

Nos. 16-10932(L) & 16-11391 XAP

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

COWABUNGA, 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**

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v.	*
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NATIONAL LABOR RELATIONS BOARD	* 16-11391 XAP
	*
Respondent/Cross-Petitioner	*

Certificate of Interested Persons

Pursuant to FED. R. APP. R. 26 and Local Rule 26.1-1, the National Labor Relations Board, by its Deputy Associate General Counsel, hereby certifies that the following persons and entities have an interest in the outcome of this case:

1. Abruzzo, Jennifer, Deputy General Counsel for NLRB
2. Cowabunga, Inc., Petitioner
3. Dreeben, Linda J., Deputy Associate General Counsel for NLRB
4. Fischer & Phillips, LLP, Counsel for Petitioner
5. Griffin, Jr., Richard F., General Counsel for the NLRB
6. Harrell, Jr., Claude, Regional Director, Region 10, for the NLRB
7. Heaney, Elizabeth, Attorney for NLRB
8. Hines, Chadwick, Charging Party
9. Hirozawa, Kent Y., Member of NLRB
10. Meyers, Kerstin I., Attorney for NLRB

11. Miscimarra, Philip, Member of NLRB
12. National Labor Relations Board, Respondent
13. Pearce, Mark Gaston, Chairman of the NLRB
14. Potashnick, Mark A., Attorney for Charging Party
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Dated at Washington, D.C.
this 8th day of August, 2016

STATEMENT REGARDING ORAL ARGUMENT

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

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

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Cowabunga, Inc. (“the Company”) for review, and the cross-application of the Board for enforcement, of

a Board Order issued against Cowabunga, reported at 363 NLRB No. 133, 2016 WL 787106 (Feb. 26, 2016). (Doc. 13.)¹

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

STATEMENT OF THE ISSUES

1. Did the Board reasonably find that the Company violated Section 8(a)(1) of the NLRA by maintaining, as a condition of employment, an arbitration agreement in which employees waived the right to maintain class or collective actions in any forum, arbitral or judicial?

2. Did the Board reasonably find that the Company violated Section 8(a)(1) of the NLRA by seeking to enforce the unlawful arbitration agreement?

¹ Consistent with 11th Circuit Rule 28-5, references to the one-volume record herein are to the documents numbered in the Appendix, which the Company filed with its brief on July 8, 2016. “Br.” refers to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

3. Did the Board reasonably find that the Company violated Section 8(a)(1) of the NLRA by maintaining an arbitration agreement that employees would reasonably construe as barring or restricting their right to file unfair-labor-practice charges with the Board and access the Board's processes?

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The Company operates retail restaurant facilities in Georgia, Alabama and South Carolina. (Doc. 13 at 4; Doc. 5 at 1.) Since at least March 20, 2014, the Company requires its employees to sign a "Mutual Agreement to Arbitrate" ("the Agreement") as a condition of employment. (Doc. 13 at 1; Doc. 5 at 2.) The Agreement states that employees "voluntarily promise, agree, and consent to resolve any claim covered by this Agreement through binding arbitration, rather than through court litigation." (Doc. 13 at 1; Doc. 2 at 8.) It further provides that "such binding arbitration . . . shall be the sole and exclusive remedy for resolving any such covered claims or disputes." (Doc. 13 at 1; Doc. 2 at 8.) Under the Agreement, covered claims "include all claims by Employee against [the Company] . . . including, without limitation, any claims Employee may have relating to his/her hiring, terms and conditions of employment, job assignments, payment of any wages, benefits or other forms of compensation, and/or separation from employment" (Doc. 13 at 1; Doc. 2 at 8-9.) Further, the Agreement

provides that: “No covered claims may be asserted as part of a multi-plaintiff, class or collective action. Moreover, no covered claims may proceed to arbitration on a multi-plaintiff, class or collective basis. Rather, each allegedly aggrieved employee must proceed to arbitration separately and individually” (Doc. 13 at 1; Doc. 2 at 9.)

In March 2015, Chadwick Hines, a former delivery driver for the Company, filed a wage and hour suit against the Company in the district court for the Northern District of Georgia “individually and on behalf of all other similarly situated delivery drivers.” (Doc. 13 at 4; Doc. 7 at 52-53.) On April 30, the Company, relying on the Agreement, filed a motion with the district court to dismiss the case, or alternatively, stay the case and to compel individual arbitration of Hines’ class-action suit. (Doc. 13 at 4; Doc. 7.) In its motion, the Company contended that the Agreement required Hines to arbitrate any claim, class-wide or otherwise, arising out of his employment relationship with the Company. (Doc. 13 at 4; Doc. 7.) Hines voluntarily withdrew his cause of action without prejudice before the district court ruled on the Company’s motion. (Doc. 13 at 2 n.1; Doc. 7 at 78.)

II. PROCEDURAL HISTORY

Pursuant to a charge filed by Hines, the Board’s General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) of the NLRA, 29

U.S.C. § 158(a)(1), by maintaining and enforcing the Agreement, which requires employees, as a condition of employment, to waive their right to engage in concerted legal activity protected by Section 7 of the NLRA, 29 U.S.C. § 157; and because employees would reasonably construe the Agreement as prohibiting the filing of unfair-labor-practice charges. (Doc. 13 at 1; Doc. 2 at 2-3.) The Company, in its amended answer, admitted all of the factual allegations. (Doc. 13 at 2; Doc. 5.)

Acting upon the General Counsel's motion for summary judgment, the Board issued an order transferring the proceeding to itself and directed the parties to show cause why the motion should not be granted. (Doc. 13 at 2; Doc. 8.) The General Counsel and the Company filed responses with the Board. (Doc. 13 at 2; Docs. 11, 12.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On February 26, 2016, the Board (Chairman Pearce and Member Hirozawa; Member Miscimarra, dissenting in part) 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 (Apr. 16, 2014), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *petition for reh'g en banc denied*, 5th Cir. No. 14-60800

(May 13, 2016), the Board found that the Company violated Section 8(a)(1) by maintaining and enforcing an agreement that requires employees to waive their right to engage in concerted legal activity protected by Section 7. The Board also found that the Company violated Section 8(a)(1) because employees would reasonably construe the Agreement as barring the filing of an unfair-labor-practice charge.

