

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

JORGIE FRANKS

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

**SAMSUNG ELECTRONICS AMERICA, INC.
f/k/a SAMSUNG TELECOMMUNICATIONS AMERICA, LLC**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITIONS 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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Docket Nos. 16-10644, 16-10788, & 16-11377

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FOR THE ELEVENTH CIRCUIT

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JORGIE FRANKS)	
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Petitioner)	
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v.)	
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NATIONAL LABOR RELATIONS BOARD)	Nos. 16-10644, 16-10788,
)	16-11377
Respondent)	

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)	
SAMSUNG ELECTRONICS AMERICA, INC.)	Board Case No.
f/k/a SAMSUNG TELECOMMUNICATIONS)	12-CA-145083
AMERICA, LLC)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	

Certificate of Interested Persons

Pursuant to Federal Rule of Appellate Procedure 26 and Local Rule 26.1-2(b), the National Labor Relations Board, by its Deputy Associate General Counsel, hereby certifies that the following persons and entities, omitted from the briefs filed by Petitioner Jorgie Franks and Petitioner/Cross-Respondent Samsung Electronics, have an interest in the outcome of this case:

Docket Nos. 16-10644, 16-10788, & 16-11377

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Dated at Washington, D.C.
this 10th day of August, 2016

STATEMENT REGARDING ORAL ARGUMENT

The Board agrees with Petitioner/Cross-Respondent Samsung 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 PETITIONS FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on petitions for review filed by Jorgie Franks (“Franks”) and Samsung Electronics America, Inc. (“Samsung”), and the cross-application for enforcement filed by the Board, of a Board Order issued against Samsung, reported at 363 NLRB No. 105, 2016 WL 453584 (Feb. 3, 2016) (“D&O” 1-11).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 Samsung transacts business in Florida. The petitions and cross-application were timely; the NLRA imposes no time limit on such filings.

¹ “D&O” refers to the consecutively paginated decisions of the Board and the administrative law judge, which can be found in Volume III of the record. “Tr.” refers to the transcript of the unfair-labor-practice hearing, contained in Volume I of the record. “GCX” refers to the General Counsel’s exhibits and “JX” refers to the Joint Exhibits, all of which are contained in Volume II of the record. “Br.” refers to Samsung’s opening brief and “Franks Br.” refers to Franks’ opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUES

1. Did the Board reasonably find that Samsung 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 work-related claims in any forum, arbitral or judicial?

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

3. Does substantial evidence support the Board's finding that Samsung twice violated Section 8(a)(1) of the NLRA by unlawfully interrogating Franks?

4. Does substantial evidence support the Board's decision to dismiss the complaint allegation that Samsung violated Section 8(a)(1) of the NLRA by instructing Franks not to discuss her lawsuit with other employees?

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

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

Samsung, which distributes and sells electronic devices, hired Franks as a Field Sales Manager in January 2013. (D&O 1; JX 1, ¶ 7.) Since approximately January 18, 2013, Samsung has maintained a "Mutual Agreement to Arbitrate Claims," which new employees in California are required to sign as a condition of employment. (D&O 6; JX 1, ¶ 8, JX 2.) Samsung maintains a separate version of

the arbitration agreement covering employees outside of California. (D&O 7; JX, ¶ 8.) Both versions (collectively “the Agreement”) require that Samsung and the signatory employee arbitrate work-related claims and provide that “there will be no right or authority for any dispute to be brought, heard or arbitrated as a class action ... or in a representative capacity on behalf of a class of persons or the general public.” (D&O 7; JX 1, ¶ 9, JX 2.)

B. Samsung Official Asks Franks About a Potential Lawsuit

In July and August 2014, Franks spoke to other employees about whether they were being adequately paid and asked whether they would join in a lawsuit against Samsung. (D&O 1; Tr. 24.) During a September 3 phone call, Samsung human resources business partner Sandra Sanchez informed Franks that she had received “feedback” that a conversation Franks had with a coworker about a potential lawsuit made the coworker uncomfortable. Franks denied having any such conversations. Sanchez responded that she just wanted to share what she had learned with Franks. Franks said she had probably been venting to a coworker. Sanchez offered that Franks could contact her directly with any concerns or if anything changed. (D&O 2; Tr. 63.)

In early October, Sanchez learned that another employee had complained that Franks had reached out to him regarding a lawsuit and that he was uncomfortable about it. (D&O 2; JX 8.) On October 7, Sanchez sent Franks an

email referencing the new complaint. In it, she asked: “[h]as anything changed since our September 3 conversation?” Sanchez then reiterated that Franks could contact her directly with any issues or concerns or submit concerns through Samsung’s compliance system. (D&O 2; JX 1, ¶ 15, JX 8.)

