

**No. 16-1385**

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

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner/Cross-Respondent**

**v.**

**ALTERNATIVE ENTERTAINMENT, INC.**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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## **STATEMENT CONCERNING ORAL ARGUMENT**

The Board believes that oral argument would assist the Court in evaluating the important legal issues, including one of first impression, presented in this case.

## JURISDICTIONAL STATEMENT

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce its Decision and Order issued against Alternative Entertainment, Inc. (“AEI”) on February 22, 2016. The Board’s Decision and Order, reported at 363 NLRB No. 131, is final under Section 10(e) and (f) of the National Labor Relations Act (“the NLRA”), as amended, 29 U.S.C. § 151, et seq., 160(e) and (f).

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

## **STATEMENT OF ISSUES**

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

II. Whether the Board is entitled to summary enforcement of its uncontested finding that AEI violated Section 8(a)(1) by maintaining an overbroad confidentiality rule.

III. Whether substantial evidence supports the Board's finding that AEI violated Section 8(a)(1) by prohibiting employee James DeCommer from discussing the new compensation system with other employees.

IV. Whether substantial evidence supports the Board's finding that AEI violated Section 8(a)(1) by discharging DeCommer in retaliation for engaging in protected, concerted activity.

## **RELEVANT STATUTORY PROVISIONS**

Relevant statutory provisions are reproduced in the Addendum to this brief.

## STATEMENT OF THE CASE

### I. PROCEDURAL HISTORY

On March 26, 2015, the Board’s General Counsel issued a complaint pursuant to unfair-labor-practice charges filed by AEI employee James DeCommer, alleging that AEI committed four violations of Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1). (D&O 5 (R. 345); GCX 1(a), (c), (e) (R. 135, 141, 146-52).)<sup>1</sup> Specifically, the complaint alleged that AEI maintained two unlawful rules, one requiring employees to resolve all employment-related disputes through individual arbitration and another prohibiting employees from discussing their compensation and other information, and took unlawful actions against DeCommer by forbidding him from discussing compensation-related matters with coworkers and discharging him for engaging in protected activity. (D&O 5 (R. 345).)

On July 9, 2015, an administrative law judge issued a recommended decision finding the violations alleged. (D&O 5-11 (R. 345-51).) In finding that AEI violated the NLRA by maintaining an arbitration agreement expressly

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<sup>1</sup> “D&O” refers to the Board’s Decision and Order, “GCX” to the General Counsel’s exhibits at the administrative hearing, and “R.” cites indicate the location of those documents in the Certified Administrative Record. “Tr.” refers to the hearing transcript, which shares its pagination with the Certified Administrative Record (e.g., Tr. 52 is at R. 52). Where applicable, references preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to AEI’s opening brief, and “C-Br.” refers to the brief filed by the Chamber of Commerce of the United States of America (“the Chamber”) as *Amicus Curiae*.

restricting conduct protected under Section 7 of the NLRA, 29 U.S.C. § 157, the judge relied on the Board's decisions in *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), *petition for rehearing 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 rehearing en banc denied*, 5th Cir. No. 14-60800 (May 13, 2016). (D&O 8-9 (R. 348-49).)

## **II. THE BOARD'S FINDINGS OF FACT**

### **A. Background**

AEI provides satellite-television installation and services to residential customers in Michigan and Wisconsin. AEI's Byron Center facility employs approximately 77 field technicians ("technicians") who install satellite dishes and set up television and internet services in customer residences. Most technicians drive company-owned vehicles, but about eight technicians (called "POVs") drive their own vehicles. (D&O 5-6 (R. 345-46); GCX 6 at 1 (R. 210), Tr. 14, 42-44, 86-88.)

Technicians' pay is calculated from the work units they complete. Each type of job is assigned a number of units. During the relevant period, POVs received an additional \$0.82 per unit to cover the cost of using their personal vehicles. (D&O 6 (R. 346); Tr. 17-18, 26, 42-43.)

Technicians are also expected to sell Smart Home Services (“SHS”), such as television and stereo installation, and associated accessories. AEI monitors SHS sales and requires technicians to achieve quarterly sales goals (a \$10-per-service-call average as of November 2014). Technicians receive notifications when they are not on track to meet quarterly goals. Supervisors can informally counsel technicians whose performance is lacking by coaching them, doing “ride-alongs,” or issuing “counseling statements” in which technicians commit to increasing sales by the end of the quarter. (D&O 6 (R. 346); GCX 8 (R. 219-75), GCX 12 (R. 293-94), Tr. 19-21, 41, 44-47, 70-71, 109-110.)

**B. DeCommer Meets All Sales Goals**

POV James DeCommer worked at the Byron Center from August 2006 until December 2014. He was consistently one of AEI’s most productive employees and never missed a quarterly SHS goal. Throughout 2014, DeCommer received only one notification, in mid-September, that his sales were not on track for the quarterly goal. He accelerated his sales and ultimately exceeded the goal. (D&O 6 (R. 346); GCX 11 at 3 (R. 287), Tr. 13-14, 20-21, 41.)

In October 2014, DeCommer broke the national SHS sales record. His November sales were lower but still exceeded requirements.<sup>2</sup> (D&O 6 & n.7 (R.

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<sup>2</sup> DeCommer (Tech #0639) sold \$1288 of SHS over 92 calls in November, so \$14 per call. (GCX 8 at 48, 51 (R. 266, 269), Tr. 49, 63-64.) The figures that AEI

346 & n.7); Tr. 39-40, 47-49, 91-93.) When approached by General Manager Victor Humphrey about that decline in sales, DeCommer stated that he was not interested in breaking SHS records anymore because increasing SHS sales decreased his pay by reducing time spent accruing service-call work units. (D&O 6-7 (R. 346-47); Tr. 40-41.) DeCommer was not counseled or disciplined in November or December for his declining SHS sales or any other reason. (D&O 8 (R. 348); Tr. 109.)

**C. DeCommer Discusses Compensation-System Changes with Coworkers and Conveys POVs' Concerns to AEI; AEI Discharges DeCommer**

In late November, DeCommer heard AEI was considering changing POV-vehicle compensation from \$0.82 per unit worked to \$0.52 per mile traveled. Robert Robinson, director of field operations, confirmed that the change was under consideration. DeCommer shared that information with several coworkers, many of whom worried that the change would decrease their earnings, and voiced his and his coworkers' concerns to Humphrey several times. (D&O 7 (R. 347); Tr. 21-24, 29, 43, 117, 121.)

On December 5, DeCommer sent Robinson a text message explaining that the new formula would cause DeCommer to lose, "conservatively," \$10,000 annually. (D&O 7 (R. 347); GCX 4 (R. 206).) Over the following days,

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attributes to DeCommer for the weeks ending November 7 and 14, 2014 (Br. 15), belong to Robert Johnson (Tech #3639). (GCX 8 at 3, 48 (R. 221, 266).)

DeCommer repeatedly told Robinson that POVs could lose up to 20% of their income under the proposed system. On December 10, Robinson informed DeCommer that AEI would implement the mileage-based formula. (D&O 7 (R. 347); GCX 6 at 2 (R. 211), Tr. 25-26, 29.)

On December 12, DeCommer approached Robinson in front of other technicians and asked for an update on the new system. Robinson suggested that they “talk outside.” (D&O 7 (R. 347); Tr. 27-29.) Once away from other employees, Robinson told DeCommer, “I don’t want you talking to any of the other technicians about this; if you have any concerns or questions, I want you to direct them to myself or to Mr. Humphrey.” (*Id.*) DeCommer reiterated that the new system was “unfair” and that AEI was “expecting us [POVs] to pay for our own expenses.” (*Id.*) Despite Robertson’s admonition, DeCommer continued to discuss the matter with other POVs. (*Id.*)

In response to DeCommer’s complaints, Robertson offered to set up a call with Chief Financial Officer Neal Maccoux. The call took place on December 16, with Humphrey in attendance. During the call, DeCommer disputed AEI’s estimates of POV income under the new system. (D&O 7 (R. 347); Tr. 30-31, 52-53, 105-06.) He explained that he would lose \$7000 to \$10,000 annually, and represented that other POVs “had done their own figures and found that they would lose quite a bit of money as well.” (D&O 7 (R. 347); Tr. 32.) At

Maccoux's request, DeCommer agreed to provide his calculations. (D&O 7 (R. 347); Tr. 33-34, 53-54.) Afterward, DeCommer briefed several technicians about the call and e-mailed AEI's president, Tom Burgess, detailing how the new system would decrease POV income and drive POVs to use company cars or leave AEI. (D&O 7 (R. 347); GCX 5 at 1-2 (R. 207-08), Tr. 34-36.)

On December 18, Humphrey pulled DeCommer into his office and said, "our relationship is not working out," then discharged DeCommer. (D&O 8 (R. 348); Tr. 36-38, 98.) When DeCommer asked if his termination had anything to do with his job performance, Humphrey responded: "no, our relationship is not working out," an explanation Robinson later reiterated. (D&O 8 (R. 348); Tr. 36-39.) DeCommer's formal separation document listed "Relationship is not working out" as the "Reason for Separation," specifying that DeCommer "[d]id not work to his potential in [SHS] consistently." (D&O 8 (R. 348); GCX 7 (R. 218), Tr. 61.)

#### **D. AEI's Arbitration Agreement**

AEI requires that its employees sign an Open Door Policy and Arbitration Program ("the Agreement") which provides that, at the election of AEI or the employee, all employment-related disputes must be resolved "exclusively through binding arbitration." (D&O 6 (R. 346); GCX 3 (R. 203-05), Tr. 16-17.) Such claims "may not be arbitrated as a class action, also called 'representative' or

‘collective’ actions, and ... may not otherwise be consolidated or joined with the claims of others.” (D&O 1, 6 (R. 341, 346); GCX 3 at 1-2 (R. 203-04).)

### **III. THE BOARD’S DECISION AND ORDER**

On February 22, 2016, the Board (Chairman Pearce and Member McFerran; Member Miscimarra, concurring in part and dissenting in part) issued a Decision and Order finding that AEI violated Section 8(a)(1) of the NLRA by requiring employees to resolve all employment-related disputes through individual arbitration, prohibiting employees from discussing compensation-related matters and other information, forbidding DeCommer from discussing the new compensation system with coworkers, and discharging DeCommer for engaging in protected activity. Member Miscimarra dissented from the finding that the Agreement was unlawful. (D&O 1, 3-4 & n.7 (R. 341, 343-44 & n.7).)

The Board’s Order requires AEI to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the NLRA. Affirmatively, the Order requires AEI to: rescind or revise its confidentiality rule and inform employees of the change; rescind or revise the Agreement to “make clear to employees that [it] does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums”; notify all current and former employees bound by the

Agreement of the change; offer DeCommer full reinstatement to his former job and make him whole for any loss of earnings and other benefits suffered as a result of AEI's actions; remove any reference to DeCommer's discharge from AEI's files; and post a remedial notice. (D&O 2-3 (R. 342-43).)

