i>Murphy Oil</i> decisions	19
a. FAA precedent does not support enforcing an arbitration agreement that violates a co-equal federal statute	20
b. This Court erroneously held that <i>Concepcion</i> mandates enforcement of an arbitration agreement that violates the NLRA.....	25
D. The charge was not time barred	28
Conclusion	31

TABLE OF AUTHORITIES

Cases:	Page(s)
<i>127 Rest. Corp.</i> , 331 NLRB 269 (2000)	13
<i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001).....	20
<i>Altex Ready Mixed Concrete Corp. v. NLRB</i> , 542 F.2d 295 (5th Cir. 1976)	11
<i>Am. Express Co. v. Italian Colors Rest.</i> , 133 S. Ct. 2304 (2013).....	24, 25, 26
<i>AT&T Mobility LLC v. Concepcion</i> , 563 U.S. 333 (2011).....	15, 17, 25, 26, 27
<i>Barrentine v. Arkansas-Best Freight Sys., Inc.</i> , 450 U.S. 728 (1981).....	22
<i>Bethany Med. Ctr.</i> , 328 NLRB 1094 (1999)	16
<i>Brady v. Nat’l Football League</i> , 644 F.3d 661 (8th Cir. 2011)	12, 13
<i>Bon Harbor Nursing & Rehab. Ctr.</i> , 348 NLRB 1062 (2006)	13, 16
<i>Carey v. Westinghouse Elec. Corp.</i> , 375 U.S. 261 (1964).....	17
<i>Cellular Sales of Missouri, LLC v. NLRB</i> , 2016 WL 3093363 (8th Cir. June 2, 2016).....	22
<i>Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984).....	7, 23

TABLE OF AUTHORITIES

Cases-Cont'd:	Page(s)
<i>Circuit City Stores, Inc. v. Adams</i> , 532 U.S. 105 (2001).....	27
<i>City of Arlington v. FCC</i> , 133 S. Ct. 1863 (2013).....	7, 23
<i>Control Servs.</i> , 305 NLRB 435 (1991), <i>enforced mem.</i> , 961 F.2d 1568 (3d Cir. 1992).....	29
<i>Convergys Corp.</i> , 363 NLRB No. 51, 2015 WL 7750753 (Nov. 30, 2015)	16
<i>CompuCredit Corp. v. Greenwood</i> , 132 S. Ct. 665 (2012).....	19, 21
<i>Courier-Citizen Co. v. Boston Electrotypers Union No. 11</i> , 702 F.2d 273 (1st Cir. 1983).....	16
<i>D.R. Horton, Inc.</i> , 357 NLRB 2277 (2012), <i>enforcement denied in relevant part</i> , 737 F.3d 344 (5th Cir. 2013), <i>petition for reh'g en banc denied</i> , 5th Cir. No. 12-60031 (April 16, 2014)	4, 17, 18, 27, 30
<i>D.R. Horton, Inc. v. NLRB</i> , 737 F.3d 344 (5th Cir. 2013), <i>petition for reh'g en banc denied</i> , 5th Cir. No. 12-60031 (April 16, 2014).....	4, 6, 7, 11, 13, 19, 21, 30
<i>E.I. du Pont de Nemours & Co. v. Train</i> , 430 U.S. 112 (1977).....	9
<i>Eastex, Inc. v. NLRB</i> , 437 U.S. 556 (1978).....	7, 11, 12, 23

TABLE OF AUTHORITIES

Cases-Cont'd:	Page(s)
<i>Eddyleon Chocolate Co.</i> , 301 NLRB 887 (1991)	13
<i>First Legal Support Servs.</i> , 342 NLRB 350 (2004)	13
<i>Flex Frac Logistics, LLC v. NLRB</i> , 746 F.3d 205 (5th Cir. 2014)	11
<i>Garner v. Teamsters Chauffeurs & Helpers Local 776</i> , 346 U.S. 485 (1953).....	6, 23
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20 (1991).....	19, 20, 21
<i>Guard Publ'g Co.</i> , 351 NLRB 1110 (2007), <i>enforced</i> , 571 F.3d 53, 59 (D.C. Cir. 2009).....	29
<i>Hoffman Plastic Compounds, Inc. v. NLRB</i> , 535 U.S. 137 (2002).....	7
<i>Holly Farms Corp. v. NLRB</i> , 517 U.S. 392 (1996).....	7
<i>Ishikawa Gasket Am., Inc.</i> , 337 NLRB 175 (2001), <i>enforced</i> , 354 F.3d 534 (6th Cir. 2004).....	13, 16
<i>J.I. Case Co. v. NLRB</i> , 321 U.S. 332 (1944).....	12
<i>Kaiser Steel Corp. v. Mullins</i> , 455 U.S. 72 (1982).....	15, 16

TABLE OF AUTHORITIES

Cases-Cont'd:	Page(s)
<i>Lewis v. Epic Sys. Corp.</i> , 2016 WL 3029464 (7th Cir. May 26, 2016).....	11, 12, 18, 19
<i>Local Lodge No. 1424 v. NLRB</i> , 362 U.S. 411 (1960).....	29
<i>Logisticare Sols., Inc.</i> , 363 NLRB No. 85, 2015 WL 9460027 (Dec. 24, 2015), <i>petition for review filed</i> , 5th Cir. No. 15-60029	16
<i>Lutheran Heritage Vill.-Livonia</i> , 343 NLRB 646 (2004)	11
<i>McKesson Drug Co.</i> , 337 NLRB 935 (2002)	13
<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614 (1985).....	21
<i>Mohave Elec. Coop., Inc. v. NLRB</i> , 206 F.3d 1183 (D.C. Cir. 2000).....	12
<i>Morton v. Mancari</i> , 417 U.S. 535 (1972).....	14, 19, 20
<i>Murphy Oil USA, Inc.</i> , 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), <i>enforcement denied in relevant part</i> , 808 F. 3d 1013 (5th Cir. 2015), <i>petition for reh'g en banc denied</i> , 5th Cir. No. 14-60800 (May 13, 2016).....	4, 11, 22, 23, 24
<i>Murphy Oil USA, Inc. v. NLRB</i> , 808 F.3d 1013 (5th Cir. 2015), <i>petition for reh'g en banc denied</i> , 5th Cir. No. 14-60800 (May 13, 2016).....	4, 7, 8, 30