C. Franks and Several Other Employees File a Class-Action Lawsuit Alleging that Samsung Violated the Fair Labor Standards Act

On approximately November 13, 2014, Franks on behalf of herself and other similarly situated employees and former employees of Samsung, filed a lawsuit in the United States District Court for the Middle District of Florida alleging that Samsung violated the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, et seq., by failing to pay overtime wages. Two other Samsung employees opted into the lawsuit as plaintiffs pursuant to procedures set forth in the FLSA, with several others joining soon thereafter. (D&O 8; JX 1, ¶ 16, JX 9.)² On December 11, Samsung’s counsel wrote to Franks’ counsel to demand that the complaint be withdrawn and that the plaintiffs individually mediate and/or arbitrate their claims pursuant to the Agreement, which the plaintiffs had each signed. (D&O 8; JX 1, ¶ 18, JX 12.) Over the following weeks, Samsung’s counsel repeatedly demanded

² The complaint was later amended to name employee Natalie Flores as the lead plaintiff with Franks remaining a party as an opt-in plaintiff. (D&O 8; JX 1, ¶ 20.) *See Natalie Flores v. Samsung Telecomms. Am., LLC*, Case No. 14-cv-02838.

that Franks' counsel withdraw the lawsuit and proceed to individual arbitration. (D&O 8; JX 12.)

On January 9, 2015, Samsung filed with the district court a motion to dismiss the lawsuit and compel individual arbitration. (D&O 8; JX 1, ¶ 27, JX 16.)

On January 27, 2015, Flores stipulated to the dismissal of the complaint without prejudice. (D&O 8; JX 1, ¶ 28, JX 17.)

II. PROCEDURAL HISTORY

Pursuant to charges filed by Franks, the Board's General Counsel issued a complaint alleging that Samsung violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by maintaining and enforcing the Agreement, which requires employees to waive their right, protected by Section 7 of the NLRA, 29 U.S.C. § 157, to pursue work-related claims concertedly. (D&O 5-6; GCX 1(j).) The complaint further alleged that Samsung violated Section 8(a)(1) by interrogating Franks about her concerted activities and by instructing Franks not to talk to other employees about a potential lawsuit related to compensation and working conditions. (D&O 6; GCX 1(j).) After conducting a hearing, an administrative law judge issued a decision and recommended order finding that Samsung violated the NLRA by maintaining and enforcing the Agreement, and by telling Franks not to discuss her lawsuit with other employees. (D&O 10.) The judge recommended

dismissal of the allegations that Samsung unlawfully interrogated Franks.

(D&O 10.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On February 3, 2016, the Board (Chairman Pearce; Members Hirozawa and McFerran) issued a Decision and Order. Applying its decisions in *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), *petition for reh'g en banc denied*, 5th Cir. No. 12-60031 (April 16, 2014), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *petition for reh'g en banc denied*, 5th Cir. No. 14-60800 (May 13, 2016), the Board found that Samsung violated Section 8(a)(1) by maintaining and enforcing the Agreement. (D&O 1.) Disagreeing with the judge, the Board found that Samsung did not unlawfully instruct Franks to refrain from discussing her lawsuit with other employees, but did unlawfully interrogate Franks about her protected concerted activity on two occasions. (D&O 1.)

The Board ordered Samsung to cease and desist from the unfair labor practices found and from any like or related interference with employees' Section 7 rights. (D&O 3.) Affirmatively, the Board ordered Samsung to rescind or revise the Agreement "to make clear to employees that [it] does not constitute a waiver of [employees'] right to maintain employment-related joint, class, or

collective actions in all forums”; notify all current and former employees who were required to sign, or were otherwise bound by, the Agreement that it has been rescinded or revised and, if revised, provide them a copy of the revised Agreement; reimburse Natalie Flores and any other plaintiffs to the FLSA suit any reasonable attorneys’ fees and litigation expenses they incurred in opposing Samsung’s motion to dismiss and compel individual arbitration; and post a remedial notice. (D&O 4.)

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 Samsung’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, Samsung’s maintenance of the Agreement, which requires its employees to arbitrate all employment-related

disputes individually, violates the NLRA. Samsung does not address any of the caselaw establishing that unfair labor practice, much less present any serious challenge to the Board's NLRA analysis.

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.

Samsung's efforts to enforce the Agreement also violated Section 8(a)(1), first by demanding that Franks and her co-plaintiffs withdraw their FLSA collective action and then by filing a motion to dismiss the complaint and compel mediation/arbitration. Because Samsung's enforcement efforts had an objective

that is illegal under federal law, they were not protected petitioning under the First Amendment.

Finally, contrary to Samsung's assertion, substantial evidence supports the Board's findings that Samsung official Sanchez unlawfully interrogated Franks on two occasions about her protected discussions with other employees about the lawsuit. Likewise, contrary to Franks' assertion, substantial evidence supports the Board's decision to dismiss the allegation that Sanchez violated the NLRA by instructing Franks not to engage in those protected discussions.

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" 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).

The Court will sustain the Board’s factual findings if they are supported by substantial evidence in the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Evans Servs., Inc. v. NLRB*, 810 F.2d 1089, 1092 (11th Cir. 1987). The fact that the Board’s final determinations may differ from those of the administrative law judge does not alter this Court’s deferential review of the Board’s conclusions. *Visiting Nurse Health Sys.*, 108 F.3d at 1360.