### **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 AEI'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 induce employees to waive their Section 7 rights prospectively in individual agreements. Such waivers violate Section 8(a)(1) of the NLRA, which bars interference with Section 7 rights. Accordingly, AEI's maintenance of the Agreement, which requires employees to arbitrate all employment-related disputes individually, violates the NLRA.

The Board also correctly found that the FAA does not mandate enforcement of the Agreement. Because the Agreement violates the NLRA, it is exempted from enforcement under the FAA's saving clause, which provides that arbitration

agreements are subject to general contract defenses such as illegality. The Agreement is properly subject to the saving clause because it violates the NLRA for reasons that are unrelated to arbitration and have consistently been applied to various types of individual contracts. The Supreme Court's FAA jurisprudence does not compel a different result.

The Board is entitled to summary enforcement of its finding that AEI maintained an unlawfully overbroad confidentiality rule. Substantial evidence supports its finding that AEI violated the NLRA by barring DeCommer from discussing changes in compensation with coworkers, and AEI fails to show that the credibility finding underlying that violation lacks any rational basis. Finally, ample evidence supports the Board's finding that AEI unlawfully discharged DeCommer for engaging in protected conduct, and AEI's purported justification for the discharge is patently pretextual.

## ARGUMENT

### I. THE BOARD REASONABLY FOUND THAT AEI VIOLATED SECTION 8(a)(1) OF THE NLRA BY MAINTAINING AN AGREEMENT THAT BARS EMPLOYEES FROM PURSUING WORK-RELATED CLAIMS CONCERTEDLY

#### A. Standard of Review

In enacting the NLRA, Congress established the Board and charged it with primary authority to interpret and apply that 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 “the statutory text forecloses” that interpretation) (reaffirming *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996) (Board “need not show that its construction is the *best* way to read the statute”); *accord Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 304 (6th Cir. 2012) (“[W]e uphold the Board’s interpretation of the [NLRA] as long as it is a permissible construction of the statute.” (quotation mark and citation omitted)). The Court does not defer to the Board’s interpretation of statutes other than the NLRA. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002).

**B. 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 engage in *other concerted activities* for the purpose of collective bargaining or other *mutual aid or protection*, and ... to refrain from any or all of such activities.” 29 U.S.C. § 157 (emphases added). As explained below, courts have long upheld the Board’s construction of Section 7 as protecting the concerted pursuit of work-related legal claims, consistent with the language and purposes of the NLRA. That construction falls squarely within the Board’s expertise and its responsibility for delineating federal labor law generally, and Section 7 in particular. *See NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (noting that “the task of defining the scope of [Section] 7 ‘is for the Board to perform in the first instance as it considers the wide variety of cases that come before it’” (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978))); *accord NLRB v. Honda of Am. Mfg., Inc.*, 73 F. App’x 810, 813 (6th Cir. 2003).

Central to this case is the Board’s holding that the right of employees to engage in concerted activity for mutual aid or protection—the “basic premise” upon which our national labor policy has been built, *Murphy Oil*, 2014 WL 5465454, at \*1—includes concerted *legal* activity. The reasonableness of the Board’s view was confirmed by the Supreme Court in *Eastex*, 437 U.S. at 565-66 & nn.15-16. In that case, the Court recognized that Section 7’s broad guarantee

reaches beyond immediate workplace disputes to encompass employees’ efforts “to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship,” including “through resort to administrative and judicial forums.” *Id.* at 565-66 & n.15.<sup>3</sup>

Indeed, as *Eastex* notes, for decades the Board has held concerted legal activity to be protected. *Id.* That line of cases dates back to *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-50 (1942), in which the Board found protected three employees’ joint lawsuit filed under the Fair Labor Standards Act (“FLSA”). It continues, unbroken and with court approval, through modern NLRA jurisprudence. *See, e.g., Morris v. Ernst & Young, LLP*, No. 13-16599, slip op. at 6 (9th Cir. Aug. 22, 2016) (“[E]mployees have the right to pursue work-related legal claims together.” (citations omitted)); *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...”); *United Parcel Serv., Inc.*, 252 NLRB 1015, 1018,

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<sup>3</sup> *Eastex* bears far more resemblance to this case than the Chamber (C-Br. 13 n.6) acknowledges; the employer in *Eastex* prospectively barred employees from engaging in Section 7 activity—just as AEI did here. 437 U.S. at 561 (banning employees from distributing protected literature).

1026 & n.26 (1980) (wage-related class action), *enforced*, 677 F.2d 421 (6th Cir. 1982).<sup>4</sup>

The Board’s holding that Section 7 protects concerted legal activity furthers the policy objectives that guided Congress in passing the NLRA. The NLRA protects collective rights “not for their own sake but as an instrument of the national labor policy of minimizing industrial strife.” *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975). Protecting employees’ ability to resolve workplace disputes collectively in an adjudicatory forum effectively serves that purpose because collective lawsuits are an alternative to strikes and other disruptive protests. *Horton*, 357 NLRB at 2279-80; *see Salt River Valley Water Users’ Ass’n v. NLRB*, 206 F.2d 325, 328 (9th Cir. 1953) (in response to dissatisfaction with wages, employee collected signatures to represent coworkers in negotiations or FLSA litigation). Conversely, denying employees access to concerted litigation “would only tend to frustrate the policy of the [NLRA] to protect the right of workers to act together to better their working conditions.” *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962).

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<sup>4</sup> *Accord Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188-89 (D.C. Cir. 2000) (Section 7 protects concerted petitions for injunctions against workplace harassment); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) (Section 7 protects concerted labor-related lawsuit unless employees act 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).

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 in *Salt River* upheld the Board’s holding that Section 7 protected employees’ efforts to exert group pressure on their employer to redress work-related claims through resort to legal processes. 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 that Congress intended NLRA to remedy “widening gap between wages and profits” (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 Federal Rule of Civil Procedure 23 or another statutory collective-action provision. *Murphy Oil*, 2014 WL 5465454, at \*6 n.30, \*10; *accord Morris*, slip op. at 10 n.3 (“Rule 23 is

not the source of employee rights; the NLRA is.”). Thus, the Board’s position is not impaired by recognizing that Rule 23 is a procedural device (Br. 25; C-Br. 15) that does not “establish an entitlement to class proceedings for the vindication of statutory rights.” *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).<sup>5</sup> The substantive right at issue is the right the NLRA affords 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). What the NLRA prohibits “is unilateral action, by an employer, that purports to completely deny employees access to class, collective, or group procedures that are otherwise available to them under statute or rule.” *Id.* at \*18.<sup>6</sup>

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<sup>5</sup> The Chamber also argues that the Supreme Court has rejected the notion that *all* litigants have a generalized “nonwaivable ... opportunity” to use class mechanisms. (C-Br. 15 n.8 (quoting *Italian Colors*, 133 S. Ct. at 2310).) But that language is not inconsistent with the Supreme Court’s recognition in *Eastex* that *some* litigants—those covered by the NLRA—have a Section 7 right to engage in concerted legal activity. *Italian Colors* thus does not undermine the Board’s interpretation of the NLRA as providing a right to access collective procedures without employer interference.

<sup>6</sup> Nor does it matter that modern class-action procedures were not available in 1935 when the NLRA was enacted, as AEI and the Chamber both claim. (Br. 27; C-Br. 13-14 & n.7). AEI’s narrow focus on class procedures (Br. 25-26) should not create the impression that concerted legal action is a recent development anachronistically imported into labor law. The procedural device of joinder, which the Agreement also bars, existed in 1935, and collective claims of various forms long predate Rule 23. *See Lewis*, 823 F.3d at 1154. Indeed, as noted, the Board has long interpreted Section 7 as protecting collective, work-related legal claims.

In sum, the Board has reasonably construed Section 7 as guaranteeing employees the option of resorting to concerted legal claims to advance work-related concerns. That construction is supported by longstanding Board and court precedent, none of which AEI 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.

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

Section 8(a)(1) of the NLRA makes it unlawful for employers to "interfere with employees exercising the right guaranteed them by [Section] 7 ... to act in concert for mutual aid and protection." *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 870 (6th Cir. 1995) (citing 29 U.S.C. § 158(a)(1)). A workplace rule or policy that explicitly restricts Section 7 activity is thus 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). Mere maintenance of an unlawful rule constitutes an unfair labor practice. *Lutheran Heritage*, 343 NLRB at 649; see also *NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 481-83 (1st Cir. 2011) (applying work-rule

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*See supra* pp. 14-15. In any event, the NLRA was drafted to allow the Board to respond to new developments when interpreting the statute. *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").

analysis to terms of employment contract). Applying that standard, the Board reasonably found that AEI'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 provides that all employment-related disputes must be resolved "exclusively through binding arbitration" and "may not be arbitrated as a class action, also called 'representative' or 'collective' actions, [or] otherwise be consolidated or joined with the claims of others." (D&O 1 (R. 341); GCX 3 at 1 (R. 203).) By requiring employees to renounce all collective legal action in favor of individual arbitration, the Agreement restrains employees from exercising their long-recognized Section 7 right to concertedly enforce employment laws, in violation of Section 8(a)(1).

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

As the Board explained in *Horton*, 357 NLRB at 2280-81, and *Murphy Oil*, 2014 WL 5465454, at \*1, 6, longstanding Board and court precedent establish that restrictions on Section 7 rights are unlawful even if, as 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 Morris*, slip op. at 12; *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; *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”). Similarly, in *NLRB v. Stone*, the Seventh Circuit held that individual contracts requiring employees to adjust their work-related grievances individually “constitute[] a violation of the [NLRA] per se,” even when “entered into without coercion.” 125 F.2d 752, 756 (7th Cir. 1942). 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 right to file any lawsuit, unfair-labor-practice charge, or other legal action).<sup>7</sup>

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. Concerted activity—of unorganized workers, in particular—often arises spontaneously when employees are presented with actual workplace problems and have to decide among themselves how to respond. *See, e.g., Wash. Aluminum*, 370 U.S. at 14-15 (concerted activity spurred by extreme cold in plant); *Salt River Valley*, 206 F.2d at 328 (concerted activity prompted by violations of minimum-wage laws). The decision whether to collectively walk out 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 refrain from *any* future concerted activity, regardless of the circumstances. *See Nijjar Realty*,

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<sup>7</sup> Collective waivers negotiated on behalf of employees by their exclusive bargaining representative, by contrast, are permissible. For example, a union may waive employees’ right to engage in an economic strike, for the term of a collective-bargaining agreement, provided 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 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; *Horton*, 357 NLRB at 2286.