TABLE OF AUTHORITIES

Cases-Cont'd:	Page(s)
<i>Nat'l Licorice Co. v. NLRB</i> , 309 U.S. 350 (1940).....	12, 16
<i>NLRB v. City Disposal Sys. Inc.</i> , 465 U.S. 822 (1984).....	7, 12, 13, 23
<i>NLRB v. J. Weingarten, Inc.</i> , 420 U.S. 251 (1975).....	24
<i>NLRB v. Jones & Laughlin Steel Corp.</i> , 301 U.S. 1 (1937).....	22
<i>NLRB v. Laredo Coca Cola Bottling Co.</i> , 613 F.2d 1338 (5th Cir. 1980)	10
<i>NLRB v. Ne. Land Servs., Ltd.</i> , 645 F.3d 475 (1st Cir. 2011).....	30
<i>NLRB v. Port Gibson Veneer & Box Co.</i> , 167 F.2d 144 (5th Cir. 1948)	12
<i>NLRB v. Stone</i> , 125 F.2d 752 (7th Cir. 1942)	13
<i>NLRB v. Town & Country Elec., Inc.</i> , 516 U.S. 85 (1995).....	9
<i>Owen v. Bristol Care, Inc.</i> , 702 F.3d 1050 (8th Cir. 2013)	22
<i>POM Wonderful LLC v. Coca-Cola Co.</i> , 134 S. Ct. 2228 (2014).....	14
<i>Purple Commc'ns, Inc.</i> , 361 NLRB No. 126, 2014 WL 6989135 (Dec. 11, 2014).....	29

TABLE OF AUTHORITIES

Cases-Cont'd:	Page(s)
<i>Prima Paint Corp. v. Flood & Conklin Mfg. Co.</i> , 388 U.S. 395 (1967).....	15
<i>Reef Indus., Inc. v. NLRB</i> , 952 F.2d 830 (5th Cir. 1991)	7
<i>Rodriguez de Quijas v. Shearson/Am. Express, Inc.</i> , 490 U.S. 477 (1989)	19
<i>Shearson/Am. Express, Inc. v. McMahon</i> , 482 U.S. 220 (1987).....	21
<i>Spandsco Oil & Royalty Co.</i> , 42 NLRB 942 (1942)	12
<i>Sutherland v. Ernst & Young LLP</i> , 726 F.3d 290 (2d Cir. 2013)	22
<i>U-Haul Co.</i> , 347 NLRB 375 (2006), <i>enforced</i> , 255 F. App'x 527 (D.C. Cir. 2007).....	30
<i>United Steelworkers of Am. v. Warrior & Gulf Navigation Co.</i> , 363 U.S. 574 (1960).....	28
 Statutes:	 Page(s)
Age Discrimination in Employment Act (29 U.S.C. § 621, et seq.)	20, 21, 25
Fair Labor Standards Act (29 U.S.C. § 201, et seq.)	12, 25

TABLE OF AUTHORITIES

Statutes-Cont'd:	Page(s)
Federal Arbitration Act (9 U.S.C. § 1, et seq.)	
Section 2 (9 U.S.C. § 2)	15
National Labor Relations Act, as amended (29 U.S.C. § 151, et seq.)	
Section 7 (29 U.S.C. § 157)	3, 4, 6, 9-19, 22-25, 27, 28,
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2-6, 8, 10, 12-14, 18-20, 25-27
Section 9 (29 U.S.C. § 159)	23
Section 10(a) (29 U.S.C. § 160(a))	2, 23
Section 10(b) (29 U.S.C. § 160(b)).....	28, 29
Section 10(e) (29 U.S.C. § 160(e))	2
Section 10(f) (29 U.S.C. § 160(f)).....	2, 8
Norris-LaGuardia Act (29 U.S.C. § 101, et seq.)	
Section 102 (29 U.S.C. § 102)	24
Section 103 (29 U.S.C. § 103)	24
Section 104 (29 U.S.C. § 104).....	24
Rules:	Page(s)
Federal Rule of Civil Procedure 23	24, 25
Fifth Circuit Internal Operating Procedure 35	10
Rules of the Supreme Court of the United States 10(a).....	9
Other Authorities:	Page(s)
Note, <i>Deference and the Federal Arbitration Act: The NLRB's Determination of Substantive Statutory Rights</i> , 128 HARV. L. REV. 907 (2015).....	23

TABLE OF AUTHORITIES

Other Authorities -Cont'd:	Page(s)
Samuel Estreicher & Richard L. Revesz, <i>Nonacquiescence by Federal Administrative Agencies</i> , 98 YALE L.J. 679 (1989)	8
Rosemary M. Collyer, <i>The National Labor Relations Board and the Supreme Court</i> , in LABOR LAW DEVELOPMENTS (Southwestern Legal Foundation 1986)..	9

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

No. 15-60913

CITI TRENDS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition of Citi Trends, Inc. (“the Company”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued against the Company on December 22, 2015, and reported at 363 NLRB No. 74.