ARGUMENT

I. SAMSUNG 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 FLSA lawsuit. It continues, unbroken and with court approval, through modern NLRA jurisprudence. *See, e.g., Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1152-53 (7th Cir. 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) (protecting concerted petitions for injunctions against workplace harassment).³

³ *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).

The Board's holding that Section 7 protects concerted legal activity furthers the policy objectives that guided Congress in passing the NLRA. The NLRA protects collective rights "not for their own sake but as an instrument of the national labor policy of minimizing industrial strife." *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975). Protecting employees' ability to resolve workplace disputes collectively in an adjudicatory forum effectively serves that purpose because collective lawsuits are an alternative to strikes and other disruptive protests. *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. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

Protecting employees' concerted pursuit of legal claims also advances the congressional objective of "restoring equality of bargaining power between employers and employees." 29 U.S.C. § 151; accord *Murphy Oil*, 2014 WL 5465454, at *1. Indeed, recognizing that concerted activity "is often an effective weapon for obtaining [benefits] to which [employees] ... are already 'legally' entitled," the Ninth Circuit upheld the Board's holding that Section 7 protected

employees' effort to exert group pressure on the employer to redress their work-related claims through resort to legal processes. *Salt River*, 206 F.2d at 328.

Similarly, the Supreme Court has acknowledged a long history of statutory employees exercising their Section 7 right to band together to take advantage of the evolving body of laws and procedures that legislatures have provided to redress their grievances. *See Eastex*, 437 U.S. at 565-66 & n.15. Such collective legal action seeks to unite workers generally and to lay a foundation for more effective collective bargaining. *Id.* at 569-70; *see also Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 753-54 (1985) (noting Congress's intention to remedy "the widening gap between wages and profits" by enacting the NLRA) (quoting 79 Cong. Rec. 2371 (1935)).

As the Board has emphasized, the source of employees' distinct, *substantive* right to pursue their legal claims concertedly is the NLRA, not Rule 23 of the Federal Rules of Civil Procedure or the FLSA's collective-action provision. *Murphy Oil*, 2014 WL 5465454, at *6 n.30, *10. For that reason, contrary to Samsung's assertion, it is immaterial that, in some contexts, "[t]he right of a litigant to employ [a class action under Rule 23] is a procedural right only, ancillary to the litigation of substantive claims." Br. 17 (quoting *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) (modification in original)). The substantive NLRA right at issue is the right afforded statutory employees 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).

Similarly, there is no basis for Samsung’s claim (Br. 19-20) that, if the Board’s position were accepted, Section 7’s “concerted” requirement would essentially displace the procedural strictures of Rule 23 and other forms of collective legal action. The Board has been “unequivocal that what Sec[ti]on 7 guarantees is the right to pursue class certification or the equivalent, not class certification itself “[T]here is no Section 7 right to class certification.... Whether a class is certified depends on whether the requisites for class certification under Rule 23 have been met.” *Murphy Oil*, 2014 WL 5465454, at *6 n.30 (quoting *D.R. Horton*, 2012 WL 36274, at *12). What the NLRA forbids is employer-employee agreements that “completely deny employees access to class, collective, or group procedures that are otherwise available to them under statute or rule.” *Murphy Oil*, 2014 WL 5465454, at *18.⁴

⁴ Samsung also incorrectly argues (Br. 18) that “the very device that the Board claims Section 7 has secured access to – collective litigation or arbitration – did not exist when the [NLRA] was passed.” While Rule 23 (and the FLSA’s collective-action provision) postdates the NLRA’s enactment, various other forms of joint and collective claims long predate it, as Samsung acknowledges (Br. 18). *See Lewis*, 823 F.3d at 1154. Indeed, the Board interpreted Section 7 as protecting the collective legal pursuit of work-related claims long before the advent of Rule 23. *See* cases cited at p. 12-13. In any event, the NLRA was drafted to allow the Board to respond to new developments in interpreting the rights it creates and

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, none of which Samsung addresses. It also reflects the Board's sound judgment that concerted legal activity is a particularly effective means to advance Congress's goal of avoiding labor strife and economic disruptions. And that judgment falls squarely within the Board's area of expertise and responsibility. *See City Disposal*, 465 U.S. at 829.

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

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

conduct it proscribes. *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (recognizing Board's “responsibility to adapt the [NLRA] to changing patterns of industrial life”).