*Inc.*, 363 NLRB No. 38, 2015 WL 7444737, at \*5 (Nov. 20, 2015) (noting 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”), *pet. 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 Bd., Textile Workers Local 1029*, 409 U.S. 213, 214-18 (1972) (Section 7 protects right of employees who resign from union not to take part in strike they once supported). By the same token, employees must be able to decide whether “to engage in ... concerted activity which they decide is appropriate,” *Plastilite Corp.*, 153 NLRB 180, 183 (1965), *enforced in relevant part*, 375 F.2d 343 (8th Cir. 1967); *see also Serendippity-Un-Ltd.*, 263 NLRB 768, 775 (1982) (same), when the opportunity for such activity arises, even after previously deciding not to do so when circumstances were different. *See Pattern Makers’ League of N. Am. v. NLRB*, 473 U.S. 95, 101-07 (1985) (union cannot maintain rule prospectively restricting employee resignations); *Mission Valley Ford Truck Sales*, 295 NLRB 889, 892 (1989) (employer cannot 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*, impair the “full

freedom” of signatory employees to decide, at the appropriate time, whether to participate in concerted activity. 309 U.S. at 361-62 (quoting 29 U.S.C. § 151).

The fact that Section 7 also protects employees’ “right to refrain” from concerted activity does not undermine the Board’s rationale. Like the choice to engage in concerted activity, the right to refrain belongs to each employee to exercise in the context of a concrete workplace dispute, free from employer interference. Under the Board’s rule, employees remain free to refrain from concerted legal action, either by choosing not to participate in a particular action, or by pursuing their grievances individually. *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. 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 employees’ options to comparatively more disruptive forms of concerted activity at a time when workplace tensions are high and employees are deciding which, if any, concerted response to pursue. As the Board has explained, *Horton*, 357 NLRB at 2279-80, the peaceful resolution of labor disputes is a core NLRA objective, and that objective is ill-served by individual agreements that prospectively waive

employees' right to consider the option of concerted legal action along with other collective means of advancing their interests as employees.<sup>8</sup>

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 firmly grounded in Board and court precedent, none of which AEI addresses in its brief. In effect, AEI concedes the NLRA violation, thereby relying solely on its claim that the FAA's mandate enforcing arbitration agreements validates the Agreement's otherwise unlawful waiver. But as explained more fully below, AEI's Agreement is not entitled to enforcement under the FAA. AEI 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)).

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<sup>8</sup> The Board's findings that Section 7 is critical to the NLRA and encompasses 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; *see generally* Note, *Deference & the Federal Arbitration Act: The NLRB's Determination of Substantive Statutory Rights*, 128 HARV. L. REV. 907, 921 (2015) ("[The FAA] context does not alter the conclusion that ... the NLRB's determination is an interpretation of the statute the agency administers and is thus within *Chevron's* scope.").

**D. The FAA Does Not Mandate Enforcement of Arbitration Agreements That Violate the NLRA by Prospectively Waiving Section 7 Rights**

AEI's principal defense is that the FAA precludes enforcement of the Board's Order. But that defense disregards the settled principle that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see also POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236-39 (2014). As demonstrated below, agreements that are unlawful under the NLRA are exempted from enforcement by the FAA's saving clause. The Board's holding to that effect in *Horton* and *Murphy Oil*, applied here, fully implements both the NLRA and the FAA and is consistent with Supreme Court precedent interpreting both statutes.

**1. Because the Agreement is illegal under the NLRA, it is exempted from enforcement by the FAA's saving clause**

Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, *save* upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). That enforcement mandate, with its saving-clause exception, "reflect[s] both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal quotations omitted). "[C]ourts must [therefore] place arbitration

agreements on an equal footing with other contracts, and enforce them according to their terms.” *Id.* (internal quotations omitted); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (FAA’s purpose is “to make arbitration agreements as enforceable as other contracts, but not more so”). Under the 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 prevent enforcement. The same is true of ostensibly neutral defenses “that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Concepcion*, 563 U.S. at 339.

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

As described above (pp. 20-25), 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 pursue concerted legal claims are unlawful even when unconnected to an agreement to arbitrate. *See LogistiCare Sols., Inc.*, 363 NLRB No. 85, 2015 WL 9460027, at \*1 (Dec. 24, 2015), *petition for review filed*, 5th Cir. No. 15-60029; *Convergys Corp.*, 363 NLRB No. 51, 2015 WL 7750753, at \*1 & n.3 (Nov. 30, 2015), *petition for review filed*, 5th Cir. No. 15-60860. That unbroken line of precedent dates from shortly after the NLRA's enactment, demonstrating that the rule does not affect only arbitration agreements or "derive [its] meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339. Indeed, as the Ninth Circuit found in *Morris*, the illegality of a concerted-action waiver under the NLRA "has nothing to do with arbitration as a forum." Slip op. at 16. "The same provision in

a contract that required court adjudication as the exclusive remedy would equally violate the NLRA.” *Id.* at 14.

Moreover, unlike the courts, whose hostility to arbitration prompted Congress to enact 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 *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.”). And to the extent that an employer agrees that employees may bring collective claims in arbitration, the Board has acknowledged that the employer may bar its employees from bringing such collective claims in court. *SolarCity Corp.*, 363 NLRB No. 83, 2015 WL 9315535, at \*5 n.15 (Dec. 22, 2015), *pet. for review filed*, 5th Cir. No. 16-60001 (stayed pending resolution of *Murphy Oil*). Protected concerted activity, not arbitration, is thus the Board’s concern. 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, when an actual workplace dispute arises, whether to join

others in seeking to enforce their employment rights. *Horton*, 357 NLRB at 2278-80.

Consistent with the Board's analysis in *Horton* and *Murphy Oil*, the Seventh and Ninth Circuits recently held that an arbitration agreement waiving employees' Section 7 right to engage in concerted action, like the Agreement here, "[met] the criteria of the FAA's saving clause for nonenforcement." *Lewis*, 823 F.3d at 1157; *see also Morris*, slip op. at 15-18. In coming to that conclusion, the courts agreed with the Board that contracts restricting Section 7 activity are illegal. *Lewis*, 823 F.3d at 1157, 1161; *accord Morris*, slip op. at 21 (joining *Lewis* in holding FAA prevents enforcement of contract waiving Section 7 rights). Both also noted that, rather than embodying hostility, the NLRA does not "disfavor" arbitration as a mechanism of dispute resolution. *Morris*, slip op. at 24; *Lewis*, 823 F.3d 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's finding that AEI violated the NLRA by maintaining the Agreement, which requires individual arbitration of all work-related claims, adheres to the FAA policy of enforcing arbitration agreements on the same terms as other contracts. There is no

conflict between either the express statutory requirements, or animating policy considerations, of the FAA and NLRA on this point.<sup>9</sup>

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

AEI is mistaken in claiming that the Supreme Court’s FAA jurisprudence forecloses the Board’s position. (Br. 22-25; *see also* C-Br. 3-4.) Although the Supreme Court has enforced agreements requiring individual arbitration in non-NLRA contexts, it has never considered whether the FAA requires enforcement of such agreements notwithstanding Section 7’s protection of employees’ right to concerted pursuit of work-related claims. Nor has the Court ever enforced an arbitration agreement that violates a federal statute—as the Agreement violates Section 8(a)(1). For a court to find that an unlawful contract under the NLRA does not fit within the FAA’s saving clause would be to disregard the settled principle that courts should treat both co-equal statutes as effective. *Morton*, 417 U.S. at 551.

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<sup>9</sup> For that reason, it is unnecessary to reach arguments that the NLRA does not contain a “contrary congressional command” overriding the FAA. (Br. 22, 24, 27; C-Br. 10-25.) 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; *see also* *Lewis*, 823 F.3d at 1157 (finding “no conflict between the NLRA and the FAA, let alone an irreconcilable one”); *accord* *Morris*, slip op. at 20.

No Supreme Court FAA case—and certainly none cited by AEI (Br. 22-25)—involves an arbitration agreement that impairs core provisions of another federal statute, much less directly violates that statute. Instead, the Court has enforced arbitration agreements over statutory challenges only where the agreements were consistent with the animating purposes of those particular statutes. For example, in *Gilmer v. Interstate/Johnson Lane Corp.*, which involved a challenge to arbitration of claims under the Age Discrimination in Employment Act (“ADEA”), the Court determined that Congress’ purpose in enacting the ADEA was “to prohibit arbitrary age discrimination in employment.” 500 U.S. 20, 27 (1991) (citation omitted). Because the substantive rights of individual employees to be free of age-based discrimination could be adequately vindicated in individual arbitration, the Court held that an arbitration agreement could be enforced. The Court rejected arguments that ADEA provisions affording a judicial forum and an optional collective-action procedure precluded enforcement of the arbitration agreement, explaining that Congress did not “intend[] the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum.” *Id.* at 29, 32 (second alteration in original) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).<sup>10</sup>

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<sup>10</sup> The Supreme Court has consistently maintained that same analytical focus on

Unlike the statutory provisions at issue in the Supreme Court’s FAA cases—none of which involves a statute whose principal objective includes 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 Section 7 rights as “fundamental”). Under the mode of statutory analysis used in cases like *Gilmer*, that is a crucial distinction. As the Board explained in *Murphy Oil*, “[t]he core objective of the [NLRA] is the protection of workers’ ability to act in concert, in support of one another.” 2014 WL 5465454, at \*1; *see also Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (describing NLRA as “designed to ... encourag[e] employees to promote their interests *collectively*”).

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; *accord Morris*, slip op. at 19 (“Without § 7, the [NLRA]’s entire structure and policy

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

flounder.”) 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, *id.* § 159, and Section 10 empowers the Board to prevent violations of Section 8, *id.* § 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.<sup>11</sup>

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. And Congress expressly protected that right from employer interference in Section 8(a)(1). Therefore, an arbitration agreement that precludes employees

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<sup>11</sup> The right to engage in collective action for mutual protection is not only critical to the NLRA, but also a “basic premise” of national labor policy generally. *Murphy Oil*, 2014 WL 5465454, at \*1. For example, in the Norris-LaGuardia Act, enacted three years before the NLRA, Congress declared unenforceable “[a]ny undertaking or promise” in conflict with the federal policy of protecting employees’ freedom to act concertedly for mutual aid or protection. 29 U.S.C. § 102, 103. Congress also barred judicial restraint of concerted litigation “involving or growing out of any labor dispute” based on employer-employee agreements. *Id.* § 104.

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 Italian Colors*, 133 S. Ct. at 2310; *Mitsubishi Motors*, 473 U.S. at 637 n.19; *accord Morris*, slip op. at 18.