To remedy those violations, the Board ordered the Company to cease and desist from the unfair labor practices found and from any like or related interference with employees' Section 7 rights. (Doc. 13 at 5.) Affirmatively, the Board ordered the Company to rescind or revise the Agreement to make clear that it does not constitute a waiver of employees' right to maintain employment-related joint, class, or collective actions "in all forums" (Doc. 13 at 5) and that it does not bar or restrict employees' right to file Board charges; notify all applicants and current and former employees who signed the Agreement that it has been rescinded or revised; reimburse Hines for reasonable attorney's fees incurred while opposing the Company's motion to dismiss; and post a remedial notice. (Doc. 13 at 5.)

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 the Company'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 employers may not restrict Section 7 rights through work rules, or induce employees to waive those rights prospectively in individual agreements. Such restrictions or waivers violate Section 8(a)(1), which bars interference with Section 7 rights. Accordingly, the Company's maintenance of the Agreement, which requires its employees to arbitrate all employment-related disputes individually, violates the NLRA. Likewise, the Board reasonably found the Company's enforcement of that Agreement through its motion to compel individual arbitration, which effectively precluded employees from pursuing collective actions in any forum, arbitral or judicial, is illegal under the NLRA.

The Board also correctly found that the FAA does not mandate enforcement of the Agreement. Because the Agreement violates the NLRA, it is exempted from enforcement under the FAA's saving clause, which provides that arbitration agreements are subject to general contract defenses such as illegality. The Agreement is properly subject to the saving clause because it violates the NLRA for reasons that are unrelated to arbitration and that have consistently been applied to various types of individual contracts. The Supreme Court's FAA jurisprudence

does not compel a different result. The Court has enforced agreements requiring individual arbitration in other contexts, but has never held that the FAA mandates enforcement of an arbitration agreement that directly violates another federal statute. Such a result would run counter to the longstanding principle that when two coequal statutes can be harmonized, courts should give effect to both.

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

STANDARD OF REVIEW

In enacting the NLRA, Congress established the Board and charged it with the primary authority to interpret and apply the statute. *See Garner v. Teamsters Chauffeurs & Helpers Local 776*, 346 U.S. 485, 490 (1953). Accordingly, the Board's reasonable interpretation of the NLRA is entitled to affirmance. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1868-71 (2013) (to reject agency interpretation of statute within its expertise requires showing that "the statutory text forecloses" agency's interpretation) (reaffirming *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *Holly Farms Corp.*

v. NLRB, 517 U.S. 392, 409 (1996) (Board “need not show that its construction is the *best* way to read the statute”); *Visiting Nurse Health Sys., Inc. v. NLRB*, 108 F.3d 1358, 1360 (11th Cir. 1997) (court affords “considerable deference to the Board’s expertise in applying the . . . [NLRA] to the labor controversies that come before it”). Questions of law regarding other statutes are reviewed *de novo*. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002).

ARGUMENT

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

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

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

(1984) (noting that “the task of defining the scope of [Section] 7 ‘is for the Board to perform in the first instance as it considers the wide variety of cases that come before it’”) (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978)); accord *Venetian Casino Resort, LLC v. NLRB*, 484 F.3d 601, 606 (D.C. Cir. 2007).

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

Indeed, as *Eastex* notes, for decades the Board has held concerted legal activity to be protected. *Id.* at 565-66 & n.15. That line of cases dates back to *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-50 (1942), in which the Board found protected three employees’ joint lawsuit filed under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, et seq. It continues, unbroken and with court

approval, through modern NLRA jurisprudence. *See, e.g., Lewis v. Epic Sys. Corp.*, No. 15-2997, 2016 WL 3029464, at *2-4 (7th Cir. May 26, 2016) (“[F]iling a collective or class action suit constitutes ‘concerted activit[y]’ under Section 7.”); *Brady v. Nat’l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) (“[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* ‘concerted activity’ under [Section] 7”); *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188-89 (D.C. Cir. 2000) (concerted petitions for injunctions against workplace harassment).²

The Board’s holding that Section 7 protects concerted legal activity furthers the policy objectives that guided Congress in passing the NLRA. The NLRA protects collective rights “not for their own sake but as an instrument of the national labor policy of minimizing industrial strife.” *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975). Protecting employees’ ability to

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

resolve workplace disputes collectively in an adjudicatory forum effectively serves that purpose because collective lawsuits are an alternative to strikes and other disruptive protests. *D.R. Horton*, 357 NLRB at 2279-80; *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’ entitled,” the Ninth Circuit upheld the Board’s holding that Section 7 protected employees’ effort to exert group pressure on the employer to redress their work-related claims through resort to legal processes. *Salt River*, 206 F.3d at 328. Similarly, the Supreme Court has acknowledged a long history of statutory employees exercising their Section 7 right to band together to take advantage of the evolving body of laws and procedures that legislatures have provided to redress

their grievances. *See Eastex*, 437 U.S. at 565-66 & n.15. Such collective legal action seeks to unite workers generally and to lay a foundation for more effective collective bargaining. *Id.* at 569-70; *see also Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 753-54 (1985) (noting Congress’s intention to remedy “the widening gap between wages and profits” by enacting the NLRA) (quoting 79 Cong. Rec. 2371 (1935)).