Samsung 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 NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 481-83 (1st Cir. 2011) (applying work-rule analysis to terms of employment contract); *U-Haul Co.*, 347 NLRB 375, 377-78 (2006) (same), *enforced*, 255 F. App’x 527 (D.C. Cir. 2007). Applying that standard, the Board reasonably found (D&O 1) that Samsung’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 requires Samsung and the employee to resolve all claims by arbitration, and prohibits all class or collective arbitration. *Id.* By explicitly requiring that employees individually arbitrate all work-related claims, the Agreement violates Section 8(a)(1) by restraining employees from exercising 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*, 823 F.3d at 1152. 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 has held, in a variety of contexts unrelated to arbitration, 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).⁵

The principle that an employer may not lawfully induce an employee prospectively to waive her Section 7 rights flows from the unique characteristics of those rights and the practical circumstances of their exercise. Protected concerted activity – of unorganized workers, in particular – often arises spontaneously when employees are presented with actual workplace problems and have to decide among themselves how to respond. *See, e.g., Washington Aluminum Co.*, 370 U.S. at 14-15 (concerted activity spurred by extreme cold in plant); *Salt River Valley*, 206 F.2d at 328 (concerted activity prompted by violations of minimum-wage laws). The decision whether collectively to walk out of a cold plant or to join other employees in a wage-and-hour lawsuit is materially different from the decision of an individual employee – made in advance of any concrete grievance – to agree to

⁵ Collective waivers negotiated on behalf of employees by their exclusive bargaining representative, by contrast, are permissible. For example, a union may waive the employees' right to engage in an economic strike, for the term of a collective-bargaining agreement, provided that the waiver is clear and unmistakable. *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 705-06 (1983); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280-83 (1956). 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.

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.”).

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*, 357 NLRB at 2279-80, the peaceful resolution of labor disputes is a core objective of the NLRA, and that objective is ill-served by individual arbitration agreements that prospectively

waive employees' right to consider the option of concerted legal action along with other collective means of advancing their interests as employees.⁶

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. Those propositions are, as just demonstrated, firmly grounded in Board and court precedent, none of which Samsung addresses in its brief. In effect, Samsung concedes the NLRA violation, thereby relying solely on its claim that FAA's mandate enforcing arbitration agreements will validate the Agreement's otherwise unlawful waiver. But Samsung's use of the particular vehicle of an arbitration agreement subject to the FAA does not excuse its unlawful prospective restriction of its employees' Section 7 rights; it cannot

⁶ The Board's findings that Section 7 is critical to the NLRA and encompasses concerted legal activity, and that agreements restricting that right are unlawful under Section 8(a)(1), are each entitled to considerable deference. *See NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (Board has prerogative to define Section 7); *Garner v. Teamsters Chauffeurs & Helpers Local 776*, 346 U.S. 485, 490 (1953) (Board has primary authority to interpret and apply NLRA); *see also City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 (2013) (statutory interpretation within agency's expertise should be accepted unless "foreclose[d]" by the statutory text); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see generally* Note, *Deference and the Federal Arbitration Act: The NLRB's Determination of Substantive Statutory Rights*, 128 HARV. L. REV. 907, 919 (2015) (explaining that "[t]h[e] [FAA] context does not alter the conclusion that ... the NLRB's determination is an interpretation of the statute the agency administers and is thus within *Chevron's* scope").

“attempt ‘to achieve through arbitration what Congress has expressly forbidden’” under the NLRA. *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 676 (4th Cir. 2016) (quoting *Graham Oil v. ARCO Prods. Co.*, 43 F.3d 1244, 1249 (9th Cir. 1994)). As explained more fully below, such agreements thus are not entitled to enforcement under the FAA.

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

Samsung’s principal defense is that the FAA precludes enforcement of the Board’s Order. But that position contravenes the settled principle that “when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” *Morton v. Mancari*, 417 U.S. 535, 551 (1972); *see also POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014). As demonstrated below, agreements that are unlawful under the NLRA are exempted from enforcement by the FAA’s saving clause. The Board’s holding to that effect in *D.R. Horton* and *Murphy Oil*, applied here, implements both the NLRA and the FAA and is consistent with Supreme Court precedent interpreting both statutes. There is thus no difficulty in fully enforcing each statute according to its terms.

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

Section 2 of the FAA provides that arbitration agreements “shall be valid, irrevocable, and enforceable, *save* upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (emphasis added). That enforcement mandate, limited by 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. *Concepcion*, 563 U.S. at 339. The same is true of ostensibly neutral defenses “that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Id.*

Illegality under the NLRA is a well-established general contract defense that fits the criteria of the FAA's saving clause. 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. 18-20), 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, which dates from shortly after the NLRA's enactment, *see, e.g., Nat'l Licorice*, 309 U.S. at 360-61, 364, demonstrates 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*, 563 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 Samsung's "[met] the criteria of the FAA's savings clause for nonenforcement." *Lewis*, 823 F.3d at 1157. In coming to that conclusion, the court agreed with the Board that contracts restricting Section 7 activity are illegal. *Id.* at 1157, 1161. It also noted that, rather than embodying hostility, the NLRA "does not disfavor arbitration" as a mechanism of dispute resolution. *Id.* at 1158.

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.⁷

⁷ For that reason, it is unnecessary to reach the question, raised by Samsung (Br. 25-28), 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;

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

Samsung is mistaken in its contention (Br. 22-24) 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 concerted. Nor has the Court ever found enforceable an arbitration agreement that violates a federal statute – as the Agreement violates Section 8(a)(1). Finding that a contract does not fit within the FAA's saving clause though it violates the NLRA would fail to give effect to the settled principle that courts should regard two co-equal statutes as effective. *Morton*, 417 U.S. at 551.