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 AEI, a different result is warranted.<sup>12</sup>

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<sup>12</sup> 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 CROA); *Gilmer*, 500 U.S. at 23 (age-

The Chamber’s (C-Br. 8-10) reliance on *Concepcion* to challenge the Board’s saving-clause analysis is also flawed. *See also* Br. 26-27 (citing Fifth Circuit’s reliance on *Concepcion* to reject saving-clause argument in *Horton*, 737 F.3d at 359-60). As described above (pp. 26-30), the Board’s rule prohibiting prospective waivers of Section 7 rights 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 unconscionability principles that, as applied, 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. Finding that this application to arbitration agreements of a non-statutory state policy of facilitating low-value claims stood “as an obstacle to the accomplishment of the FAA’s objectives,” the Court declined to read the saving clause to protect it. *Id.* at 340, 343. Later, in *Italian Colors*, the Court applied *Concepcion* to strike down a similar, *federal-court-imposed* policy that sought to ensure an “affordable procedural path” to vindicate claims by requiring that collective litigation be available when individual arbitration would be prohibitively expensive. 133 S. Ct.

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discrimination claim by manager); *Rodriguez de Quijas*, 490 U.S. at 482-83 (investor claims under Securities Act).

2304. Neither holding suggests that the FAA mandates enforcement of a contract that directly violates a co-equal federal statute like 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 *Horton* read *Concepcion* expansively as precluding the Board’s *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*, 823 F.3d at 1158; *see also Morris*, slip op. at 23-24 (contrasting *Concepcion* and *Italian Colors*, which “held that arguments about the adequacy of arbitration necessarily yield to the policy of the FAA,” with the Board’s rule, which “has nothing to do with the adequacy of arbitration proceedings).

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. 27-29), 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.<sup>13</sup>

That contrasts with the California rule that the 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.” *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(a)(1)’s ban on prospective restrictions of Section 7 rights in a 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 the Board ever required class procedures in arbitration, as the California rule did. Should the employer voluntarily agree to arbitrate employee claims on a collective basis, the Board acknowledges that the employer may legitimately restrict employees from exercising their collective-litigation rights in

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<sup>13</sup> 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).

court. *SolarCity*, 2015 WL 9315535, at \*5 n.15. But to the extent that the employer does not agree that joint, class, or collective claims may be brought in arbitration, the Board acknowledges an employer’s right “to insist that *arbitral* proceedings be conducted on an individual basis,” so long as employees remain free to bring concerted actions in another forum. *Horton*, 357 NLRB at 2288.<sup>14</sup>

AEI 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

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<sup>14</sup> Thus, there is no basis for the Chamber’s claim that “conditioning the enforcement of arbitration provisions on the availability of class procedures would lead employers to abandon arbitration altogether....” (C-Br. 26 (footnote omitted).) Moreover, to the extent the Chamber claims that arbitration is really more advantageous to employees (*id.* at 27-30), its views of employees’ best interests are appropriately discounted. *See Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (“[t]he Board is entitled to suspicion” regarding employer’s “benevolence as its workers’ champion”).

In any event, nothing in the Board’s rule precludes employees from deciding for themselves, when a grievance arises, whether arbitration or collective litigation is the better option. In that context, Section 7 gives employees the right to decide whether to pursue individual arbitration or to forego that claimed advantage in order to benefit other employees or to strengthen the cause of employees generally. *See, e.g., United Servs. Auto. Ass’n*, 340 NLRB 784, 792 (2003) (employee opposed employer policy “solely for the benefit of her fellow employees” when she would not be personally affected), *enforced*, 387 F.3d 908 (D.C. Cir. 2004); *Caval Tool Div., Chromalloy Gas Turbine Corp.*, 331 NLRB 858, 862-63 (2000) (“[A]n employee who espouses the cause of another employee is engaged in concerted activity, protected by Section 7...”), *enforced*, 262 F.3d 184 (2d Cir. 2001); *accord NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-06 (2d Cir. 1942) (worker solidarity established by employees aiding aggrieved individual who has the only “immediate stake in the outcome” enlarges employees’ power to secure redress for their grievances and “is ‘mutual aid’ in the most literal sense”).

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 *Horton* based on cases holding 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 that a judge-made state rule did not fit within the saving clause, *id.* at 358-60 (citing *Concepcion*, 563 U.S. 333). Those cases do not answer the materially different question of whether the NLRA protects such a right. The Seventh and Ninth Circuits, by contrast, recognized that Section 7 affords statutory employees a substantive right to engage in collective litigation to enforce workplace statutes. *Morris*, slip op. at 6, 13; *Lewis*, 823 F.3d at 1160. Those courts 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*, 823 F.3d at 1158; *see also Morris*, slip op. at 16.<sup>15</sup>

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<sup>15</sup> While other circuit courts have rejected the Board’s *Horton* position in non-Board cases, 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, 1053-55 (8th Cir. 2013) (finding FLSA did not contain congressional command barring enforcement of arbitration agreement); *Sutherland v. Ernst &*

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

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*Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013) (per curiam) (rejecting citation to Board's *Horton* decision based on *Owen*, without analysis). The Eighth Circuit's decision in *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772, 775-76 (8th Cir. 2016), relies on *Owen* to reject *Horton* in a Board case, but adds no new rationale. AEI's reliance (Br. 28 n.3) on *Walthour v. Chipio Windshield Repair*, 745 F.3d 1326 (11th Cir. 2014) and *Richards v. Ernst & Young, LLP*, 744 F.3d 1072 (9th Cir. 2013), is equally misplaced. In *Walthour*, the court rejected claims that the FLSA overrides the FAA's enforcement mandate, but did not reach the NLRA issue. 745 F.3d 1334-36. And in *Richards*, the court simply held that the plaintiff had waived her defense that an arbitration agreement was unlawful under the Board's *Horton* decision; the court cited various decisions either rejecting or applying *Horton*'s rationale, but did not otherwise discuss *Horton* in its analysis. 744 F.3d 1075 & n.3. The critical point is that none of those decisions addresses the Board's saving-clause argument. *See Lewis*, 823 F.3d at 1159. District court decisions rejecting the Board's position suffer from the same analytical flaws.

employment statutes and what renders agreements that preclude any collective action unlawful under the NLRA and unenforceable under the FAA.

## **II. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE PORTION OF ITS ORDER RELATED TO ITS FINDING THAT AEI MAINTAINED AN OVERBROAD CONFIDENTIALITY RULE**

The Board found that AEI’s handbook rule prohibiting “[u]nauthorized disclosure of business secrets or confidential business or customer information, including any compensation or employee salary information” is unlawfully overbroad. (D&O 1 n.1, 4 n.7, 6, 8 (R. 341 n.1, 344 n.7, 346, 348); GCX 2 at 28 (R. 191).) Because AEI does not challenge that finding (Br. 19 n.1), the Board is entitled to summary enforcement of that portion of its Order. *See NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 232 (6th Cir. 2000) (employer “effectively admit[s] the truth of” Board findings when it fails to challenge them (citation omitted)).

## **III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT AEI UNLAWFULLY PROHIBITED DeCOMMER FROM DISCUSSING COMPENSATION ISSUES WITH COWORKERS**

Section 8(a)(1) of the NLRA prohibits employers from interfering with employees in the exercise of their Section 7 rights. “A rule prohibiting employees from communicating with one another regarding wages ... undoubtedly tends to interfere with the employees’ right to engage in protected concerted activity.” *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 537 (6th Cir. 2000) (citation

omitted). Robinson admonished DeCommer that he did not “want [him] talking to any of the other technicians about” the new mileage-based compensation system (Tr. 28), thereby plainly interfering with DeCommer’s right to discuss terms and conditions of employment with coworkers. Therefore, substantial evidence supports the Board’s finding that AEI violated Section 8(a)(1). (D&O 7 (R. 347).) *See Frenchtown*, 683 F.3d at 304 (“The Board’s factual findings and its application of the law to those facts are conclusive ‘if supported by substantial evidence on the record considered as a whole.’” (quoting 29 U.S.C. § 160(e))).

AEI’s sole challenge to that unfair-labor-practice finding is that the Board erred by finding that Robinson made the unlawful statement. (Br. 40.) But the Board affirmed the judge’s specific determination to credit DeCommer’s testimony to that effect over Robinson’s denial. (D&O 1 n.1, 7 n.13 (R. 341 n.1, 347 n.13).) And this Court “severely limit[s its] review of credibility determinations and accept[s] those made by the Board unless they have no rational basis.” *Fluor Daniel, Inc. v. NLRB*, 332 F.3d 961, 967 (6th Cir. 2003) (quotation mark and citation omitted). AEI is unable to show that the Board’s credibility finding lacks any rational basis.

The judge, who “was in the superior position of observing the witness’ demeanor,” *V&S ProGalv, Inc. v. NLRB*, 168 F.3d 270, 276-77 (6th Cir. 1999), found DeCommer generally credible. He not only credited specific aspects of

DeCommer's testimony (D&O 6 n.3, 7 nn.9, 12 & 16 (R. 346 n.3, 347 nn.9, 12 & 16)), but also noted several instances where it was corroborated by other witnesses or AEI's position statement (D&O 7 nn.9, 12, 15 (R. 347 nn.9, 12, 15)). AEI argues, misleadingly, that DeCommer said the words "[i]f I remember right" just before describing Robinson's statement. (Br. 17-18.) In fact, DeCommer employed that phrase only after recounting in precise detail the words he and Robinson exchanged. (Tr. 27.) Indeed, DeCommer's slight uncertainty prefaced his answer to a question probing the *location* of their conversation, not Robinson's words, which DeCommer remembered clearly. (Tr. 27-28.) On this record, the Board acted within its discretion in crediting DeCommer over Robinson, and ample evidence thus supports the Board's unfair-labor-practice finding.

#### **IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT AEI UNLAWFULLY DISCHARGED DeCOMMER FOR ENGAGING IN PROTECTED, CONCERTED ACTIVITY**

An employer violates Section 8(a)(1) if it discharges an employee for engaging in protected, concerted activity. *NLRB v. Lloyd A. Fry Roofing Co. of Del.*, 651 F.2d 442, 446 (6th Cir. 1981). In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Supreme Court approved the Board's test, articulated in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 89 (1st Cir. 1981), for determining motivation when an employer asserts that it had a lawful reason for the discharge. Under that

test, a reviewing court must determine whether substantial evidence supports the Board's finding that protected conduct was a "motivating factor" for the discharge. *Transp. Mgmt.*, 462 U.S. at 401; *Ctr. Constr. Co. v. NLRB*, 482 F.3d 425, 435 (6th Cir. 2007).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); accord *NLRB v. Dole Fresh Vegetables, Inc.*, 334 F.3d 478, 484 (6th Cir. 2003). Under the substantial-evidence standard, the Court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera*, 340 U.S. at 488; accord *Dole Fresh Vegetables*, 334 F.3d at 484. "Simply showing that the evidence supports an alternative story is not enough; [the employer] must show that the Board's story is unreasonable." *NLRB v. Galicks, Inc.*, 671 F.3d 602, 608 (6th Cir. 2012).