(ROA.129.)¹ The Board had subject-matter jurisdiction over the proceeding below under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended (“NLRA”), 29 U.S.C. § 151, et seq. The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the NLRA, 29 U.S.C. § 160(e) and (f), because the Board’s Order is final and the Company transacts business in this circuit. The Company’s petition and the Board’s cross-application were timely because the NLRA places no time limit on the initiation of review or enforcement proceedings.

STATEMENT OF THE ISSUE

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

STATEMENT OF THE CASE

I. THE BOARD’S FINDINGS OF FACT

The Company operates 511 retail clothing stores in 29 states and maintains distribution warehouses in South Carolina and Oklahoma. (ROA.132; ROA.3.)

As a condition of employment, the Company requires each applicant and employee

¹ “ROA.” references are to the record on appeal. “Br.” references are to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

to sign an arbitration agreement (“Agreement”), which requires them to arbitrate certain current and future work-related disputes with the Company. (ROA.132; ROA.3-4, 28-40.) Under the heading “Class/Collective Action Waiver,” the Agreement requires that:

all claims . . . be pursued on an individual basis only. You and the Company hereby waive all rights to (i) commence, or be a party to, any class, representative or collective claims or (ii) jointly bring any claim against each other with any other person or entity. You and the Company must pursue any claim on an individual basis only, including claims alleging a pattern and practice of unlawful conduct.

(ROA.132; ROA.29.)

Dedrick Peterkin began working at the Company’s South Carolina distribution warehouse in November 2008. (ROA.132; ROA.5.) In October 2012, he signed the Agreement. (ROA.132; ROA.5, 41.)

II. PROCEDURAL HISTORY

Based on a charge filed by Peterkin, the Board’s General Counsel issued a complaint alleging that the Company had violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by maintaining a mandatory arbitration agreement that interfered with, restrained, and coerced employees in the exercise of their rights guaranteed in Section 7 of the NLRA, 29 U.S.C. § 157. (ROA.132; ROA 12, 14-18.) Following the parties’ joint motion to waive a hearing and submission of a statement of issues, stipulation of facts, and record exhibits, an administrative law judge found that the Company had violated Section 8(a)(1) by maintaining the

Agreement, which requires employees, as a condition of employment, to waive their right to maintain class or collective actions in any forum, arbitral or judicial.² (ROA.134; ROA.1-10.)

III. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Pearce and Member McFerran; Member Miscimarra, dissenting in part) affirmed the judge's unfair-labor-practice finding, pursuant to its decisions in *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), *petition for reh'g en banc denied*, 5th Cir. No. 12-60031 (April 16, 2014), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *petition for reh'g en banc denied*, 5th Cir. No. 14-60800 (May 13, 2016). (ROA.129.)

The Board's Order requires the Company to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the NLRA. (ROA.129-30.) Affirmatively, the Order requires the Company to rescind the Agreement in all its forms, or revise all forms to make

² The judge found that the Company's maintenance of the Agreement independently violated Section 8(a)(1) because employees would reasonably understand the Agreement as restricting their right to file charges with the Board. (ROA.134.) The Board reversed that unfair-labor-practice finding because it was based on a theory that was not litigated. (ROA 129.)

clear to employees that the Agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(ROA.129.) The Order further requires the Company to notify all applicants and current and former employees who were required to sign or otherwise become bound to the Agreement in any form that it has been rescinded or revised, and, if revised, to provide them a copy of the revised agreement. (ROA.130.) Finally, the Order requires that the Company must also post a remedial notice at its South Carolina facility and at all other facilities where the unlawful mandatory arbitration agreement is or has been in effect. (ROA.130.)

SUMMARY OF ARGUMENT

The Board applied its *D.R. Horton* and *Murphy Oil* decisions, both of which this Court has rejected, to find that the Agreement violates Section 8(a)(1) of the NLRA. As this Court has recognized, the Board's application of its own precedents on a nationwide basis except where bound by a contrary final judgment involving the same parties is not a gesture of disrespect but a practical necessity born of the NLRA's venue provision. That provision provides for review in multiple forums, preventing the Board from knowing with certainty which circuit's law will apply on review. In addition, the Board's adherence to its precedents is necessary to establish a basis for Supreme Court review.

With respect to the merits of the violation found, it is well established under Supreme Court precedent that: (1) concerted pursuit of work-related legal claims is protected by Section 7 of the NLRA, and (2) an individual contract purporting to waive Section 7 rights prospectively violates Section 8(a)(1) of the Act and is, therefore, unenforceable. Accordingly, the Board reasonably found the Company's Agreement – which requires that “all claims . . . be pursued on an individual basis only” – is illegal under the NLRA.

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

STANDARD OF REVIEW

When Congress enacted the NLRA, it conferred upon the Board the primary authority to interpret and apply the statute. *See Garner v. Teamsters Chauffeurs & Helpers Local 776*, 346 U.S. 485, 490 (1953); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 349 (5th Cir. 2013) (recognizing “Board's expertise in labor law”). Unless

the “statutory text forecloses” the Board’s interpretation, the Board’s exercise of its primary authority to interpret the NLRA is entitled to affirmance so long as it is reasonable, even if the Court might decide the issue differently *de novo*. See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868-71 (2013) (reaffirming *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996) (courts “must respect” Board’s reasonable judgment; “it need not show that its construction is the *best* way to read the statute”); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1017 (5th Cir. 2015) (“This court reviews the Board’s legal conclusions *de novo*, but [w]e will enforce the Board’s order if its construction of the statute is reasonably defensible.” (Internal quotation and citation omitted)). The Court also defers to the Board’s plausible inferences, findings of fact, and application of the statute. *D.R. Horton*, 737 F.3d at 349, 356. More specifically, “the task of defining the scope of [Section] 7 ‘is for the Board to perform in the first instance as it considers the wide variety of cases that come before it’” *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978)); accord *D.R. Horton, Inc.*, 737 F.3d at 356; *Reef Indus., Inc. v. NLRB*, 952 F.2d 830, 838 (5th Cir. 1991). 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