No Supreme Court FAA case mandates enforcement of an arbitration agreement that impairs core provisions of another federal statute, much less directly violates such a statute. Instead, the Court has enforced arbitration

both can – and should – be given effect. *Morton*, 417 U.S. at 551; *accord Lewis*, 823 F.3d at 1157 (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.

agreements over challenges based on provisions in other statutes 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”) and has often been cited as undermining the Board’s rule, *see, e.g., Horton*, 737 F.3d at 357, 361, the Court determined that Congress’ purpose in enacting the ADEA was “to prohibit arbitrary age discrimination in employment.” *Gilmer*, 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, 32 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).⁸

⁸ The Supreme Court has consistently maintained that same analytical focus on statutory purpose when assessing challenges to arbitration agreements based on other federal statutes. *See, e.g., CompuCredit v. Greenwood*, 132 S. Ct. 665, 670-71 (2012) (judicial-forum provision not “principal substantive provision[]” of Credit Repair Organizations Act); *Rodriguez de Quijas v. Shearson/Am. Express, 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.*

This Court's *Walthour v. Chipio Windshield Repair, LLC* decision, which Samsung cites repeatedly (Br. 20, 21, 27, 30) in support of its arguments, applied *Gilmer* to find that the FLSA's collective-action provision (which is identical to the ADEA's) does not create a substantive right to collective litigation. 745 F.3d 1326, 1334-35 (11th Cir. 2014). Like *Gilmer*, it did not address the additional rights that Section 7 affords statutory employees, which were not asserted in either case.

Unlike the statutory provisions at issue in the Supreme Court's (and this Court's) FAA cases – none of which involve statutes whose principal objectives include protecting collective action – the NLRA's protection of collective action is foundational, underlying the entire architecture of federal labor law and policy. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (characterizing 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

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).

(1981) (describing NLRA as “designed to ... encourag[e] employees to promote their interests *collectively*”).

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*, 823 F.3d at 1160. 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. Section 10 empowers the Board to prevent violations of Section 8. 29 U.S.C. § 160. Thus, the NLRA’s various provisions all lead back to Section 7’s guarantee of employees’ right to join together “to improve terms and conditions of employment or otherwise improve their lot as employees.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).⁹

⁹ The right to engage in collective action for mutual protection is not only critical to the NLRA, but also a “basic premise” of national labor policy generally. *Murphy Oil*, 2014 WL 5465454, at *1. For example, in the Norris-LaGuardia Act, enacted three years before the NLRA, Congress declared unenforceable “[a]ny undertaking or promise” in conflict with the federal policy of protecting

Concerted activity under the NLRA is thus not, as Samsung repeatedly insists (*see, e.g.*, Br. 20 (citing *Walthour*, 745 F.3d at 1336)), 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*, 823 F.3d at 1160. 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 prospectively waive “substantive” federal rights. *See Am. Express Co. v. Italian Colors*, 133 S. Ct. 2304, 2310 (2012); *Mitsubishi Motors*, 473 U.S. at 637 n.19.

employees’ freedom to act concertedly for mutual aid or protection. 29 U.S.C. § 102, 103. This includes, but contrary to Samsung’s assertion otherwise (Br. 27), is not limited to, contracts prohibiting employees from joining labor unions. 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.

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*, *Walthour*, and similar cases enforcing individual-arbitration agreements, a different result is warranted.¹⁰

Samsung's exclusive reliance (Br. 22-24) on *Concepcion* to challenge the Board's saving-clause analysis is also flawed. As described above (pp. 26-29), 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 agreement was unenforceable under a judicial interpretation of California's state

¹⁰ Because Section 7 is only implicated when an arbitration 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 v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (age-discrimination claim by manager); *Rodriguez de Quijas*, 490 U.S. at 482-83 (investor claims under Securities Act).

unconscionability principles that barred class-action waivers in most arbitration agreements and permitted a party to a consumer contract to demand classwide 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. 2304. 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” 823 F.3d at 1158. 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.” 823 F.3d at 1158.

The Board’s rule is a straightforward application of a longstanding NLRA 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. 18-20), that illegality defense developed outside of the arbitration context and was recognized by the Board and courts well before the advent of agreements mandating individual arbitration of employment disputes.¹¹ 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*, 823 F.3d at 1158 (“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

¹¹ It was not until 2001 that the Supreme Court definitively ruled that the FAA applied to employment contracts. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

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, despite Samsung’s repeated mischaracterizations (Br. 16-22), has the Board 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.