Evidence that an employee engaged in protected concerted activity of which the employer was aware, and that the employer harbored hostility towards that activity, suffices to show an unlawful motivating factor. *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), clarifying *Transp. Mgmt.*, 462 U.S. at 395, 403 n.7; accord, e.g., *Ctr. Constr.*, 482 F.3d at 435. Once those facts are established, the discharge is unlawful unless the record

as a whole compels acceptance of the employer’s affirmative defense that it would have discharged the employee in the absence of protected conduct. *Transp. Mgmt.*, 462 U.S. at 401-03; *Ctr. Constr.*, 482 F.3d at 435. If the employer’s proffered explanation is pretextual—that is, either false or not in fact relied upon—the violation is deemed proven. *Conley v. NLRB*, 520 F.3d 629, 643 (6th Cir. 2008); *accord Ozburn-Hessey Logistics, LLC, v. NLRB*, \_\_\_ F.3d \_\_\_, 2016 WL 4409353, at \*6-7 (D.C. Cir. Aug. 19, 2016).

Here, ample evidence supports the Board’s findings that DeCommer engaged in protected concerted activity, AEI had knowledge of DeCommer’s protected activity, and that the protected activity motivated AEI to discharge him. Therefore, the Court should enforce the Board’s unanimous finding that AEI violated Section 8(a)(1) by discharging DeCommer. (D&O 1 n.2, 4 n.7, 9-10 (R. 341 n.2, 344 n.7, 349-50).)

**A. DeCommer Engaged in Protected Concerted Activity**

“The Board’s determination that an employee engaged in protected concerted activity is entitled to great deference.” *Main St. Terrace*, 218 F.3d at 540 (citation omitted). Here, DeCommer: (1) discussed shared concerns about the new compensation system with coworkers; and (2) voiced those concerns to management. (D&O 1 n.2 (R. 341 n.2).) Settled precedent defining the contours

of Section 7 supports the Board's finding that both of those activities constitute protected, concerted conduct.

First, Section 7 protects the right of employees to communicate with one another regarding their terms and conditions of employment. *See Main St. Terrace*, 218 F.3d at 537. AEI does not dispute the Board's finding, based on DeCommer's unrebutted testimony, that he repeatedly discussed the new system with coworkers. (D&O 7 & nn.9, 12, 16 (R. 347 & nn.9, 12, 16); Tr. 21-23, 28-29, 32, 35-36.) Those conversations "fit precisely" into the Board's definition of concerted activity. *See Salisbury Hotel, Inc.*, 283 NLRB 685, 686 (1987) (employee's complaints to coworkers were concerted because they "appear[ed] calculated to induce, prepare for, or otherwise relate to some kind of group action" (citation omitted)).

Second, "[i]t is well settled that 'an individual employee may be engaged in concerted activity when he acts alone.'" *Main St. Terrace*, 218 F.3d at 539 (quoting *City Disposal Sys.*, 465 U.S. at 831). The Board has long held, with judicial approval, that concerted activity includes conduct by a single employee, which either seeks to initiate, induce, or prepare for group action, or "bring[s] truly group complaints to the attention of management." *Meyers Indus. (Meyers II)*, 281 NLRB 882, 887 (1986), *enforced sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C.

Cir. 1987); accord *NLRB v. Talsol Corp.*, 155 F.3d 785, 796 (6th Cir. 1998).<sup>16</sup> In other words, “[t]he relevant inquiry ... ‘is whether the employee acted with the purpose of furthering group goals,’” regardless of whether he was expressly appointed by others to represent their interests. *Main St. Terrace*, 218 F.3d at 539 (quoting *Compuware Corp. v. NLRB*, 134 F.3d 1285, 1288 (6th Cir. 1998)).

DeCommer’s complaints to management explicitly sought to further goals common to all POVs. Not only did DeCommer repeatedly reference coworkers, but he also expressly advocated for POVs as a group. For instance, his e-mail to Burgess refers to “povs,” “we,” and “us,” details how the new compensation system will affect “pov [J]ohn [D]oe,” and even discusses the tax implications for POVs who file differently than DeCommer.<sup>17</sup> (GCX 5 at 2 (R. 208).) Similarly, DeCommer told Maccoux that all POVs would be affected and that others had “found that they would lose quite a bit of money as well.” (D&O 7 (R. 347); Tr. 31-32.) That evidence belies AEI’s claim that DeCommer was concerned solely for “his own paycheck.” (Br. 9-10, 34.)

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<sup>16</sup> AEI quotes *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), for the notion that concerted activity must “be engaged in, with, or on the authority of other employees.” (Br. 31.) However, *Meyers II* clarified that a single employee acts concertedly when bringing “truly group complaints to the attention of management.” 281 NLRB at 887.

<sup>17</sup> DeCommer’s use of the best data available to him—his own—to illustrate his points does not mean that he was only concerned for himself, as AEI suggests (Br. 9-10).

Moreover, DeCommer's complaints formed part of a course of conduct that included his indisputably protected conversations with coworkers. (D&O 10 (R. 350).) He not only brought coworkers' concerns to management but also regularly briefed them about managers' responses.<sup>18</sup> (D&O 7 (R. 347); Tr. 23, 28-29, 35-36.) That back-and-forth suggests that employees agreed about the need to press the issue with management and that DeCommer actively encouraged their involvement.<sup>19</sup> *See NLRB v. Evans Packing Co.*, 463 F.2d 193, 194-95 (6th Cir. 1972) (lone employee's complaints to employer about overtime-pay policy were concerted because they reflected common grievances, which he had discussed with coworkers and once raised to employer in their presence); *Salisbury Hotel*, 283 NLRB at 686-87 (employees' complaints showed they agreed "at least tacitly" on common grievance; individual employee's complaints to management were part of concerted effort). Indeed, DeCommer tried to initiate a discussion of the new system with Robinson in front of other employees, but Robinson cut it short. *See, e.g., Cibao Meat Prods.*, 338 NLRB 934, 934 (2003) (employee acted concertedly when protesting new employer policy in front of coworkers), *enforced*, 84 F. App'x 155 (2d Cir. 2004).

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<sup>18</sup> This negates AEI's claim (Br. 34) that other employees were unaware of DeCommer's conversations with management.

<sup>19</sup> Indeed, Humphrey testified that other employees raised the same concerns as DeCommer. (Tr. 115-16.)

The preceding analysis highlights the extent to which the evidence of concerted activity in this case exceeds that of *Manimark Corp. v. NLRB*, 7 F.3d 547 (6th Cir. 1993), on which AEI principally relies (Br. 32-33). In *Manimark*, an employee (Fields) was discharged after voicing two different complaints to management on two separate occasions. The Court found that the first complaint was not concerted because Fields referenced a group concern only “as an afterthought,” after expressing a purely personal complaint, and never mentioned the conversation to other employees, despite management’s invitation that he arrange a group meeting to discuss the group issue. *Id.* at 550-51. As to the second complaint, the Court found no evidence that other employees either shared Fields’s concern or joined in his complaint. *Id.* at 551-52. By contrast, DeCommer discussed the new compensation system with coworkers, approached management multiple times to raise their shared concerns, and repeatedly emphasized the impact of that change on all POVs. In addition, DeCommer reported back to his coworkers about the substance of his conversations with management.<sup>20</sup>

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<sup>20</sup> AEI’s other cases (Br. 34-36) are inapposite. *Hitachi Capital America Corp.*, 361 NLRB No. 19, 2014 WL 3897175 (Aug. 8, 2014), *Salon/Spa at Boro*, 356 NLRB 444 (2010), *Champion Home Builders Co.*, 343 NLRB 671 (2004), *Whittaker Corp.*, 289 NLRB 933 (1988), and *Every Woman’s Place, Inc.*, 282 NLRB 413 (1986), merely demonstrate that evidence of concertedness can take many forms, but do not refute the Board’s finding here. The remaining cases predate the Board’s clarification of the definition of “concerted” in *Meyers I* and *II*.

Nor is there any merit to AEI's argument (Br. 29-30) that the General Counsel's complaint did not properly allege the concerted activity found by the Board. A Board complaint will support an unfair-labor-practice finding "so long as [it] informs the respondent of the acts which constitute the charged unlawful behavior and respondent is given an opportunity to respond." *NLRB v. Scenic Sportswear*, 475 F.2d 1226, 1227 (6th Cir. 1973) (per curiam) (citing *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 350-51 (1938)). Moreover, "the Board may find a violation not alleged in the complaint if the matter is related to other violations alleged ..., is fully and fairly litigated, and no prejudice to the respondent has been alleged or established." *NLRB v. Consol. Biscuit Co.*, 301 F. App'x 411, 423 (6th Cir. 2008) (citation omitted); *see also Nat'l Licorice*, 309 U.S. at 369 (Board may "deal[] adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending ....").

The complaint alleged that AEI unlawfully discharged DeCommer because he and other employees concertedly complained to AEI about the new compensation system. (GCX 1(e) ¶¶ 6-7 (R. 147).) The Board found that AEI unlawfully discharged DeCommer because he discussed "shared concerns" about the new system with coworkers and voiced those concerns to management. (D&O 1 n.2 (R. 341 n.2).) AEI cannot, and does not, deny that those discussions and

complaints were closely related, or that it knew DeCommer’s activities protesting the new system formed the basis of the unlawful-discharge allegation. Nor does AEI dispute the Board’s finding (D&O 1 n.1 (R. 341 n.1)) that the specific issue of whether DeCommer discussed the new system with his coworkers was fully litigated. Finally, AEI does not identify any prejudice it suffered due to the purportedly imprecise complaint allegation—nor could it, having availed itself of the opportunity to except to the judge’s findings and analysis before the Board. *See Consol. Biscuit*, 301 F. App’x at 423 (noting that opportunity to litigate issue before the Board eliminates any remaining prejudice). In sum, AEI cannot credibly maintain that its liability came as a surprise, or that it did not have the opportunity to fully and fairly litigate this issue.

**B. AEI Knew of DeCommer’s Protected Activities**

Ample evidence also supports the Board’s finding (D&O 10, R. 350) that AEI was aware of DeCommer’s protected complaints to management, and discussions with coworkers, regarding the new compensation system. As described, DeCommer repeatedly made explicit and implicit references to his coworkers’ concerns when conveying his complaints to AEI management. Notably, the Board credited DeCommer’s un rebutted testimony that he expressly told CFO Maccoux, in Humphrey’s presence, that he had “talked with other employees” who shared his concerns about the new system. (D&O 7 (R. 347); Tr.

31-32.) Moreover, the Board found that the timing of DeCommer's discharge, just five days after Robinson admonished him against discussing the new system with coworkers, supported a reasonable inference that AEI knew DeCommer continued to engage in such conversations. (D&O 10 (R. 350).)