THE COMPANY VIOLATED SECTION 8(a)(1) OF THE NLRA BY MAINTAINING AN AGREEMENT THAT BARS EMPLOYEES FROM PURSUING WORK-RELATED CLAIMS CONCERTEDLY

A. Introduction

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

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

In the case before this Court, there are issues on review about which the Board and this Court agree – namely, that employees have a substantive right to engage in collective legal activity (*infra* pp. 10-12), and that contracts interfering with employees' Section 7 rights are unlawful (*infra* pp.12-13). The Board, however, acknowledges this Court's disagreement with the Board's view that the FAA does not mandate enforcement of arbitration agreements that violate the NLRA by prospectively waiving employees' Section 7 rights to pursue work-

related claims collectively. Nonetheless, consistent with its litigating position in this and other circuits, and pursuant to the Court's orders directing the parties to file briefs, *Citi Trends Inc. v. NLRB*, No. 15-60913 (Feb. 2, 2016; Mar. 9, 2016), the Board respectfully submits that the following legal principles should govern the outcome of this case.³

B. The Agreement's Waiver of Employees' Section 7 Right To Pursue Work-Related Legal Claims Concertedly Violates Section 8(a)(1) of the NLRA

Section 7 of the NLRA guarantees employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other concerted activities* for the purpose of collective bargaining or other *mutual aid or protection*, and . . . to refrain from any or all of such activities.” 29 U.S.C. § 157 (emphasis added). Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), prohibits employers from engaging in conduct that “reasonably tends to interfere with, restrain or coerce employees” in the exercise of rights guaranteed by Section 7. *NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338, 1340-41 (5th Cir. 1980). Under well-established Board precedent, approved by this Court, a work rule is unlawful under Section 8(a)(1) if it explicitly restricts, or is applied to restrict, activities protected

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

by Section 7. *Lutheran Heritage Vill.-Livonia*, 343 NLRB 646, 646-47 (2004); *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 208-09 (5th Cir. 2014); *see also D.R. Horton*, 737 F.3d at 363 (applying *Lutheran Heritage* to assess whether arbitration agreement interfered with employees' right to file Board charges).

Central to this case is the Board's court-approved interpretation of Section 7 as protecting the right of employees to engage in concerted legal activity as part of the broader right to engage in concerted activity for mutual aid or protection. *Eastex*, 437 U.S. at 565-66 & nn.15-16 (1978) (recognizing that Section 7 encompasses not only collective bargaining but also other concerted activity, both in the workplace and in legislative and judicial forums); *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454, *1 (Oct. 28, 2014) (quoting *Eastex* and noting Supreme Court's agreement that "Section 7 protects employees 'when they seek to improve working conditions through resort to administrative and judicial forums'"); *Lewis v. Epic Sys. Corp.*, No. 15-2997, 2016 WL 3029464, at *2 (7th Cir. May 26, 2016) ("[F]iling a collective or class action suit constitutes 'concerted activit[y]' under Section 7."); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) ("Generally, filing by employees of a labor related civil action is protected activity under Section 7 of the NLRA unless the employees

acted in bad faith.”).⁴ Courts have recognized that the Board’s construction falls squarely within its expertise and its responsibility for delineating federal labor law, generally, and Section 7 in particular. *See City Disposal*, 465 U.S. at 829 (noting that “the task of defining the scope of [Section] 7 ‘is for the Board to perform in the first instance as it considers the wide variety of cases that come before it’”) (quoting *Eastex*, 437 U.S. at 568).

Equally rooted in longstanding Board and judicial precedent is the notion that individual contracts that prospectively waive Section 7 rights violate Section 8(a)(1) “no matter what the circumstances that justify their execution or what their terms.” *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944); *Nat’l Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940) (“[E]mployers cannot set at naught the [NLRA] by inducing their workmen to agree not to demand performance of the duties which the [statute] imposes.”); *Lewis*, 2016 WL 3029464, at *4 (agreeing with longstanding precedent finding contracts requiring employees to renounce Section 7 rights are unlawful); *NLRB v. Port Gibson Veneer & Box Co.*, 167 F.2d 144, 146

⁴ *See also Brady v. Nat’l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) (“[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is ‘concerted activity’ under [Section] 7”) (emphasis in original); *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188-89 (D.C. Cir. 2000) (concerted petitions for injunctions against workplace harassment); *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-50 (1942) (finding protected three employees’ joint lawsuit filed under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201, et seq.).

(5th Cir. 1948) (employers “may not require individual employees to sign employment contracts which, though not unlawful in their terms, are used to deter self-organization”); *First Legal Support Servs.*, 342 NLRB 350, 362-63 (2004) (unlawful to have employees sign contracts stripping them of right to organize).⁵

This Court’s decision in *D.R. Horton* did nothing to undermine those fundamental, longstanding principles. Indeed, this Court acknowledged that the Board’s interpretation of Section 7 finds support in Supreme Court and circuit precedent. *D.R. Horton*, 737 F.3d at 356-57 (citing *City Disposal*, 465 U.S. at 831-82, 835-36; *Brady v. Nat’l Football League*, 644 F.3d 661, 673 (8th Cir. 2011); *127 Rest. Corp.*, 331 NLRB 269, 275-76 (2000)).