The Company (Br. 20), arguing that Rule 23 does not “establish an entitlement to class proceedings for the vindication of statutory rights,” *Am. Express Co. v. Italian Colors Rest.*, 133S. Ct. 2304, 2309 (2013), faults the Board for acting contrary to the Rules Enabling Act by transforming Rule 23’s procedural right to litigate a class action into a substantive right. But the Company’s claim relies on the mistaken premise that Rule 23 is the source of the employees’ right to engage in concerted legal action. The source of that right, however, is the NLRA. *See Lewis*, 2016 WL 3029464, at *9 (“Rule 23 is not the source of the collective right here; Section 7 of the NLRA is.”). As the Board has emphasized, what Section 7 protects in this context is statutory employees’ right to act in concert “to pursue joint, class, or collective claims *if and as available*, without the interference of an employer-imposed restraint.” *Murphy Oil*, 2014 WL 5465454, at *2 (second emphasis added). The NLRA requires that employers refrain from interfering with employees’ exercise of their right to collective legal action, regardless of whether

employees are entitled to any particular procedural mechanisms for exercising those rights.³

The Company's insistence (Br. 26) that Hines' wage-related lawsuit was not "concerted" because he filed it as a single plaintiff on behalf of similarly situated delivery drivers is similarly without merit. As the Board observed: "the filing of an employment-related class or collective action by an individual is an attempt to initiate, to induce, or to prepare the group for action and is therefore conduct protected by Section 7." Doc. 13 at 2, *quoting Beyoglu*, 362 NLRB No. 152, 2015 WL 4572913 (July 29, 2015); *accord Meyers Indus.*, 281 NLRB 882, 887 (1986) (concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action . . ."), *enforced sub*

³ The Company's emphasis (Br. 20) on Rule 23 should not lead to the conclusion that concerted legal action is a new development that has been anachronistically imported into labor law. Joint and collective claims of various forms long predate Rule 23, *Lewis*, 2016 WL 3029464, at *3-4, as do the Board's earliest decisions finding that Section 7 protects the collective legal pursuit of work-related claims. *See* pp. 10-12. 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.

nom., *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). By filing his lawsuit as a putative collective action, Hines signaled his intent to proceed collectively, and sought to induce participation of similarly situated employees. Thus, contrary to the Company's characterization (Br. 26), Hines' filing of the complaint was not the isolated conduct of a single employee, but, rather, conduct seeking "to initiate or induce group action." *Meyers Indus.*, 281 NLRB at 887.

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

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

An employer violates Section 8(a)(1) of the NLRA by "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in section [7]." 29 U.S.C. § 158(a)(1). A workplace rule or policy that explicitly restricts Section 7 activity is unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004); *accord Cintas Corp. v. NLRB*, 482 F.3d 463, 467-68 (D.C. Cir. 2007). It does not matter whether the employer has applied or enforced

the policy – mere maintenance constitutes an unfair labor practice. *Lutheran Heritage*, 343 NLRB at 649; *Cintas Corp.*, 482 F.3d at 467-68. Here, because the Company imposed the Agreement on all employees as a condition of employment, which carries an “implicit threat” that failure to comply will result in loss of employment, the Board appropriately utilized the work-rule standard.

D.R. Horton, 357 NLRB at 2283; *see also Ne. Land Servs.*, 645 F.3d 475, 481-83 (1st Cir. 2011) (applying work-rule analysis to terms of employment contract); *U-Haul Co.*, 347 NLRB 375, 377-78 (2006) (same), *enforced*, 255 F. App’x 527 (D.C. Cir. 2007). Applying that standard, the Board reasonably found (Doc. 13 at 1) that the Company’s maintenance of the Agreement violates Section 8(a)(1).

1. The Agreement unlawfully restricts Section 7 activity

The Agreement facially and indisputably restricts employees’ Section 7 rights because it prohibits employees from pursuing *any* concerted legal claims, without exception. Specifically, it provides that “any claim covered by [the] Agreement” must be resolved “through binding arbitration, rather than through court litigation.” (Doc. 13 at 5; Doc. 2 at 8.) By explicitly requiring that employees individually arbitrate all work-related claims, the Agreement violates Section 8(a)(1) by restraining employees from exercising in any forum their long-recognized right concertedly to enforce employment laws.

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

As the Board explained in *D.R. Horton*, 357 NLRB at 2280-81, and *Murphy Oil*, 2014 WL 5465454, at *1, 6, restrictions on Section 7 rights are unlawful even if, like here, they take the form of agreements between employers and employees. In *National Licorice Co. v. NLRB*, the Supreme Court held that individual contracts in which employees prospectively relinquish their right to present grievances “in any way except personally,” or otherwise “stipulate[] for the renunciation ... of rights guaranteed by the [NLRA],” are unenforceable and “a continuing means of thwarting the policy of the [NLRA].” 309 U.S. 350, 360-61 (1940); accord *Lewis*, 2016 WL 3029464, at *4. As the Court explained, “employers cannot set at naught the [NLRA] by inducing their workmen to agree not to demand performance of the duties which [the statute] imposes.” *Nat’l Licorice*, 309 U.S. at 364. Similarly, in *NLRB v. Stone*, the Seventh Circuit held that individual contracts requiring employees to adjust their grievances with their employer individually violate the NLRA, even when “entered into without coercion.” 125 F.2d 752, 756 (7th Cir. 1942); see also *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) (individual contracts conflicting with Board’s function of preventing NLRA violations “obviously must yield or the [NLRA] would be reduced to a futility”).

Consistent with those long established principles, the Board in a variety of contexts unrelated to arbitration has held that Section 8(a)(1) bars individual

contracts that prospectively waive Section 7 rights. *See, e.g., First Legal Support Servs., LLC*, 342 NLRB 350, 362-63 (2004) (unlawful to have employees sign contracts stripping them of right to organize); *McKesson Drug Co.*, 337 NLRB 935, 938 (2002) (unlawful to insist that employee 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).⁴

The principle that an employer may not lawfully induce an employee prospectively to waive her Section 7 rights flows from the unique characteristics of those rights and the practical circumstances of their exercise. Protected concerted activity – of unorganized workers, in particular – often arises spontaneously when employees are presented with actual workplace problems and have to decide 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*, 206 F.2d at 328

⁴ 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. *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 705-06 (1983); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280-83 (1956). And a union may negotiate procedural agreements requiring bargaining unit employees to resolve disputes through arbitration rather than adjudication. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009). Such waivers are themselves the product of concerted activity – the choice of employees to exercise their Section 7 right “to bargain collectively through representatives of their own choosing.” 29 U.S.C. § 157; *D.R. Horton*, 357 NLRB at 2286.