Therefore, there is no merit to AEI's claim (Br. 36-38) that it was unaware that DeCommer had discussed concerns about the new system with other employees, or that when he approached management alone to complain, he was in fact defending the POVs' collective interest. AEI's only defense consists of arguing that Robinson never told DeCommer to "stop" talking to other employees. (Br. 13-14, 37-38.) That objection does not undermine the weight of the remaining evidence, none of which AEI addresses, that it knew of DeCommer's concerted protected activities.

### **C. AEI Harbored Animus toward DeCommer's Protected Activities**

Because employers seldom admit to unlawful discrimination, courts have long recognized that the Board may rely on circumstantial evidence and inferences reasonably drawn from the totality of the evidence to determine the true motives underlying an employer's actions. *See, e.g., NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941); *Main St. Terrace*, 218 F.3d at 537-38. Circumstantial evidence of unlawful motivation may include the questionable timing of the adverse action, the pretextual (*i.e.*, shifting, contrived, or implausible) nature of the employer's

explanation, the employer's deviation from past disciplinary practices, and the existence of other unfair labor practices during the same period. *See W.F. Bolin*, 70 F.3d at 871; *Mid-Mountain Foods*, 332 NLRB 251 (2000), *enforced mem.* 11 F. App'x 372 (4th Cir. 2001).

The Board found that the timing of DeCommer's discharge, a mere five days after Robinson's distinct, unlawful admonition not to discuss the mileage-based system with other employees, was evidence of unlawful animus. (D&O 10 (R. 350); Tr. 27-28, 36-37.) In that short span of time, DeCommer continued to discuss the new system with coworkers, disputed the accuracy of AEI's calculations to Maccoux and volunteered that he had discussed the new system with other employees, reported back to coworkers about that conversation, and wrote AEI President Burgess a forceful e-mail detailing employees' shared concerns for their livelihood. (D&O 7-8 (R. 347-48); GCX 5 (R. 207-09), Tr. 28-29, 31-34, 35-36.) The fact that DeCommer's discharge occurred on the heels of another unfair labor practice and that flurry of protected activity is grounds enough to establish animus. *See, e.g., NLRB v. Venture Packaging, Inc.*, 923 F.2d 855, 1991 WL 4698, at \*5 (6th Cir. Jan. 18, 1991) (Table) (finding timing of employer's actions sufficient, by itself, to establish unlawful motivation); *NLRB v. Aquatech, Inc.*, 926 F.2d 538, 547 (6th Cir. 1991) (“[T]iming and abruptness of

discharge are persuasive evidence of motivation” (quoting *NLRB v. Advanced Bus. Forms Corp.*, 474 F.2d 457, 465 (2d Cir. 1973))).

The Board also found that AEI’s proffered reason for discharging DeCommer was pretextual, which strongly indicates that the true factor motivating AEI was unlawful animus. The Board cited compelling evidence in support of its pretext finding, specifically that AEI’s explanation was not only vague and shifting, but also implausible and inconsistent with AEI’s treatment of similarly situated employees. (D&O 1 n.2, 10 (R. 341 n.2, 350).)

From the start, AEI has been less than forthcoming in explaining DeCommer’s discharge. When Humphrey broke the news to DeCommer, he said only, “our relationship is not working out.” (D&O 8 (R. 348); Tr. 36-39, 98.) Humphrey wrote those same words in DeCommer’s separation document, along with the notation that DeCommer did not consistently “work to his potential” in SHS, presumably referencing DeCommer’s declining sales. (D&O 8 (R. 348); GCX 7 (R. 218), Tr. 36-38.) In its initial position statement to the Board, AEI continued to claim that it fired DeCommer for “refus[ing] to commit to make a reasonable effort to make SHS sales.” (GCX 6 at 3-4 (R. 212-13).) However, AEI altered its explanation after the Board hearing concluded, and began to claim that it fired DeCommer for explicitly refusing to sell SHS. (Br. 14, 16-17, 38.) Not only is that alleged reason not mentioned on DeCommer’s separation document (GCX 7

(R. 218)), but Humphrey also admitted he never raised it to DeCommer (Tr. 98). Despite this, AEI now insists that DeCommer “was not discharged because he had low [SHS]” (Br. 16), perhaps in tacit acknowledgement that, as discussed below, the evidence does not support a performance-based explanation for DeCommer’s discharge. AEI’s vague and inconsistent explanations support the Board’s finding of unlawful animus. *See W.F. Bolin*, 70 F.3d at 871.

Moreover, the evidence undermines any performance-based explanation for DeCommer’s discharge. DeCommer credibly testified that he asked if his job performance was to blame, and that Humphrey answered, “*no*, our relationship is not working out.” (D&O 8 (R. 348); Tr. 38 (emphasis added).) And even AEI’s sales figures belie its explanation. AEI claims DeCommer did not meet his quarterly sales goals in November (Br. 15, 39), when in fact he was well above the \$10 minimum that month. *See supra* note 2. And while DeCommer’s December sales were below target when he was terminated, there were still two weeks left in which DeCommer could have met his goal, just as he did in September.

Finally, the Board found that DeCommer’s discharge marked a significant departure from AEI’s past disciplinary practices, further demonstrating pretext and suggesting an unlawful ulterior motive. *See W.F. Bolin*, 70 F.3d at 871. The record reflects that AEI typically dealt with SHS and other performance-related issues by coaching failing employees, or giving them notices or ride-alongs, before

resorting to termination. (D&O 6 (R. 346); GCX 11, 12 (R. 285-92, 293-94).) AEI has identified only two other technicians terminated for SHS-related reasons: Greg Behrns and Ryan Myers. (Br. 17.) Both not only had serious, longstanding performance deficiencies, but had repeatedly been warned about those problems. Behrns “[r]efused to perform SHS at job sites” and was coached 13 times—three for SHS-related reasons—between September and December 2014, and Myers “fail[ed] metrics” on a continuing basis, was coached six times (two for low SHS), and had two other “behavior corrections” in November-December alone. (D&O 8 (R. 348); GCX 11 at 3 & 7, 13 at 1 & 3 (R. 287, 291, 295, 297), Tr. 102-03.) By contrast, DeCommer was coached only three times in all of 2014—including just one low-SHS notice that he quickly corrected—and he did not incur any coaching, warning, or other discipline from mid-September until his discharge. (GCX 11 at 3 (R. 287), Tr. 20-21, 41, 109.)

AEI’s attempt to equate DeCommer with Behrns and Myers betrays the “transparently pretextual” nature of its explanation for his discharge. (D&O 10 (R. 350).) AEI’s predicament is that it cannot claim DeCommer was fired for having low SHS because the record shows it handles those problems by coaching employees, not firing them. So, instead, AEI tries to analogize one of its best employees to two of its worst, and claims that all three were fired for the same reason. That charade exposes AEI’s claim for what it is: a transparent attempt to

conceal the fact that DeCommer's protected conduct was the real reason for his discharge.

There is no need for the Court to consider at this juncture whether the record as a whole compels acceptance of the affirmative defense that the employer would have taken the same action regardless of the protected conduct. *Transp. Mgmt.*, 462 U.S. at 401-03; *Ctr. Constr.*, 482 F.3d at 435. That is because the only rationale AEI proffers for DeCommer's discharge is his alleged refusal to sell SHS. (Br. 14, 16-17, 38.) Because substantial evidence supports the Board's finding that AEI's explanation is a mere pretext intended to conceal its true, unlawful motivation, "there is nothing left to balance against the impermissible motive." *Temp-Masters, Inc. v. NLRB*, 460 F.3d 684, 693 (6th Cir. 2006); *see generally Republic Die & Tool Co. v. NLRB*, 680 F.2d 463, 465 (6th Cir. 1982).

In sum, substantial evidence supports the Board's finding that DeCommer engaged in protected, concerted activity, of which AEI was aware. Ample evidence also supports the Board's reasonable inference, based on timing and AEI's pretextual efforts to explain the discharge, that AEI's unlawful animus toward DeCommer's protected conduct was a motivating factor for his termination. Accordingly, the Court should enforce the Board's finding that AEI violated Section 8(a)(1) of the NLRA by discharging DeCommer.

## CONCLUSION

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

Respectfully submitted,

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August 2016

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner	)	No. 16-1385
	)	
v.	)	Board Case No.
	)	07-CA-144404
ALTERNATIVE ENTERTAINMENT, INC.,	)	
	)	
Respondent	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 14,000 words of proportionally spaced, 14-point type, and the word-processing software used was Microsoft Word 2010. The Board further certifies that the electronic version of the Board's brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel, and that the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC  
this 22nd day of August 2016

# **ADDENDUM**

**ADDENDUM**  
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## THE NATIONAL LABOR RELATIONS ACT

### **Section 1 of the NLRA (29 U.S.C. § 151):**

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self- organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

**Section 7 of the NLRA (29 U.S.C. § 157):**

Employees shall have 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 shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

**Section 8(a)(1) of the NLRA (29 U.S.C. § 158(a)):**

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

**Section 10 of the NLRA (29 U.S.C. § 160) provides in relevant part:**

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

\* \* \*

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall

cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner

to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

## **THE FEDERAL ARBITRATION ACT**

### **9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate**

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

## **THE NORRIS-LAGUARDIA ACT**

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

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

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

following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

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

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

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

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

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

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

- (a) Ceasing or refusing to perform any work or to remain in any relation of employment;

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

**FOR PUBLICATION**

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

STEPHEN MORRIS; KELLY  
MCDANIEL, on behalf of  
themselves and all others  
similarly situated,  
*Plaintiffs-Appellants,*

v.

ERNST & YOUNG, LLP; ERNST  
& YOUNG U.S., LLP,  
*Defendants-Appellees.*

No. 13-16599

D.C. No.  
5:12-cv-04964-RMW

OPINION

Appeal from the United States District Court  
for the Northern District of California  
Ronald M. Whyte, Senior District Judge, Presiding

Argued and Submitted November 17, 2015  
San Francisco, California

Filed August 22, 2016

Before: Sidney R. Thomas, Chief Judge and Sandra S.  
Ikuta and Andrew D. Hurwitz, Circuit Judges.

Opinion by Judge Thomas;  
Dissent by Judge Ikuta

**SUMMARY\***

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**Labor Law**

The panel vacated the district court's order compelling individual arbitration in an employees' class action alleging that Ernst & Young misclassified employees to deny overtime wages in violation of the Fair Labor Standards Act and California labor laws.

As a condition of employment, the employees were required to sign agreements that contained a "concerted action waiver" requiring the employees to pursue legal claims against Ernst & Young exclusively through arbitration, and arbitrate only as individuals and in "separate proceedings."