Under the well-accepted principles set forth above, the Company’s Agreement facially and indisputably infringes upon its employees’ Section 7 rights

⁵ See also *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942) (finding that individual contracts requiring employees to adjust their grievances with their employer individually violate the NLRA, even without coercion); *Eddyleon Chocolate Co.*, 301 NLRB 887, 887 (1991) (unlawful to ask job applicant to agree not to join union); *Bon Harbor Nursing & Rehab. Ctr.*, 348 NLRB 1062, 1073, 1078 (2006) (employer unlawfully conditioned employees’ reinstatement, after dismissal for non-union concerted protest, on agreement not to engage in further similar protests); *Ishikawa Gasket Am., Inc.*, 337 NLRB 175, 175-76 (2001) (employer unlawfully conditioned employee’s severance payments on agreement not to help other employees in workplace disputes or act “contrary to the [employer’s] interests in remaining union-free”), *enforced*, 354 F.3d 534 (6th Cir. 2004); *McKesson Drug Co.*, 337 NLRB 935, 938 (2002) (finding employer violated Section 8(a)(1) by conditioning return to work from suspension on broad waiver of rights, both present and future, to invoke Board’s processes for alleged unfair labor practices).

because it prohibits them from pursuing *any* concerted legal action, arbitral or judicial. Therefore, the Company violated Section 8(a)(1) of the NLRA by maintaining that Agreement. As explained more fully below, such an unlawful agreement is not entitled to enforcement under the FAA.

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

The basis of this Court’s holding in *D.R. Horton* and *Murphy Oil* is that the FAA precludes enforcement of the Board’s Order. But that position contravenes the settled principle that “when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see also POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014). As demonstrated below, agreements that are unlawful under the NLRA are exempted from enforcement by the FAA’s savings clause. The Board’s holding to that effect in *D.R. Horton* and *Murphy Oil*, applied here, implements both the NLRA and the FAA and is consistent with Supreme Court precedent interpreting both statutes. There is thus no difficulty in fully enforcing each statute according to its terms.

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

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

One well-established general contract defense is illegality. As the Supreme Court explained in *Kaiser Steel Corp. v. Mullins*, “a federal court has a duty to

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

As discussed above (pp. 12-13), the Board, with court approval, has consistently found unlawful under the NLRA a variety of individual contracts that prospectively restrict Section 7 rights. *Nat’l Licorice*, 309 U.S. at 360-61, 364. It has set aside settlement agreements that require employees to agree not to engage in concerted protests, *Bon Harbor Nursing & Rehab. Ctr.*, 348 NLRB 1062, 1078 (2006); *Bethany Med. Ctr.*, 328 NLRB 1094, 1105-06 (1999), and has found unlawful a separation agreement that was conditioned on the departing employee’s agreement not to help other employees in workplace disputes, *Ishikawa Gasket Am., Inc.*, 337 NLRB 175, 175-76 (2001). 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 Convergys Corp.*, 363 NLRB No. 51, 2015 WL 7750753, at *1 & n.3 (Nov. 30, 2015), *petition for review filed*, 5th Cir. No. 15-60860; *Logisticare Sols., Inc.*, 363 NLRB No. 85, 2015 WL 9460027,

at *1 (Dec. 24, 2015), *petition for review filed*, 5th Cir. No. 15-60029. That unbroken line of precedent, dating from shortly after the NLRA's enactment, demonstrates that illegality under the NLRA has consistently served to invalidate a variety of contracts, not just arbitration agreements. For that reason, the Board precedent at issue does not affect only arbitration agreements or “derive [its] meaning from the fact that an agreement to arbitrate is at issue.” *Concepcion*, 563 U.S. 339.

Moreover, unlike the courts, whose hostility to arbitration prompted enactment of the FAA, *see Concepcion*, 563 U.S. at 339, the Board harbors no prejudice against arbitration, *see Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 271 (1964) (discussing Board's policies favoring arbitration as means of peacefully resolving workplace disputes). Nothing in the Board's *D.R. Horton* decision prohibits an employer from requiring arbitration of all *individual* work-related claims; as the Board explained, “[e]mployers remain free to insist that *arbitral* proceedings be conducted on an individual basis.” *D.R. Horton*, 357 NLRB at 2288. What violates the NLRA is an agreement that prospectively forecloses the concerted pursuit of work-related claims in any forum, arbitral or judicial. Such an agreement unlawfully restricts employees' Section 7 right to decide for themselves, at the time an actual workplace dispute arises, whether or

not to join with others in seeking to enforce their employment rights. *Id.* at 2278-80.

Indeed, consistent with the Board's analysis in *D.R. Horton* and *Murphy Oil*, the Seventh Circuit recently held that arbitration agreements similar to the Company's "meet[] the criteria of the FAA's savings clause for nonenforcement" because they waive employees' Section 7-protected right to engage in concerted action in violation of Section 8(a)(1). *Lewis*, 2016 WL 3029464, at *7. In coming to that conclusion, the court agreed with the Board that contracts restricting Section 7 activity are illegal. *Id.* at *4, *7. It also noted that, rather than embodying hostility, the NLRA "does not disfavor arbitration" as a mechanism of dispute resolution. *Id.* at *7.