Samsung 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, *id.* at 358-60 (citing *Concepcion*, 563 U.S. 333). Those cases, like this Circuit’s decision in *Walther*, discussed

above (p. 32) , do not answer the materially different question of whether the NLRA protects such a right. The Seventh Circuit, by contrast, recognized that Section 7 affords statutory employees a substantive right to engage in collective litigation to enforce workplace statutes. *Lewis*, 823 F.3d at 1160. It 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. *Id* at 1158.¹²

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

¹² While other circuit courts have rejected the Board’s *D.R. Horton* position in non-Board cases, which Samsung cites (Br. 16-17 n.2), they too have misread Supreme Court precedent and evince 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 *Horton* in a Board case, but added no new rationale. See *Cellular Sales of Missouri, LLC v. NLRB*, _F.3d_, 2016 WL 3093363, at *2 (8th Cir. June 2, 2016). And, as Samsung acknowledges, *Richards v. Ernst & Young, LLP*, 744 F.3d 1075 & n.3 (9th Cir. 2013), 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. District court decisions rejecting the Board’s position suffer from the same analytical flaws.

grounds in an appropriate case.” *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 72 (1975); *see also New York Shipping Ass’n, Inc. v. Fed. Mar. Comm’n*, 854 F.2d 1338, 1367 (D.C. Cir. 1988) (“[T]here is no anomaly if conduct privileged under one statute is nonetheless condemned by another; we expect persons in a complex regulatory state to conform their behavior to the dictates of many laws, each serving its own special purpose.”). The NLRA’s protection of, and prohibition on interference with, concerted activity is what distinguishes it from other employment statutes and what renders agreements that require *individual* arbitration unlawful under the NLRA and unenforceable under the FAA.

II. SAMSUNG 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, Samsung attempted to enforce the Agreement by demanding that Franks and her co-plaintiffs withdraw their FLSA complaint, and by filing a motion to dismiss the complaint and compel mediation/arbitration. Because, as shown, the Agreement is unlawful under the NLRA, the Board reasonably found (D&O 1) that Samsung’s efforts to enforce the Agreement violated Section 8(a)(1). Moreover, the Board acted within its broad discretion in devising a remedy for that violation.

The Board's finding that Samsung violated the NLRA by seeking enforcement of the unlawful Agreement does not, contrary to Samsung's assertion (Br. 29-32), deprive it of its First Amendment rights. *See Murphy Oil*, 2014 WL 5465454, at *27-28. In *Bill Johnson's Restaurants v. NLRB*, the Supreme Court explained that although the First Amendment's protection of the right to petition the Government for redress of grievances includes the right of access to the courts, it does not protect petitioning that "has an objective that is illegal under federal law." 461 U.S. 731, 737 n.5 (1983); accord *Small v. Operative Plasterers' & Cement Masons' Int'l Ass'n Local 200, AFL-CIO*, 611 F.3d 483, 491 (9th Cir. 2010). Under that exception to First Amendment protection, court action only constitutes an unfair labor practice if, "[o]n the surface," it "seek[s] objectives which [are] illegal under federal law." *See Teamsters Local 776 v. NLRB*, 973 F.2d 230, 236 (3d Cir. 1992); accord *Wright Elec., Inc. v. NLRB*, 200 F.3d 1162, 1166-67 (8th Cir. 2000). That is true regardless of the merits of the underlying lawsuit. *See Teamsters Local 776*, 973 F.2d at 236.

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). The Board may also restrain litigation that is "aimed at achieving a result

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

Through its motion to dismiss its employees’ FLSA suit and compel individual arbitration, Samsung sought to enforce the Agreement, an unlawful contract. It also explicitly sought to prevent its employees’ exercise of their Section 7 right to litigate work-related claims concertedly. Therefore, its actions had an illegal objective and fell outside the protection of the First Amendment.

D&O 1.¹³

¹³ 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). Although Samsung argues (Br. 29-30) that its efforts to enforce the unlawful Agreement did not meet that standard, the Board never reached the issue, having found an illegal objective. And Samsung’s citation (Br. 31-32) to the Fifth Circuit’s finding in *Murphy Oil* that the First Amendment protected enforcement of an individual-arbitration agreement disregards that, unlike her, the employer in that case acted pursuant to binding in-circuit precedent. 808 F.3d at 1021. More fundamentally, whether a favorable court decision precludes a finding of an illegal objective ultimately turns on the correctness of that court decision. *See, e.g., Sheet Metal Workers Int’l Ass’n Local Union No. 27, AFL-CIO v. E.P. Donnelly, Inc.*, 737 F.3d

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT SAMSUNG VIOLATED SECTION 8(a)(1) BY UNLAWFULLY INTERROGATING FRANKS

“[A]ny interrogation of employees by an employer presents an ever present danger of coercing employees in violation of their Section 7 rights.” *TRW-United Greenfield Div. v. NLRB*, 637 F.2d 410, 416 (5th Cir. 1981). Thus, while interrogations are not per se unlawful, an employer violates Section 8(a)(1) of the NLRA by coercively interrogating employees about their Section 7-protected activities. *See NLRB v. Gaylord Chem. Co.*, __F.3d__, 2016 WL 3127087, at *11 (11th Cir. June 3, 2016) (employer unlawfully interrogated employee about union sympathies).