(concerted activity prompted by violations of minimum-wage laws). The decision whether collectively to walk out of a cold plant or to join other employees in a wage-and-hour lawsuit is materially different from the decision of an individual employee – made in advance of any concrete grievance – to agree to refrain from *any* future concerted activity, regardless of the circumstances. *See Nijjar Realty, Inc.*, 363 NLRB No. 38, 2015 WL 7444737, at *5 (Nov. 20, 2015) (noting that such waivers are made “at a time when the employees are unlikely to have an awareness of employment issues that may now, or in the future, be best addressed by collective or class action”), *petition for review filed*, 9th Cir. No. 15-73921.

In other words, as the Supreme Court has recognized, “the vitality of [Section] 7 requires that the [employee] be free to refrain in November from the actions he endorsed in May.” *NLRB v. Granite State Joint Board, Textile Workers Local 1029*, 409 U.S. 213, 217-18 (1972) (Section 7 protects right of employees who resign from union not to take part in strike they once supported). By the same token, employees must be able to decide whether “to engage in ... concerted activity which they decide is appropriate,” *Plastilite Corp.*, 153 NLRB 180, 183 (1965), *enforced in relevant part*, 375 F.2d 343 (8th Cir. 1967); *see also Serendippity-Un-Ltd.*, 263 NLRB 768, 775 (1982) (same), when the opportunity for such activity arises, even after previously deciding not to do so when circumstances were different. *See Pattern Makers’ League of N. Am. v. NLRB*,

473 U.S. 95, 101-07 (1985) (union could not maintain rule prospectively restricting employee resignations); *Mission Valley Ford Truck Sales*, 295 NLRB 889, 892 (1989) (employer could not hold employee to “earlier unconditional promises to refrain from organizational activity”). In this context, prospective individual waivers, like the contract struck down in *National Licorice*, 309 U.S. at 361, impair the “full freedom” of the signatory employees to decide, at the appropriate time, whether to participate in concerted activity.

The fact that Section 7 also protects employees’ “right to refrain” from concerted activity does not change that calculus. Like the choice to engage in concerted activity, the right to refrain belongs to the employee to exercise, free from employer interference, in the context of a specific workplace dispute. As the Board has explained, employees remain free to refrain by choosing not to participate in a specific concerted legal action. *See Murphy Oil*, 2014 WL 5465454, at *24 (“In prohibiting *employers* from requiring employees to pursue their workplace claims individually, *D.R. Horton* does not compel *employees* to pursue their claims concertedly.”) (Emphasis in original).

Individual prospective waivers of Section 7 rights undermine the core purposes of the NLRA by weakening all employees’ *collective* right to band together for mutual aid or protection. An employee’s ability to engage in concerted activity depends on her ability to communicate with and appeal to fellow

employees to join in that action. *See, e.g., Signature Flight Support*, 333 NLRB 1250, 1257 (2001) (finding employee efforts “to persuade other employees to engage in concerted activities” protected), *enforced mem.*, 31 F. App’x 931 (11th Cir. 2002); *Am. Fed’n of Gov’t Emps.*, 278 NLRB 378, 382 (1986) (describing as “indisputable” that one employee “had a Section 7 right to appeal to [another employee] to join” in protected activity); *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”). But such real-time appeals would be futile if employees are picked off one-by-one through individual waivers. While an employee not bound by a prospective waiver may choose in a particular instance not to assist her coworkers, an employee who has waived her Section 7 rights prospectively can never assist her coworkers regardless of the force of their appeals for assistance. Such prospective, individual restrictions thus diminish each employee’s right to mutual aid and protection and the ability of employees together to advance their interests in the workplace.

Finally, where, as here, the prospective waiver of Section 7 rights operates to bar only concerted *legal* activity, the result is to limit the employees’ options to comparatively more disruptive forms of concerted activity at a time when workplace tensions are high and employees are deciding which, if any, concerted response to pursue. As the Board has explained, *D.R. Horton*, the peaceful

resolution of labor disputes is a core objective of the NLRA, and that objective is ill-served by individual arbitration agreements that prospectively waive employees' right to consider the option of concerted legal action along with other collective means of advancing their interests as employees. 357 NLRB at 2279-80.

In sum, the Agreement's express bar on a key form of concerted activity violates Section 8(a)(1) of the NLRA. And it is no less unlawful for being styled an agreement, in light of the longstanding prohibition on individual contracts that prospectively waive Section 7 rights. That the Company used the particular vehicle of an arbitration agreement subject to the FAA to impose that prospective bar likewise does not excuse its restriction of Section 7 rights; it cannot "attempt 'to achieve through arbitration what Congress has expressly forbidden'" under the NLRA. *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 676 (4th Cir. 2016) (quoting *Graham Oil v. ARCO Prods. Co.*, 43 F.3d 1244, 1249 (9th Cir. 1994)). As explained more fully below, such agreements thus are not entitled to enforcement under the FAA.⁵

⁵ As the Company acknowledges, the Board is "owed deference to its expertise in applying the Act to labor controversies" (Br. 8), and, therefore, the Board's findings that Section 7 is critical to the NLRA and encompasses concerted legal activity, and that agreements restricting that right are unlawful under Section 8(a)(1), are each entitled to considerable deference. *See 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;

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

The Company's principal defense is that the FAA precludes enforcement of the Board's Order. But that position contravenes the settled principle that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."

Morton v. Mancari, 417 U.S. 535, 551 (1972); *see also POM Wonderful LLC v.*

Coca-Cola Co., 134 S. Ct. 2228, 2236 (2014). As demonstrated below,

agreements that are unlawful under the NLRA are exempted from enforcement by

the FAA's saving clause. The Board's holding to that effect in *D.R. Horton* and

Murphy Oil, applied here, implements both the NLRA and the FAA and is

consistent with Supreme Court precedent interpreting both statutes. There is thus

no difficulty in fully enforcing each statute according to its terms.

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

Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, *save* upon such grounds as exist at law or in equity

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").