In sum, because the defense that a contract is illegal under the NLRA is unrelated to the fact that an agreement to arbitrate is at issue, that defense falls comfortably within the FAA's savings-clause exception. The Board thus adhered to the FAA policy of enforcing arbitration agreements on the same terms as other contracts in finding that the Company violated the NLRA by maintaining the Agreement, which requires arbitration of all work-related claims on an individual basis.⁶ There is no conflict between either the express statutory requirements, or

⁶ Because Section 7 is only implicated when the agreement applies to work-related claims of statutory employees, it poses no impediment to enforcement of arbitration agreements that apply to consumer, commercial, or other non-

animating policy considerations, of the FAA and NLRA with respect to that unfair-labor-practice.⁷

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

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

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

⁷ For that reason, it is unnecessary to reach the question, addressed by this Court, of whether the NLRA clearly contains a “contrary congressional command” overruling the FAA. *D.R. Horton*, 737 F.3d at 360-62. That inquiry is designed to determine which statutory command controls when another federal statute conflicts with the FAA and the two cannot be reconciled. Here, there is no conflict between the statutes; both can – and should – be given effect. *Morton*, 417 U.S. at 551; *accord Lewis*, 2016 WL 3029464, at *6 (finding “no conflict between the NLRA and the FAA, let alone an irreconcilable one”). Nevertheless, it is evident that Section 8(a)(1) of the NLRA expressly commands employers not to interfere with their employees’ Section 7 right to engage in concerted activity for mutual aid or protection. To the extent an arbitration agreement bars concerted pursuit of claims in any forum, whether arbitral or judicial, its enforcement under the FAA would “inherent[ly] conflict” with those NLRA provisions. *Gilmer*, 500 U.S. at 26.

employees to pursue work-related claims concertedly. Indeed, the Supreme Court has never considered that question. Nor has it ever found enforceable an arbitration agreement that violates a federal statute as the Agreement violates Section 8(a)(1). This Court thus overreads Supreme Court jurisprudence in holding that a contract that violates the NLRA does not fit within the FAA’s savings clause. *See Alexander v. Sandoval*, 532 U.S. 275, 282-84 (2001) (instructing parties not to treat Supreme Court decisions as authoritative on issues of law Court did not decide). It also fails to give effect to the settled principle that courts should regard two co-equal statutes as effective. *Morton*, 417 U.S. at 551.

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

None of the Supreme Court’s FAA cases involve arbitration agreements that impair core provisions of another federal statute, much less directly violate such a statute. Instead, the Court has enforced arbitration agreements over challenges based on statutory provisions only where the agreements were consistent with the animating purposes of those particular statutes. For example, in *Gilmer*, which involved a challenge to arbitration of claims under the Age Discrimination in Employment Act (“ADEA”), the Court determined that Congress’ purpose in enacting the ADEA was “to prohibit arbitrary age discrimination in employment.” 500 U.S. at 27. Because the substantive rights of individual employees to be free

of age-based discrimination could be adequately vindicated in individual arbitration, the Court held that an arbitration agreement could be enforced. The Court rejected arguments that ADEA provisions affording a judicial forum and an optional collective-action procedure precluded enforcement of an arbitration agreement, explaining that Congress did not “intend[] the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum.” *Id.* at 29 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).⁸

In rejecting the Board’s rationale in *D.R. Horton*, this Court misapprehends the Supreme Court’s FAA cases as dispositive of the issue here. While this Court cited prior FAA cases like *Gilmer* for the proposition that “there is no substantive right to class procedures under the [ADEA]” or “to proceed collectively under the FLSA,” *D.R. Horton*, 737 F.3d at 357, those cases do not answer the materially

⁸ The Supreme Court has consistently maintained that same analytical focus on statutory purpose when assessing challenges to the enforcement of arbitration agreements based on provisions in other federal statutes. *See, e.g., CompuCredit*, 132 S. Ct. at 671 (judicial-forum provision not “principal substantive provision[]” of Credit Repair Organizations Act); *Rodriguez de Quijas*, 490 U.S. at 481 (judicial-forum and venue provisions in Securities Act not “so critical that they cannot be waived”); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 235-36 (1987) (Exchange Act provision not intended to bar regulation when “chief aim” was to preserve exchanges’ power to self-regulate).

different question of whether the NLRA protects such a right.⁹ Unlike the statutory provisions at issue in the Supreme Court’s FAA cases – involving statutes whose objectives do not include protecting collective action against individual employee waiver – the NLRA provisions protecting collective action are foundational, underlying the entire architecture of federal labor law and policy. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (characterizing rights protected by Section 7 as “fundamental”). Under the mode of statutory analysis used in cases like *Gilmer*, that is a crucial distinction. As the Board explained in *Murphy Oil*, “[t]he core objective of the [NLRA] is the protection of workers’ ability to act in concert, in support of one another.” 2014 WL 5465454, at *1; *see also Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (describing NLRA as “designed to ... encourag[e] employees to promote their interests *collectively*”) (emphasis in original).

⁹ Likewise, other circuits’ decisions rejecting the Board’s *D.R. Horton* position in non-Board cases overread Supreme Court precedent and reflect a misunderstanding of the Board’s position. *See Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013) (finding *Concepcion* resolved savings-clause issue, and FLSA did not contain congressional command barring enforcement of arbitration agreement); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) (per curiam) (rejecting citation to Board’s *D.R. Horton* decision based on *Owen*, without analysis). The Eighth Circuit’s decision in *Cellular Sales of Missouri, LLC v. NLRB*, relied on *Owen* to deny enforcement in a Board case, but added no new rationale. No. 15-1620, 2016 WL 3093363 (8th Cir. June 2, 2016). None of those decisions addresses the Board’s savings-clause argument. District court decisions rejecting the Board’s position suffer from the same analytical flaws.