“An interrogation is coercive if, when viewed in all the surrounding circumstances, its probable effect tends to interfere with the employees’ free exercise of their Section rights.” *Gaylord Chem*, 2016 WL 3127087, at *11. In making that determination, the Board considers a number of factors, including the nature of the information sought, the rank of the questioning official, the place and manner of the conversation, and whether the employer assures the employees that no reprisals will be taken if they support the union. *Gaylord Chem.*, 2016 WL 3127087, at *11. “This list is not exhaustive ... and coercion may occur even if all

879, 892-99 (3d Cir. 2013) (upholding the Board’s illegal-objective finding and reversing district-court decision finding otherwise).

of these factors operate in favor of the employer.” *TRW-United Greenfield*, 637 F.2d at 416; accord *Sturgis Newport Bus. Forms, Inc. v. NLRB*, 563 F.2d 1252, 1256 (5th Cir. 1977). Moreover, the test is an objective one, requiring neither evidence of an employer’s subjective intent to coerce nor proof of an employee’s subjective perception that she was coerced. See *Torbitt & Castleman, Inc. v. NLRB*, 123 F.3d 899, 906 (6th Cir. 1997). Finally, “[b]ecause the question whether coercive interrogation has occurred is one of fact, its primary determination rests with the Board, and [the court] accord[s] ‘great deference’ to [the Board’s] findings.” *NLRB v. Great W. Coca-Cola Bottling Co.*, 740 F.2d 398 (5th Cir. 1984); see also *Gaylord Chem.*, 2016 WL 3127087, at *4, 11 (deferring to Board’s finding that employer unlawfully interrogated employee).

Here, substantial evidence supports the Board’s findings (D&O 3) that, considering the totality of the circumstances, Sanchez’s statements to Franks during a September 3 phone call were coercive and thus unlawful. Indeed, several aspects of the call indicate coercion. By “sharing” with Franks that some coworkers were uncomfortable with Franks discussing a potential lawsuit with them, and informing Franks that she could contact Sanchez with any concerns, Sanchez sought to elicit information about Franks’ protected activity of bringing a collective wage-and-hour lawsuit against Samsung and about Franks’ related conversations with other employees. Thus, the nature of the information Sanchez

discussed supports the Board's finding that her statements were coercive. *See Grass Valley Grocery Outlet*, 338 NLRB 877, 877 n.1 (2003) (employer's statement that he heard employee was voting for union and a union leader "constituted an unlawful effort to elicit" whether employer supported union), *enforced mem., sub nom. NLRB v. Cubitt*, 121 F. App'x 720 (9th Cir. 2005).

Sanchez's position as a high-level management official and the fact she had not previously contacted Franks also support the finding that her statements were coercive. *Cf. NLRB v. McCormick Steel Co.*, 381 F.2d 88, 91 (5th Cir. 1967) (employees' daily, casual contacts with questioner weigh against interrogation finding). The same is true of Franks' decision to respond untruthfully by denying Sanchez's assertions, which revealed her reluctance to discuss the matter with Sanchez, and of Sanchez's failure to give Franks assurances against reprisal. *See Sturgis Newport Bus. Forms, Inc.*, 563 F.2d at 1256 (employees' evasive answers, and supervisors' failure to provide assurances against reprisal, supported finding that questioning was coercive); *Gelita USA, Inc.*, 356 NLRB 467 (2011), *affirming* 352 NLRB 406 (2008) (employer's assertion that purported interrogation was casual conversation and not coercive refuted by employees' reluctance to participate). The circumstances thus provide substantial evidence supporting the Board's finding that Sanchez's September 3 statements were coercive.

Substantial evidence also supports the Board's finding (D&O 3) that Sanchez's October 7 email to Franks was coercive. In the email, Sanchez stated that another employee had complained that Franks had approached him about a lawsuit against Samsung, and she asked whether anything had changed since their September 3 conversation. The Board found (D&O 3) that Sanchez's email inquiry, which explicitly referenced and reiterated her unlawful September 3 comments, was aimed at discovering the extent of Franks' protected concerted activity and was thus an unlawful interrogation.

In challenging those findings, Samsung suggests (Br. 32, 34) that if Franks did not enjoy a right to engage in collective arbitration, then Sanchez's inquiries could not be unlawful. But the Board never found a right to collective arbitration. *See* p.38. And, as the Board made clear (D&O 3), Sanchez's statements were unlawfully coercive for an unrelated reason, i.e., because Sanchez sought to elicit information about Franks' lawsuit and related conversations with coworkers. As already established, Franks' efforts to enlist her fellow employees to work to improve their terms of employment through concerted litigation constitute protected activity. That is true regardless of whether the Court agrees with the Board that Samsung's maintenance and enforcement of the Agreement's concerted-action waiver violated the NLRA.