The panel held that an employer violates § 7 and § 8 of the National Labor Relations Act by requiring employees to sign an agreement precluding them from bringing, in any forum, a concerted legal claim regarding wages, hours, and terms of conditions of employment. The panel held that Ernst & Young interfered with the employees' right to engage in concerted activity under the National Labor Relations Act by requiring the employees to resolve all of their legal claims in "separate proceedings." The panel concluded that the "separate proceedings" terms in the Ernst & Young contracts could not be enforced.

The panel held that the Federal Arbitration Act did not dictate a contrary result. The panel held that when an

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\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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arbitration contract professes to waive a substantive federal right, the savings clause of the Federal Arbitration Act prevents the enforcement of that waiver.

The panel vacated the order, and remanded to the district court to determine whether the “separate proceedings” clause was severable from the contract. The panel held that it need not reach plaintiff’s alternative arguments regarding the Norris LaGuardia Act, the Fair Labor Standards Act, or whether Ernst & Young waived its right to arbitration.

Judge Ikuta dissented because she believed that the majority’s opinion violated the Federal Arbitration Act’s command to enforce arbitration agreements according to their terms, was directly contrary to Supreme Court precedent, and was on the wrong side of a circuit split. Judge Ikuta concluded that § 7 of the National Labor Relations Act did not prevent the collective action waiver at issue here, and would hold that the employee’s contract must be enforced according to its terms.

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### OPINION

THOMAS, Chief Judge:

In this case, we consider whether an employer violates the National Labor Relations Act by requiring employees to sign an agreement precluding them from bringing, in any forum, a concerted legal claim regarding wages, hours, and terms and conditions of employment. We conclude that it does, and vacate the order of the district court compelling individual arbitration.

### I

Stephen Morris and Kelly McDaniel worked for the accounting firm Ernst & Young. As a condition of employment, Morris and McDaniel were required to sign agreements not to join with other employees in bringing legal claims against the company. This “concerted action waiver” required employees to (1) pursue legal claims against Ernst & Young exclusively through arbitration and (2) arbitrate only as individuals and in “separate proceedings.” The effect of the two provisions is that employees could not initiate concerted legal claims against the company in any forum—in court, in arbitration proceedings, or elsewhere.

Nonetheless, Morris brought a class and collective action against Ernst & Young in federal court in New York, which McDaniel later joined. According to the complaint, Ernst & Young misclassified Morris and similarly situated employees. Morris alleged that the firm relied on the misclassification to deny overtime wages in violation of the Fair Labor Standards Act (“FLSA”), 29 U.S.C.A. § 201 *et seq.*, and California labor laws.

The case was eventually transferred to the Northern District of California. There, Ernst & Young moved to compel arbitration pursuant to the agreements signed by Morris and McDaniel. The court ordered individual arbitration and dismissed the case. This timely appeal followed.

Morris and McDaniel argue that their agreements with the company violate federal labor laws and cannot be enforced. They claim that the “separate proceedings” clause contravenes three federal statutes: the National Labor Relations Act (“NLRA”), 29 U.S.C. §§ 151 *et seq.*, the Norris LaGuardia Act, 29 U.S.C. § 101 *et seq.*, and the FLSA. Relevant here, Morris and McDaniel rely on a determination by the National Labor Relations Board (“NLRB” or “Board”) that concerted action waivers violate the NLRA. *D.R. Horton*, 357 NLRB No. 184 (2012) (“*Horton I*”), *enf. denied* 737 F.3d 344 (5th Cir. 2013) (“*Horton II*”); *see also* *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) (“*Murphy Oil I*”), *enf. denied* 808 F.3d 1013 (5th Cir. 2015) (“*Murphy Oil II*”).

We have jurisdiction under 28 U.S.C. § 1331 and review the district court’s order to compel arbitration *de novo*. *Balen v. Holland Am. Line, Inc.*, 583 F.3d 647, 652 (9th Cir. 2009).

## II

This case turns on a well-established principle: employees have the right to pursue work-related legal claims together. 29 U.S.C. § 157; *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978). Concerted activity—the right of employees to act *together*—is the essential, substantive right established by the NLRA. 29 U.S.C. § 157. Ernst & Young interfered with that right by requiring its employees to resolve all of their legal claims in “separate proceedings.” Accordingly, the concerted action waiver violates the NLRA and cannot be enforced.

## A

The Supreme Court has “often reaffirmed that the task of defining the scope of [NLRA rights] ‘is for the Board to perform in the first instance as it considers the wide variety of cases that come before it.’” *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (quoting *Eastex*, 437 U.S. at 568). “[C]onsiderable deference” thus attaches to the Board’s interpretations of the NLRA. *Id.* Thus, we begin our analysis with the Board’s treatment of similar contract terms.

The Board has concluded that an employer violates the NLRA

when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other

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working conditions against the employer in any forum, arbitral or judicial.

*Horton I*, 357 NLRB No. 184, slip op. at 1.

The Board’s determination rested on two precepts. First, the Board interpreted the NLRA’s statutory right “to engage in . . . concerted activities for the purpose of . . . mutual aid or protection” to include a right “to join together to pursue workplace grievances, including through litigation.” *Id.* at 2 (interpreting 29 U.S.C. § 157). Second, the Board held that an employer may not circumvent the right to concerted legal activity by requiring that employees resolve all employment disputes individually. *Id.* at 4–5, 13 (interpreting 29 U.S.C. § 158). In other words, employees must be able to initiate a work-related legal claim together in some forum, whether in court, in arbitration, or somewhere else. *Id.* A concerted action waiver prevents this: employees may only resolve disputes in a single forum—here, arbitration—and they may never do so in concert. *Id.*<sup>1</sup>

The Supreme Court has instructed us to review the Board’s interpretations of the NLRA under the familiar two-step framework set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 & n.9 (1984). *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992) (*Chevron* framework applies to NLRB constructions of the

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<sup>1</sup> The contract in *Horton I* required all claims to be heard in arbitration and required the arbitrator to “hear only Employee’s individual claims.” *Horton I*, 357 NLRB No. 184, slip op. at 1. It also contained an express waiver of class or collective proceedings in arbitration. *Id.* Ernst & Young concedes that the “separate proceedings” term in the exclusive arbitration agreements here has the same effect.

NLRA). The Board’s reasonable interpretations of the NLRA command deference, while the Board’s remedial preferences and interpretations of unrelated statutes do not. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143–44 (2002).<sup>2</sup>

Under *Chevron*, we first look to see “whether Congress has directly spoken to the precise question at issue.” *Chevron*, 467 U.S. at 842. In analyzing Congressional intent, we employ the “traditional tools of statutory construction.” *Id.* at 843 & n. 9. We not only look at the precise statutory section in question, but we also analyze the provision in the context of the governing statute as a whole, presuming congressional intent to create a “symmetrical and coherent regulatory scheme.” *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)). If we conclude that “the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842–43.

In this case, we need go no further. The intent of Congress is clear from the statute and is consistent with the Board’s interpretation.

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<sup>2</sup> The Board has both rulemaking and adjudicative powers, 29 U.S.C. § 156, § 160, and it may authoritatively interpret the NLRA through either process. *NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 294 (1974) (concluding that the Board may announce “new principles in an adjudicative proceeding”). Our analysis under *Chevron* does not extend to the Board’s interpretation of statutes it does not administer, to the Board’s interpretation of Supreme Court cases, or to the Board’s remedial preferences.

To determine whether the NLRA permits a total waiver on concerted legal activity by employees, we begin with the words of the statute. The NLRA establishes the rights of employees in § 7. It provides that:

Employees shall have 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

29 U.S.C. § 157.

Section 8 enforces these rights by making it “an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7].” 29 U.S.C. § 158; *see NLRB v. Bighorn Beverage*, 614 F.2d 1238, 1241 (9th Cir. 1980) (describing relationship between sections; § 7 establishes rights and § 8 enforces them).

Section 7 protects a range of concerted employee activity, including the right to “seek to improve working conditions through resort to administrative and judicial forums.” *Eastex*, 437 U.S. at 566; *see also City Disposal Sys.*, 465 U.S. at 835 (“There is no indication that Congress intended to limit [§ 7] protection to situations in which an employee’s activity and that of his fellow employees combine with one another in any particular way.”). Therefore, “a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is ‘concerted activity’ under § 7 of the National Labor Relations Act.” *Brady v. NFL*, 644 F.3d

661, 673 (8th Cir. 2011). So too is the “filing by employees of a labor related civil action.” *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976). Courts regularly protect employees’ right to pursue concerted work-related legal claims under § 7. *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1189 (D.C. Cir. 2000) (“filing a civil action by a group of employees is protected activity” under § 7) (internal quotation marks and citation omitted); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (same).

It is also well-established that the NLRA establishes the right of employees to act in *concert*: “Employees shall have the right . . . to engage in other *concerted* activities for the purpose of *collective* bargaining or other *mutual aid* and protection.” 29 U.S.C. § 157 (emphasis added). Concerted action is the basic tenet of federal labor policy, and has formed the core of every significant federal labor statute leading up to the NLRA. *City Disposal Sys.*, 465 U.S. at 834–35 (describing history of the term “concert” in statutes affecting federal labor policy). Taken together, these two features of the NLRA establish the right of employees to pursue work-related legal claims, and to do so together. The pursuit of a concerted work-related legal claim “clearly falls within the literal wording of § 7 that ‘[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.’” *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975) (quoting 29 U.S.C. § 157). The intent of Congress in § 7 is clear and comports with the Board’s interpretation of the statute.<sup>3</sup>

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<sup>3</sup> *Eastex* clarifies that concerted activity extends to judicial forums, and it does not limit concerted activity to any particular vehicle or mechanism. 437 U.S. at 556 & n.15. Further, we reject the argument that the NLRA cannot protect a right to concerted legal action because Rule 23 class

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The same is true for the Board’s interpretation of § 8’s enforcement provisions. Section 8 establishes that “[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157.” 29 U.S.C. § 158. A “separate proceedings” clause does just that: it prevents the initiation of any concerted work-related legal claim, in any forum. Preventing the exercise of a § 7 right strikes us as “interference” within the meaning of § 8. Thus, the Board’s determination that a concerted action waiver violates § 8 is no surprise. And an employer violates § 8 a second time by conditioning employment on signing a concerted action waiver. *Nat’l Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940) (“Obviously employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree” to waive the statute’s substantive protections); see *Retlaw Broad. Co.*, 310 NLRB no. 160, slip op. at 14 (1993), *enforced*, 53 F.3d 1002 (9th Cir. 1995) (section 8 prohibits conditioning employment on waiver of § 7 right).<sup>4</sup> Again, we need not proceed to the second step of *Chevron* because the intent of Congress in § 8 is clear and matches the Board’s interpretation.

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actions did not exist until after the NLRA was passed. See *City Disposal Sys.*, 465 U.S. at 835 (noting that the NLRA has forward-looking view of § 7 protections). Rule 23 is not the source of employee rights; the NLRA is. *Eastex* settles this question by expressly including concerted legal activity within the set of protected § 7 activities. 437 U.S. at 566.