Consistent with the fundamental status of Section 7 – and of particular relevance to the savings-clause inquiry – Section 8 expressly prohibits restriction of Section 7 rights. And other NLRA provisions further demonstrate the central role Section 7 rights play in federal labor policy and the importance of Section 8’s proscription of interference with those rights. Section 9 establishes procedures, such as elections and exclusive representation, to implement representational Section 7 rights. 29 U.S.C. § 159. And Section 10 empowers the Board to prevent violations of Section 8. 29 U.S.C. § 160. Thus, the NLRA’s various provisions all lead back to Section 7’s guarantee of employees’ right to join together “to improve terms and conditions of employment or otherwise improve their lot as employees.” *Eastex*, 437 U.S. at 565.¹⁰

Indeed, the right to engage in collective action for mutual protection is not only critical to the NLRA, but also a “basic premise” of national labor policy generally. *Murphy Oil*, 2014 WL 5465454, at *1. For example, in the Norris-

¹⁰ The Board’s determination that Section 7 is critical to the NLRA is entitled to considerable deference. *See City Disposal*, 465 U.S. at 829 (Board has prerogative to define Section 7); *Garner*, 346 U.S. at 490 (Board has primary authority to interpret and apply NLRA); *see also City of Arlington*, 133 S. Ct. at 1871 (statutory interpretation within agency’s expertise should be accepted unless “foreclose[d]” by the statutory text); *Chevron*, 467 U.S. at 842-43; *see generally* Note, *Deference and the Federal Arbitration Act: The NLRB’s Determination of Substantive Statutory Rights*, 128 HARV. L. REV. 907, 919 (2015) (explaining that “[t]h[e] [FAA] context does not alter the conclusion that ... the NLRB’s determination is an interpretation of the statute the agency administers and is thus within *Chevron*’s scope”).

LaGuardia Act, enacted three years before the NLRA, Congress declared unenforceable “[a]ny undertaking or promise” in conflict with the federal policy of protecting employees’ freedom to act concertedly for mutual aid or protection. 29 U.S.C. § 102, 103. Congress also barred judicial restraint of concerted litigation “involving or growing out of any labor dispute” based on employer-employee agreements. 29 U.S.C. § 104.

In sum, unlike in *Gilmer* and similar Supreme Court and circuit cases, concerted activity under the NLRA is not merely a procedural means of vindicating a statutory right; it is itself a core, substantive statutory right.¹¹ And

¹¹ As the Board has emphasized, what Section 7 protects in this context is the employees’ right to act in concert “to pursue joint, class, or collective claims *if and as available*, without the interference of an employer-imposed restraint.” *Murphy Oil*, 2014 WL 5465454, at *2 (second emphasis added). Accordingly, the Board’s position is not impaired by recognizing that Federal Rule of Civil Procedure 23, which governs class actions, does not “establish an entitlement to class proceedings for the vindication of statutory rights.” *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

Nor does it matter that modern class-action procedures were not available to employees in 1935 when the NLRA was enacted. The NLRA was drafted to allow the Board to respond to new developments. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (recognizing Board’s “responsibility to adapt the [NLRA] to changing patterns of industrial life”). The relevant point is that when class-action procedures became available, the NLRA barred employers from interfering with their employees’ Section 7 right to use those new procedures for their mutual aid or protection. The Company’s arbitration agreement, in any event, would preclude its employees from pursuing joint claims, notwithstanding that the procedural device of joinder existed in 1935. And no more availing is the assertion that Rule 23 is a “procedural device.” It is the NLRA, not Rule 23, that creates the

Congress expressly protected that right from employer interference in Section 8(a)(1). Therefore, an arbitration agreement that precludes employees covered by the NLRA from engaging in concerted legal action in any forum is not like a waiver of the optional collective-action mechanisms in statutes like the ADEA or FLSA. Rather, it is akin to a contract providing that employees can be fired on the basis of age contrary to the ADEA, or will not be paid the minimum wage dictated by the FLSA. The Supreme Court has never held that an arbitration agreement may waive such rights or violate the statutes that create and protect them.

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

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

substantive right to engage in concerted legal action; Rule 23 is just one mechanism for exercising a Section 7 right, akin to a picket sign or a handbill.

prosecution of low-value claims arising under other statutes by enabling consumers to bring them collectively. 563 U.S. at 340.¹² That interpretation barred class-action waivers in most arbitration agreements in consumer contracts of adhesion. Employing a preemption analysis, the Supreme Court found that the rule “interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA.” *Id.* at 344, 346-52. It found, moreover, that the unconscionability law was “applied in a fashion that disfavors arbitration.” *Id.* at 341.

By contrast, the Board’s rule fits within the savings clause because it bars enforcement of arbitration agreements that violate Section 8(a)(1) of the NLRA, a specific federal statutory proscription. The Board’s rule is intended to effectuate the NLRA, not to implement non-statutory policies such as the judicially created policy of facilitating particular claims, low-value or otherwise, brought under other laws. *Cf. Concepcion*, 563 U.S. at 340; *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 & n.5 (2013). That the Supreme Court declined to read the savings clause as protecting such judicially created defenses, which “stand as an obstacle to the accomplishment of the FAA’s objectives,” *Concepcion*, 563 U.S. at

¹² Similarly, in *Italian Colors*, the Supreme Court applied *Concepcion* to strike down a federal-court-imposed requirement that collective litigation must be available when individual arbitration would be prohibitively expensive, ensuring an “affordable procedural path” to vindicate claims. *Italian Colors*, 133 S. Ct. at 2308-09.

343, does not suggest that the savings clause precludes a defense of contract illegality based on the NLRA, a co-equal federal law.