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

One well-established general contract defense is illegality. As the Supreme Court explained in *Kaiser Steel Corp. v. Mullins*, “a federal court has a duty to determine whether a contract violates federal law before enforcing it.” 455 U.S. 72, 83 (1982). Giving effect to that principle, the Court held that if a contract required an employer to cease doing business with another company in violation of

the NLRA, it would be unenforceable. *Id.* at 84-86; *see also Courier-Citizen Co. v. Boston Electrotypers Union No. 11*, 702 F.2d 273, 276 n.6 (1st Cir. 1983) (explaining that “the federal courts may not enforce a contractual provision that violates section 8 of the [NLRA]”).

As described above (pp. 17-22), the Board, with court approval, has consistently found unlawful under the NLRA individual contracts that prospectively restrict Section 7 rights. Illegality under the NLRA serves to invalidate a variety of contracts, not just arbitration agreements. The Board has set aside settlement agreements that require employees to agree not to engage in concerted protests. *Bon Harbor Nursing & Rehab. Ctr.*, 348 NLRB 1062, 1078 (2006); *Bethany Med. Ctr.*, 328 NLRB 1094, 1105-06 (1999). It has found unlawful a separation agreement that was conditioned on the departing employee’s agreement not to help other employees in workplace disputes. *Ishikawa Gasket Am., Inc.*, 337 NLRB 175, 175-76 (2001), *enforced*, 354 F.3d 534 (6th Cir. 2004). The Board has also found that waivers of an employee’s right to engage in concerted legal action are unlawful even when unconnected to an agreement to arbitrate. *See Logisticare Solutions, Inc.*, 363 NLRB No. 85, 2015 WL 9460027, at *1 (Dec. 24, 2015) (employee handbook), *petition for review filed*, 5th Cir. No. 15-60029; *Convergys Corp.*, 363 NLRB No. 51, 2015 WL 7750753, at *1 & n.3 (Nov. 30, 2015) (application for employment), *petition for review filed*, 5th Cir.

No. 15-60860. That unbroken line of precedent dates from shortly after the NLRA's enactment. *See, e.g., Nat'l Licorice*, 309 U.S. at 360-61, 364. Those cases demonstrate that the rule does not either affect only arbitration agreements or “derive [its] meaning from the fact that an agreement to arbitrate is at issue.” *Concepcion*, 562 U.S. at 339.

Moreover, unlike the courts, whose hostility to arbitration prompted enactment of the FAA, *see id.*, the Board harbors no prejudice against arbitration. *See Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 271 (1964) (discussing the Board's policies favoring arbitration as means of peacefully resolving workplace disputes). Nothing in the Board's *D.R. 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 *D.R. Horton* and *Murphy Oil*, the Seventh Circuit recently held that an arbitration agreement similar to the Company's “[met] the criteria of the FAA's savings clause for nonenforcement.”

Lewis, 2016 WL 3029464, at *6. In coming to that conclusion, the court agreed with the Board that contracts restricting Section 7 activity are illegal. *Id.* at *10, 14. It also noted that, rather than embodying hostility, the NLRA “does not disfavor arbitration” as a mechanism of dispute resolution. *Id.* at *7.

In sum, because the defense that a contract is illegal under the NLRA is unrelated to the fact that an agreement to arbitrate is at issue, that defense meets the criteria of the FAA’s saving-clause exception. In other words, the Board adheres to the FAA policy of enforcing arbitration agreements on the same terms as other contracts. There is no conflict between either the express statutory requirements, or animating policy considerations, of the FAA and NLRA with respect to that unfair labor practice.⁶

⁶ For that reason, it is unnecessary to reach the question raised by the Company (Br. 14-17) of whether the NLRA clearly contains a “contrary congressional command” overruling the FAA. That inquiry is designed to determine which statutory command controls when another federal statute conflicts with the FAA and the two cannot be reconciled. Here, there is no conflict between the statutes; both can – and should – be given effect. *Morton*, 417 U.S. at 551; *accord Lewis*, 2016 WL 3029464, at *6 (finding “no conflict between the NLRA and the FAA, let alone an irreconcilable one”). Nevertheless, it is evident that Section 8(a)(1) of the NLRA expressly commands employers not to interfere with their employees’ Section 7 right to engage in concerted activity for mutual aid or protection. To the extent an arbitration agreement bars concerted pursuit of claims in any forum, whether arbitral or judicial, its enforcement under the FAA would inherently conflict with the NLRA.

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

The Company is mistaken in its contention (Br. 18-19) that the Board's position is foreclosed by Supreme Court precedent enforcing agreements that require individual arbitration in other contexts. The Supreme Court has never considered whether such agreements must be enforced under the FAA despite the NLRA's protection of the right of statutory employees to pursue work-related claims concertedly. Nor has the Court ever found enforceable an arbitration agreement that violates a federal statute – as the Agreement violates Section 8(a)(1). For a court to find that a contract that violates the NLRA does not fit within the FAA's saving clause would be to fail to give effect to the settled principle that courts should regard two co-equal statutes as effective. *Morton*, 417 U.S. at 551.

None of the Supreme Court FAA cases that the Company cites (Br. 12-13, 18-19) involve arbitration agreements that impair core provisions of another federal statute, much less directly violate such a statute. Instead, the Court has enforced arbitration agreements over challenges based on statutory provisions only where the agreements were consistent with the animating purposes of those particular statutes. For example, in *Gilmer v. Interstate/Johnson Lane Corp.*, which involved a challenge to arbitration of claims under the Age Discrimination in Employment Act (“ADEA”), the Court determined that Congress' purpose in

enacting the ADEA was “to prohibit arbitrary age discrimination in employment.” 500 U.S. 20, 27 (1991). Because the substantive rights of individual employees to be free of age-based discrimination could be adequately vindicated in individual arbitration, the Court held that an arbitration agreement could be enforced. The Court rejected arguments that ADEA provisions affording a judicial forum and an optional collective-action procedure precluded enforcement of an arbitration agreement, explaining that Congress did not “intend[] the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum.” *Id.* at 29 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).⁷

Unlike the statutory provisions at issue in the Supreme Court’s FAA cases – involving statutes whose objectives do not include protecting collective action against individual employee waiver – the NLRA’s protection of collective action is