Samsung's other arguments similarly lack merit. It asserts (Br. 33) that "Sanchez did not prohibit [Franks] from discussing her lawsuit or her work schedule with other employees," and that Samsung was not "investigat[ing] a potential violation of the mutual arbitration agreement." Neither explanation undermines the Board's finding that Sanchez's statements were designed to elicit information about Franks' protected activities. Moreover, that Sanchez may have been "friendly" and "nice" while attempting to elicit such information from Franks (Br. 33) is immaterial to the determination of whether her statements were coercive. Board precedent establishes "that neither friendly relations between employees and an interrogating manager nor the employees' lack of fear render permissible any employer statements which have a tendency to be coercive and to interfere with employee rights." *Gladioux Food Serv., Inc.*, 252 NLRB 744, 745 (1980); *see also TRW-United Greenfield*, 637 F.2d at 418 (if interrogation is coercive in nature, it makes no difference that employee was not actually coerced or that employer maintained façade of friendliness). Finally, Samsung's suggestion (Br. 33-34) that Sanchez was merely inquiring into Franks' complaints, in the ordinary course of business, are unsubstantiated. As the Board explained (D&O 3 n.5), Samsung did not argue to the Board, or demonstrate, that it was conducting an investigation either into Franks' concerns or other employees' complaints about Franks.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT SAMSUNG DID NOT INSTRUCT FRANKS NOT TO TALK WITH OTHER EMPLOYEES ABOUT A LAWSUIT

Although the Board found that Sanchez unlawfully interrogated Franks about her protected activity, it found that there was insufficient evidence to support the separate allegation that Sanchez instructed Franks not to discuss her lawsuit with other employees. Substantial evidence supports its dismissal of that unproven allegation. *See Shell Chem. Co. v. NLRB*, 495 F.2d 1116, 1126 (5th Cir. 1974) (“The standard of review requires that the Board’s dismissal of the complaint be supported by substantial evidence in the record”).

The judge found that neither Franks’ testimony that Sanchez instructed her not to discuss the lawsuit, nor Sanchez’s insistence that she made no such statement, was more credible than the other. He inferred, however, from the October 7 email in which Sanchez asked whether anything had changed since September 3, that she was asking why Franks had not followed her instruction not to discuss the lawsuit, implicitly confirming that Sanchez had issued such an instruction in their earlier conversation.¹⁴ The Board, however, found that the

¹⁴ Although the judge framed this finding as a credibility determination, which generally is entitled to the utmost deference, he made clear that he did not base it on the demeanor of the witnesses, but rather on his assessment of the record evidence and inferences drawn therefrom. Because the Board is equally capable of analyzing such evidence, it reviewed that determination *de novo*. *See Kopack v. NLRB*, 668 F.2d 946, 955 (7th Cir. 1982) (explaining that while judge credited

inference drawn by the judge was no more persuasive than the inference proffered by Samsung, that Sanchez's e-mail was asking whether anything had changed since Franks' undisputed statement on September 3 that she had no concerns to bring to Sanchez's attention. Because the Board's assessment of the inferences is plausible, it should not be overturned. *See NLRB v. Contemporary Cars, Inc.*, 667 F.3d 1364, 1370 (11th Cir. 2012). Substantial evidence thus supports the Board's finding (D&O 2-3) that the evidence was in "equipoise" over whether Sanchez ever issued the allegedly unlawful instruction, and its consequent dismissal of the allegation that she violated the NLRA by giving such an instruction.

Franks (Br. 48-50) does not challenge the Board's inferences. Instead, she insists that the Board's rejection of the factual finding that Sanchez instructed her not to discuss the lawsuit is inconsistent with its legal determination that Sanchez's unlawfully interrogated Franks by making comments designed to elicit information from Franks about her protected activity. Franks fails, however, to explain the purported inconsistency. In light of the deference due to the Board's inferences, and given Franks' failure to articulate why the Board's interrogation-related findings are inconsistent, the Board's dismissal of this allegation should be upheld.

certain testimony, decision was not based on demeanor of witnesses "that must be given added weight in [court's] review of the record").

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the petitions for review filed by Samsung and Franks and enforcing the Board's Order in full.

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National Labor Relations Board
August 2016

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

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JORGIE FRANKS)	
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Petitioner)	
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v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	Nos. 16-10644, 16-10788,
)	16-11377
Respondent)	
<hr/>)	
SAMSUNG ELECTRONICS AMERICA, INC.)	Board Case No.
f/k/a SAMSUNG TELECOMMUNICATIONS)	12-CA-145083
AMERICA, LLC)	
)	
Petitioner/Cross-Respondent)	
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v.)	
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NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 11,675 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
This 10th day of August, 2016

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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JORGIE FRANKS)	
)	
Petitioner)	
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	Nos. 16-10644, 16-10788,
)	16-11377
Respondent)	
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)	
SAMSUNG ELECTRONICS AMERICA, INC.)	Board Case No.
f/k/a SAMSUNG TELECOMMUNICATIONS)	12-CA-145083
AMERICA, LLC)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	
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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2016, the foregoing document was electronically filed 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 that the foregoing document was served on all those parties or their counsel through the Court's CM/ECF system.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 10th day of August, 2016