Nor has the Board taken aim at arbitration. Rather, it has applied a longstanding NLRA interpretation, endorsed by the Supreme Court, to find unlawful *all* individual contracts, including arbitration agreements, that prospectively waive Section 7 rights in violation of Section 8(a)(1). That illegality defense developed outside of the arbitration context and was recognized by the Board and courts well before the advent of agreements mandating individual arbitration of employment disputes.¹³ Moreover, the Board has not applied the statutory ban on restrictions of Section 7 rights in a manner disproportionately impacting arbitration agreements. *Cf. Concepcion*, 563 U.S. at 342 (“it is worth noting that California’s courts have been more likely to hold contracts to arbitrate unconscionable than other contracts”). Indeed, unlike California courts, the Board has never required that an employer allow employees the opportunity to arbitrate as a class. Rather, as noted above, the Board acknowledges an employer’s right “to insist that *arbitral* proceedings be conducted on an individual basis,” so long as employees remain free to bring concerted actions in another forum. *D.R. Horton*, 357 NLRB at 2288. And, far from being hostile to arbitration as a means of

¹³ It was not until 2001 that the Supreme Court definitively ruled that the FAA applied to employment contracts. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

enforcing statutory rights of employees, the Board embraces arbitration as “a central pillar of Federal labor relations policy, and in many different contexts ... defers to the arbitration process.” *Id.* at 2289 (citing *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960)).

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

D. The Charge Was Not Time Barred

The Company’s argument (Br. 37-40) that Peterkin failed to meet the 6-month time limitation for filing unfair-labor-practice charges under Section 10(b) of the NLRA, 29 U.S.C. § 160(b), lacks merit.¹⁴ Although Peterkin signed the Agreement in October 2012 and did not file his charge until July 2014, that time frame is irrelevant. Peterkin did not challenge the Agreement’s formation, but

¹⁴ Section 10(b), in relevant part, states “[t]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board”

rather the Company's continued maintenance of it (ROA.12), so his charge of that ongoing conduct was timely, as the Board found (ROA.129, 132-33).

As the Board explained (ROA.129), the Company "continued to maintain the unlawful arbitration policy during the 6-month period preceding the filing of the initial charge. The Board has long held under these circumstances that maintenance of an unlawful workplace rule, such as [the Company's Agreement], constitutes a continuing violation that is not time barred by Section 10(b)." That finding comports with the Board's and courts' treatment of other contracts and work rules. *See Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 423 (1960) (validity of contract's execution cannot be challenged outside 10(b) period; lawfulness of enforcing facially invalid agreement can be); *Control Servs.*, 305 NLRB 435, 435 n.2, 442 (1991) (maintenance or enforcement of unlawful rule timely alleged, even if promulgated outside 10(b) period), *enforced mem.*, 961 F.2d 1568 (3d Cir. 1992); *see also Guard Publ'g Co.*, 351 NLRB 1110, 1110 n.2 (2007) (same), *enforced*, 571 F.3d 53, 59 (D.C. Cir. 2009), *overruled on other grounds by Purple Commc'ns, Inc.*, 361 NLRB No. 126, 2014 WL 6989135 (Dec. 11, 2014).

The Company's additional assertion (Br. 38-40) that the Agreement, as a contract, is not analogous to other unilaterally imposed workplace rules is unavailing. Because the Company required employees to assent to the Agreement as a condition of employment (ROA.3-4), which carries an "implicit threat" that

failure to comply will result in loss of employment, the Board appropriately applied the work-rule standard. *D.R. Horton*, 357 NLRB at 2280, 2283. Indeed, this Court has applied the Board's work-rule standard to assess arbitration agreements' interference with employees' right to file Board charges, *see D.R. Horton*, 737 F.3d at 363; *accord Murphy Oil*, 808 F.3d at 1018-19, as have other circuit courts, *see, e.g., NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 478, 481-83 (1st Cir. 2011) (applying work-rule standard to employment contract); *U-Haul Co.*, 347 NLRB 375, 377-78 (2006) (same), *enforced*, 255 F. App'x 527 (D.C. Cir. 2007).

CONCLUSION

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

Respectfully submitted,

/s/ Kira Dellinger Vol

KIRA DELLINGER VOL

Supervisory Attorney

/s/ Jared D. Cantor

JARED D. CANTOR

Attorney

National Labor Relations Board

1015 Half Street, SE

Washington, DC 20570

(202) 273-0656

(202) 273-0016

RICHARD F. GRIFFIN, JR.

General Counsel

JENNIFER ABRUZZO

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

June 2016

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

CITI TRENDS, INC.	:
	:
Petitioner/Cross-Respondent	:
	: Case No. 15-60913
v.	:
	: Board Case No.
NATIONAL LABOR RELATIONS BOARD	: 10-CA-133697
	:
Respondent/Cross-Petitioner	:

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Edward M. Cherof
Jonathan J. Spitz
Jackson Lewis, P.C.
Suite 1000
1155 Peachtree Street, N.E.
Atlanta, GA 30309

Daniel D. Schudroff
Jackson Lewis, P.C.
29th Floor
666 3rd Avenue
New York, NY 10017

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, D.C.
this 28th day June, 2016

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

CITI TRENDS, INC.	:
	:
Petitioner/Cross-Respondent	:
	: Case No. 15-60913
v.	:
	: Board Case No.
NATIONAL LABOR RELATIONS BOARD	: 10-CA-133697
	:
Respondent/Cross-Petitioner	:

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,301 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS

Board counsel certifies that the contents of the accompanying CD-ROM, which contains a copy of the Board's brief, is identical to the hard copy of the Board's brief filed with the Court and served on the petitioner/cross-respondent. The Board counsel further certifies that the CD-ROM has been scanned for viruses using Symantec Endpoint Protection version 12.1.6. According to that program, the CD-ROM is free of viruses.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 28th day of June, 2016