⁷ The Supreme Court has consistently maintained that same analytical focus on statutory purpose when assessing challenges to arbitration agreements based on other federal statutes. *See, e.g., CompuCredit*, 132 S. Ct. 665, 670-71 (2012) (judicial-forum provision not “principal substantive provision[]” of Credit Repair Organizations Act); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (judicial-forum and venue provisions in Securities Act not “so critical that they cannot be waived”); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 235-36 (1987) (Exchange Act provision not intended to bar regulation when “chief aim” was to preserve exchanges’ power to self-regulate); *see also Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1334-35 (11th Cir. 2014) (applying *Gilmer* to find that the FLSA’s collective-action provision does not create a substantive right to collective litigation).

foundational, underlying the entire architecture of federal labor law and policy. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (characterizing the rights protected by Section 7 as “fundamental”). Under the mode of statutory analysis used in cases like *Gilmer*, that is a crucial distinction. As the Board explained in *Murphy Oil*, “[t]he core objective of the [NLRA] is the protection of workers’ ability to act in concert, in support of one another.” 2014 WL 5465454, at *1; *see also Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (describing NLRA as “designed to ... encourag[e] employees to promote their interests *collectively*”) (emphasis in original).

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 saving-clause inquiry – Section 8 expressly prohibits restriction of Section 7 rights. 29 U.S.C. §§ 158(a)(1), (b)(1). And other NLRA provisions further demonstrate the central role Section 7 rights play in federal labor policy and the importance of Section 8’s proscription of interference with those rights. Section 9 establishes procedures, such as elections and exclusive representation, to implement representational Section 7 rights. 29 U.S.C. § 159. And Section 10 empowers the Board to prevent violations of Section 8. 29 U.S.C. § 160. Thus,

the NLRA's various provisions all lead back to Section 7's guarantee of employees' right to join together "to improve terms and conditions of employment or otherwise improve their lot as employees." *Eastex*, 437 U.S. at 565.⁸

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 D.R. 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. To the contrary, the Court has repeatedly emphasized that it will not sanction the enforcement of arbitration agreements that

⁸ The right to engage in collective action for mutual protection is not only critical to the NLRA, but also a "basic premise" of national labor policy generally. *Murphy Oil*, 2014 WL 5465454, at *1. For example, in the Norris-LaGuardia Act, enacted three years before the NLRA, Congress declared unenforceable "[a]ny undertaking or promise" in conflict with the federal policy of protecting employees' freedom to act concertedly for mutual aid or protection. 29 U.S.C. §§ 102, 103. Congress also barred judicial restraint of concerted litigation "involving or growing out of any labor dispute" based on employer-employee agreements. 29 U.S.C. § 104.

prospectively waive “substantive” federal rights. *See Italian Colors*, 133 S. Ct. at 2310; *Pyett*, 556 U.S. at 273; *Mitsubishi Motors*, 473 U.S. at 637 n.19.

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 the Company as enforcing individual-arbitration agreements, a different result is warranted.⁹

The Company’s reliance (Br. 18-19) on *Concepcion* to challenge the Board’s saving-clause analysis is also flawed. As described above (pp. 28-30), the Board’s rule fits within the saving clause because it bars enforcement of arbitration agreements that violate a co-equal federal statute in a manner that would invalidate any contract. By contrast, in *Concepcion*, a party asserted that an arbitration

⁹ Because Section 7 is only implicated when the agreement applies to work-related claims of statutory employees, it poses no impediment to enforcement of arbitration agreements that apply to consumer, commercial, or other non-employment-related claims, or that involve employees exempt from NLRA coverage, such as statutory supervisors or managers. *See, e.g., CompuCredit*, 132 S. Ct. at 672-73 (consumer claims under Credit Repair Organization Act); *Gilmer*, 500 U.S. at 23 (age-discrimination claim by manager); *Rodriguez de Quijas*, 490 U.S. at 482-83 (investor claims under Securities Act).

agreement was unenforceable under a judicial interpretation of California's state unconscionability principles that barred class-action waivers in most arbitration agreements and permitted a party to a consumer contract to demand class-wide arbitration. 563 U.S. at 340, 346. The Court declined to read the saving clause as protecting that non-statutory state policy of facilitating low-value claims brought under other laws, which stood "as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 340, 343. Later, in *Italian Colors*, the Court applied *Concepcion* to strike down a similar, federal-court-imposed requirement that collective litigation must be available when individual arbitration would be prohibitively expensive, ensuring an "affordable procedural path" to vindicate claims. 133 S. Ct. at 2309. Neither holding suggests that the FAA mandates enforcement of a contract that directly violates the NLRA.

As the Seventh Circuit explained in *Lewis*, "[n]either *Concepcion* nor *Italian Colors* goes so far as to say that *anything* that conceivably makes arbitration less attractive automatically conflicts with the FAA" 2016 WL 3029464, at *7. While the Fifth Circuit in *D.R. Horton* read *Concepcion* expansively as precluding the Board's *D.R. Horton* rationale, 357 F.3d at 359-60, that court failed, as the Seventh Circuit explained, to recognize a crucial distinction. *Concepcion*, as well as *Italian Colors*, analyzed whether judge-made or implicit statutory policies were incompatible with the FAA, whereas here the analysis entails "reconciling two

federal statutes, which must be treated on equal footing.” *Lewis*, 2016 WL 3029464, at *7-8.

The Board’s rule is a straightforward application of a longstanding NLRB interpretation, endorsed by the Supreme Court, pursuant to which *all* individual contracts that prospectively waive Section 7 rights violate Section 8(a)(1). As detailed above, pp. 17-22, 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.¹⁰ That contrasts with the California rule that the Supreme Court rejected in *Concepcion*, which was specifically “applied in a fashion that disfavors arbitration,” *id.* at 341; *see Lewis*, 2016 WL 3029464 at * 7 (“the law [in *Concepcion*] was directed toward arbitration, and it was hostile to the process”).

Far from being hostile to the principle that arbitration is an effective means of enforcing employees’ statutory rights, the Board embraces arbitration as “a central pillar of Federal labor relations policy and in many different contexts ... defers to the arbitration process.” *D.R. Horton*, 357 NLRB at 2289 (citing *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960)). The Board has not applied Section 8’s ban on restrictions of Section 7 rights in a

¹⁰ 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).

manner that disproportionately impacts 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.”). Nor has it ever required class procedures in arbitration, as the California rule did. Rather, 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.

The Company thus misreads the Supreme Court’s FAA cases as dispositive of the issue here, and as standing for the broad proposition that the FAA demands enforcement of arbitration agreements that violate a co-equal federal statute. *See Alexander v. Sandoval*, 532 U.S. 275, 282-84 (2001) (instructing parties not to treat Supreme Court decisions as authoritative on issues of law Court did not decide). The Fifth Circuit made a similar error in rejecting the Board’s rationale in *D.R. Horton* when it relied on FAA cases for the proposition that “there is no substantive right to class procedures under the [ADEA]” or “to proceed collectively under the FLSA,” 737 F.3d at 357 (citing *Gilmer*, 500 U.S. at 32; *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004)), and

to reject the Board's saving-clause analysis, *D.R. Horton*, 737 F.3d at 358-60 (citing *Concepcion*, 563 U.S. at 339).¹¹

In the same vein, the Company incorrectly asserts (Br. 23) that this Court “rejected” the Board's *D.R. Horton* rationale in *Walthour*. The Court's rationale in *Walthour* does not compel rejection of *D.R. Horton*. In *Walthour*, the Court determined, relying on *Gilmer* and *Italian Colors*, that the FLSA's collective-action procedure is not a substantive right. *Walthour*, 745 F.3d at 1332. This determination, however, does not implicate *D.R. Horton*'s holding because, in *D.R. Horton*, the source of the substantive right to pursue legal collective action is the NLRA, not — as claimed in *Walthour* — the FLSA. *Walthour* and those other cases (*see n.11*) do not address, much less answer, the materially different question

¹¹ Likewise, other circuits' decisions rejecting the Board's *D.R. Horton* position in non-Board cases misread Supreme Court precedent and reflect a misunderstanding of the Board's position. *See Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013) (finding 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*, relies on *Owen* to reject *D.R. Horton* in a Board case, but added no new rationale. *See Cellular Sales of Missouri, LLC v. NLRB*, Nos. 15-1620, 15-1860, 2016 WL 3093363, at *2 (8th Cir. June 2, 2016). The Company (Br. 23) also cites *Richards v. Ernst & Young, LLP*, but the court in that case held that the plaintiff had waived her argument based on the Board's *D.R. Horton* rationale, and then cited decisions both rejecting and applying that rationale. 744 F.3d 1075, 1075 & n.3 (9th Cir. 2013). None of those decisions address the Board's saving clause argument. District court decisions rejecting the Board's position suffer from the same analytical flaws.

of whether the NLRA protects such a right. The Seventh Circuit, by contrast, correctly recognized that Section 7 is the source of the collective right at issue here and held that *Concepcion* does not govern because, unlike the rule in that case, the Board's "general principle" barring the prospective waiver of Section 7 activity "extends far beyond collective litigation or arbitration" and is not hostile to the arbitral process. *Lewis*, 2016 WL 3029464, at *7, *9.

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

II. THE COMPANY VIOLATED SECTION 8(a)(1) BY SEEKING ENFORCEMENT OF THE AGREEMENT

Just as an employer violates Section 8(a)(1) by maintaining an agreement that requires its employees to individually arbitrate all employment-related disputes, so too does it violate Section 8(a)(1) by seeking to enforce such an unlawful agreement. Here, the Company enforced the Agreement by filing a motion in Hines' collective wage-and-hour lawsuit in the district court to compel individual arbitration and stay the judicial proceedings. Because, as shown, the Agreement is unlawful under the NLRA, the Board reasonably found (Doc. 13 at 3), that the Company's efforts to enforce the Agreement violated Section 8(a)(1).

Contrary to the Company's contention (Br. 24-25), the Board's Decision and Order do not implicate the Company's constitutional right to petition the Government for redress of grievances because the Supreme Court has explained that the First Amendment does not protect petitioning that "has an objective that is illegal under federal law." *Bill Johnson's Rests. v. NLRB*, 461 U.S. 731, 737 n.5 (1983). Under that exception, court action constitutes an unfair labor practice if "[o]n the surface" it "seek[s] objectives which [are] illegal under federal law." *Teamsters Local 776 v. NLRB*, 973 F.2d 230, 236 (3d Cir. 1992).¹²

¹² In arguing that a lawsuit is only unlawful if it is objectively baseless and subjectively motivated by unlawful purpose, the Company overlooks (Br. 25) the

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

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

Employees have an unquestionable Section 7 right to file and pursue charges before the Board. *See Util. Vault Co.*, 345 NLRB 79, 82 (2005). The mere maintenance of a workplace rule that employees would "reasonably construe" as restricting that right is unlawful. *Lutheran Heritage*, 343 NLRB at 646; *Cintas*, 482 F.3d at 467-68. To determine whether a rule would lend itself to an unlawful

Court's clear articulation in *Bill Johnson's* that a lawsuit is unlawful if it has an illegal objective. To be sure, in the absence of an illegal objective, the Board may find a lawsuit unlawful only if it is both objectively baseless *and* subjectively motivated by an unlawful purpose. *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 531 (2002). But here the Board specifically found (Doc. 13 at 3 n.3) that the Company's motion had an illegal objective.

interpretation, the Board reads the rule from the position of non-lawyer employees. *U-Haul*, 347 NLRB at 378. Finally, any ambiguity in a work rule is construed against the employer as the rule’s promulgator. *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999); *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132 (2012) (“Board law is settled that ambiguous employer rules – rules that reasonably could be read to have a coercive meaning – are construed against the employer.”), *enforced*, 746 F.3d 205 (5th Cir. 2014). As the Board has explained, “[t]his principle follows from the Act’s goal of preventing employees from being chilled in the exercise of their Section 7 rights – whether or not that is the intent of the employer – instead of waiting until that chill is manifest, when the Board must undertake the difficult task of dispelling it.” *Flex Frac*, 358 NLRB at 1132; *see also Ne. Land Servs.*, 645 F.3d at 483 (affirming that “the Board’s rule is intended to be prophylactic and . . . is subject to deference”).

The Agreement requires employees to individually arbitrate “any claims . . . relating to his/her hiring, terms and conditions of employment, job assignments, payment of any wages, benefits or other forms of compensation, and/or separation from employment” (Doc. 2 at 8.) The term “claims” includes any claims involving:

[a]ny federal, state, or local laws, regulations, or statutes prohibiting employment discrimination (such as, without limitation, race, sex,

national origin, age, disability, religion), retaliation, and harassment, including but not limited to claims arising under Title VII of the Civil Rights Act of 1964, as amended (“Title VII”), the Age Discrimination in Employment Act (“ADEA”), the Americans with Disabilities Act (“ADA”), the Equal Pay Act (“EPA”), the Civil Rights Acts of 1866 and 1871, 42 U.S.C. § 1981, the Family and Medical Leave Act (“FMLA”), Pregnancy Discrimination Act (“PDA”) and any state law equivalents.

(Doc. 2 at 8-9.) The Board reasonably found (Doc. 13 at 3) that employees would construe that broad language as requiring individual arbitration of alleged unfair labor practices, thereby prohibiting them from filing charges with the Board. That finding is reasonably defensible and consistent with the Board’s court-approved findings in similar cases. In *Murphy Oil USA, Inc. v. NLRB*, for instance, the Fifth Circuit agreed with the Board that requiring employees to arbitrate “any and all disputes or claims [employees] may have . . . which relate in any manner . . . to . . . employment” could be construed as barring employees from filing Board charges. 808 F.3d 1013, 1019 (5th Cir. 2015) (“[t]he problem is that broad ‘any claims’ language can create ‘[t]he reasonable impression . . . that an employee is waiving not just [her] trial rights, but [her] administrative rights as well’”) (quoting *D.R. Horton*, 737 F.3d at 363-64); *see also Cellular Sales*, 2016 WL 3093363, at *4 (deferring to Board’s finding that requirement that employees individually arbitrate “[a]ll claims, disputes, or controversies” was unlawful under work-rule standard).

The Company errs in arguing (Br. 28) that the Agreement could not be reasonably construed as prohibiting employees from filing Board charges because Hines filed a charge with the Board. The Section 8(a)(1) standard is objective, measuring the tendency of the employer's action to restrict or coerce Section 7 rights. As the Fifth Circuit explained in enforcing a similar finding in *Murphy Oil*, “the actual practice of employees is not determinative” of whether an employer has committed an unfair labor practice. 808 F.3d at 1019 (quoting *Flex Frac*, 746 F.3d at 209) (employee's filing of Board charges challenging rule does not establish that rule cannot reasonably be interpreted as preventing Board charges); *accord Cellular Sales*, 2016 WL 3093363, at *3 n.2 (same); *Cintas*, 482 F.3d at 467. Further, to the extent the Company (Br. 28) relies on the Agreement's lack of an express prohibition on filing charges, any ambiguities are construed against the Company as the drafter of the Agreement. *See Lafayette Park Hotel*, 326 NLRB at 828; *Flex Frac*, 358 NLRB at 1132.

* * *

Finally, contrary to the Company's claim (Br. 27), the charge alleging all three violations is timely under Section 10(b) of the NLRA, 29 U.S.C. § 160(b), which imposes a 6-month time limitation for filing unfair-labor-practice charges

with the Board.¹³ As the Board explained (Doc. 13 at 2), the Company “continued to maintain the unlawful Agreement during the 6-month period preceding the filing of the initial charge.” Under well-established Board precedent, the maintenance or enforcement of an unlawful workplace rule, such as the Agreement here, constitutes a continuing violation that is not time barred by Section 10(b).¹⁴ See *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 423 (1960) (validity of contract’s execution cannot be challenged outside the 10(b) period; lawfulness of employer later enforcing facially invalid agreement can be); *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, 2015 WL 1205241, at *1 n.7 (Mar. 16, 2015) (“The Board has held repeatedly that the maintenance of an unlawful rule is a continuing violation, regardless of when the rule was first promulgated”), *enforced in relevant part*, Nos. 15-1620, 15-1860, 2016 WL 3093363 (8th Cir. June 2, 2016); *Murphy Oil*, 2014 WL 5465454, at *4 (enforcement of an unlawful rule independently violates Section 8(a)(1)), *enforced in relevant part*, 808 F.3d 1013, 1019 (5th Cir. 2015);

¹³ 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”

¹⁴ The Company’s bare assertion (Br. 27) that the Agreement is not a work rule, but, rather, a contract, is without merit. Because contractual restrictions on employee rights are effectively the rules of the workplace for signatory employees, it makes no difference that the unlawful restriction is in the form of an agreement. Furthermore, as discussed above (pp. 3-4), whereas here the Agreement was a condition of employment and failure to comply could thus result in loss of employment, application of the Board’s work-rule standard is particularly apt.

Control Servs, 305 NLRB 435, 435 n.2, 442 (1991) (maintenance or enforcement of unlawful rule timely alleged, even if rule was 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). Here, the Company not only maintained its unlawful rule within the relevant 6-month period before the charge was filed, but also sought to enforce the Agreement on April 30, 2015, through its motion to compel individual arbitration. The Board's determination of timeliness thus fully comports with the Board's and courts' treatment of other contracts and work rules.

CONCLUSION

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

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August 2016

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

COWABUNGA, INC.	*
	*
Petitioner/Cross-Respondent	*
	*
v.	*
	* Nos. 16-10932(L)
NATIONAL LABOR RELATIONS BOARD	* 16-11391 XAP
	*
Respondent/Cross-Petitioner	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,769 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010. Board counsel further certifies that: the electronic version of the Board's brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel; and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.2015.2015 and is virus-free according to that program.

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Dated at Washington, DC
this 8th day of August, 2016

**UNITED STATES COURT OF APPEALS
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	*	
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	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC
this 8th day of August, 2016