<sup>4</sup> In contrast, there was no § 8 violation in *Johnmohammadi v. Bloomington’s, Inc.* because the employee there could have opted out of the individual dispute resolution agreement and chose not to. 755 F.3d 1072, 1076 (9th Cir. 2014).

Section 8 has long been held to prevent employers from circumventing the NLRA's protection for *concerted* activity by requiring employees to agree to *individual* activity in its place. *National Licorice*, for example, involved a contract clause that discouraged workers from redressing grievances with the employer "in any way except personally." 309 U.S. at 360. This clause violated the NLRA. *Id.* at 361. The individual dispute resolution practice envisioned by the contract, and required by the employer, represented "a continuing means of thwarting the policy of the Act." *Id.*

Similarly, *J.H. Stone & Sons*, 125 F.2d 752 (7th Cir. 1942), concluded that individual dispute resolution requirements nullify the right to concerted activity established by § 7:

By the clause in dispute, the employee bound himself to negotiate any differences with the employer and to submit such differences to arbitration. The result of this arbitration was final. Thus the employee was obligated to bargain individually and, in case of failure, was bound by the result of arbitration. This is the very antithesis of collective bargaining.

*Id.* at 756.

The "separate proceedings" clause in this case is no different. Under the clause, the employee is obligated to pursue work-related claims individually and, no matter the outcome, is bound by the result. This restriction is the "very antithesis" of § 7's substantive right to pursue concerted work-related legal claims. For the same reason, the Seventh Circuit recently concluded that "[a] contract that limits

Section 7 rights that is agreed to as a condition of continued employment qualifies as ‘interfer[ing] with’ or ‘restrain[ing] . . . employees in the exercise’ of those rights in violation of Section 8(a)(1).” *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1155 (7th Cir. 2016). Indeed, § 7 rights would amount to very little if employers could simply require their waiver.

In sum, the Board’s interpretation of § 7 and § 8 is correct. Section 7’s “mutual aid or protection clause” includes the substantive right to collectively “seek to improve working conditions through resort to administrative and judicial forums.” *Eastex*, 437 U.S. at 566; *accord City Disposal Sys.*, 465 U.S. at 834–35. Under § 8, an employer may not defeat the right by requiring employees to pursue all work-related legal claims individually. *See J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) (“Individual contracts . . . may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act”). The NLRA is unambiguous, and there is no need to proceed to the second step of *Chevron*.<sup>5</sup>

Applied to the Ernst & Young contract, § 7 and § 8 make the terms of the concerted action waiver unenforceable. The “separate proceedings” clause prevents concerted activity by employees in arbitration proceedings, and the requirement that employees only use arbitration prevents the initiation of concerted legal action anywhere else. The result: interference

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<sup>5</sup> Because congressional intent can be ascertained employing the usual tools of statutory construction, we do not proceed to step two of the *Chevron* analysis. However, if that analysis were undertaken, the only conclusion could be that “[t]he Board’s holding is a permissible construction of ‘concerted activities for . . . mutual aid or protection’ by the agency charged by Congress with enforcement of the Act.” *Weingarten*, 420 U.S. at 260 (quoting 29 U.S.C. § 157).

with a protected § 7 right in violation of § 8. Thus, the “separate proceedings” terms in the Ernst & Young contracts cannot be enforced.<sup>6</sup>

### B

The Federal Arbitration Act (“FAA”) does not dictate a contrary result. The “separate proceedings” provision in this case appears in an agreement that directs employment-related disputes to arbitration. But the arbitration requirement is not the problem. The same provision in a contract that required court adjudication as the exclusive remedy would equally violate the NLRA. The NLRA obstacle is a ban on initiating, in any forum, concerted legal claims—not a ban on arbitration.

The FAA “was enacted in 1925 in response to widespread judicial hostility to arbitration agreements.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). In relevant part, it provides that,

A written provision in any maritime transaction or a contract evidencing a

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<sup>6</sup> Ernst & Young also argues for the first time on appeal that there is no evidence that Morris and McDaniel are statutory employees covered by the NLRA. This argument was not adequately raised before the district court and is therefore waived. *See Solis v. Matheson*, 563 F.3d 425, 437 (9th Cir. 2009). Likewise, we also reject the claim that the Board’s interpretations of the NLRA in *Horton I* and *Murphy Oil I* do not apply here because there was no NLRB proceeding or finding of an unfair labor practice. We agree with the agency’s interpretation of the NLRA because it gives effect to Congress’s intent. Our agreement has nothing to do with the procedural history of the cases from which the Board’s interpretation arose.

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transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . 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. The Act requires courts to “place arbitration contracts ‘on equal footing with all other contracts,’” *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)), and to “enforce them according to their terms,” *Concepcion*, 563 U.S. at 339. Not all contract terms receive blanket enforcement under the FAA, however. The FAA’s

saving clause permits agreements to arbitrate to be invalidated by “generally applicable contract defenses, such as fraud, duress, or unconscionability,” but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.

*Id.* (quoting *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). Accordingly, when a party raises a defense to the enforcement of an arbitration provision, a court must determine whether the defense targets arbitration contracts without “due regard . . . to the federal policy favoring arbitration.” *DIRECTV*, 136 S. Ct. at 471 (quoting *Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989)).

The contract defense in this case does not “derive [its] meaning from the fact that an agreement to arbitrate is at issue.” *Concepcion*, 563 U.S. at 339. An agreement to arbitrate work-related disputes does not conflict with the NLRA. Indeed, federal labor policy favors and promotes arbitration. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

The illegality of the “separate proceedings” term here has nothing to do with arbitration as a forum. It would equally violate the NLRA for Ernst & Young to require its employees to sign a contract requiring the resolution of all work-related disputes *in court* and in “separate proceedings.” The same infirmity would exist if the contract required disputes to be resolved through casting lots, coin toss, duel, trial by ordeal, or any other dispute resolution mechanism, if the contract (1) limited resolution to that mechanism and (2) required separate individual proceedings. The problem with the contract at issue is not that it requires arbitration; it is that the contract term defeats a substantive federal right to pursue concerted work-related legal claims.<sup>7</sup>

When an illegal provision not targeting arbitration is found in an arbitration agreement, the FAA treats the contract like any other; the FAA recognizes a general contract defense

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<sup>7</sup> In contrast, the arbitration cases cited by the dissent and Ernst & Young involved litigants seeking to avoid an arbitral forum—their defenses targeted arbitration. Here, Morris and McDaniel seek to exercise substantive rights guaranteed by federal statute in *some* forum, including in arbitration.

of illegality.<sup>8</sup> 9 U.S.C. § 2; *Concepcion*, 563 U.S. at 339. The term may be excised, or the district court may decline enforcement of the contract altogether. *See* 19 Richard Lord, 8 *Williston on Contracts* § 19:70 (4th ed. 1990) (“Illegal portions of a contractual agreement may be severed if the illegal provision is not central to the parties’ agreement.”); *see also Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 433 (9th Cir. 2015) (“‘generally applicable’ contract defense” is “preserved by § 2’s saving clause”).

Crucial to today’s result is the distinction between “substantive” rights and “procedural” rights in federal law. The Supreme Court has often described rights that are the essential, operative protections of a statute as “substantive” rights. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). In contrast, procedural rights are the ancillary, remedial tools that help secure the substantive right. *See id.*; *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 671 (2012) (describing difference between statute’s “guarantee” and provisions contemplating ways to enforce the core guarantee).<sup>9</sup>

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<sup>8</sup> *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), is not to the contrary. Under *Stolt*, an arbitrator may not add to the terms of an arbitration agreement, and therefore may not order class arbitration unless the contract provides for it. *Id.* at 684. This does not require a court to enforce an illegal term. Nor would *Stolt* prevent the district court, on remand, from severing the “separate proceedings” clause to bring the arbitration provision into compliance with the NLRA.

<sup>9</sup> The Age Discrimination in Employment Act (“ADEA”), for example, establishes a primary, substantive right against age discrimination. 29 U.S.C. § 623; *Gilmer*, 500 U.S. at 27. It provides for collective proceedings as one way, among many, to secure that right. 29 U.S.C.

The difference is key, because substantive rights cannot be waived in arbitration agreements. This tenet is a fundamental component of the Supreme Court’s arbitration jurisprudence: “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” *Mitsubishi*, 473 U.S. at 628. Thus, if a contract term in an arbitration agreement “operate[s] . . . as a prospective waiver of a party’s right to pursue statutory remedies for [substantive rights], we would have little hesitation in condemning the agreement.” *Id.* at 637 n.19; *see also Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013); *Green Tree Fin. Corp.-Al. v. Randolph*, 531 U.S. 79, 90 (2000); *Gilmer*, 500 U.S. at 28; *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 240 (1987).

The FAA does not mandate the enforcement of contract terms that waive substantive federal rights. Thus, when an arbitration contract professes the waiver of a substantive federal right, the FAA’s saving clause prevents a conflict between the statutes by causing the FAA’s enforcement mandate to yield. *See Epic Sys.*, 823 F.3d at 1159 (“Because the NLRA renders [the defendant’s] arbitration provision illegal, the FAA does not mandate its enforcement.”).<sup>10</sup>

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§ 626 (providing for “Recordkeeping, investigation, and enforcement” of the ADEA, including collective legal redress).

<sup>10</sup> Contrary to the suggestions of the dissent, the Supreme Court has repeatedly endorsed the distinctive roles of substantive and procedural rights in its recent arbitration case law. As recently as *Italian Colors*, the Supreme Court has held that the key question for courts assessing a statutory rights claim arising from an arbitration agreement is whether the agreement “constitute[s] the elimination of the *right to pursue* that

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The rights established in § 7 of the NLRA—including the right of employees to pursue legal claims together—are substantive. They are the central, fundamental protections of the Act, so the FAA does not mandate the enforcement of a contract that alleges their waiver. The text of the Act confirms the central role of § 7: that section establishes the “*Right of employees as to organization.*” 29 U.S.C. § 157 (emphasis added). No other provision of the Act creates these sorts of rights. Without § 7, the Act’s entire structure and policy flounder. For example, § 8 specifically refers to the “exercise of the rights guaranteed in section 157.” 28 U.S.C. § 158; *Bighorn Beverage*, 614 F.2d at 1241 (“Section 8(a)(1) of the Act implements [§ 7’s] guarantee”).

The Act’s other enforcement sections are similarly confused without the rights established in § 7. *See, e.g.*, 29 U.S.C. § 160 (providing powers of the Board to prevent interference with rights in § 7). There is no doubt that Congress intended for § 7 and its right to “concerted activities” to be the “primary substantive provision” of the NLRA. *See Gilmer*, 500 U.S. at 24. For this reason, the right

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remedy.” 133 S. Ct. at 2311 (emphasis in original). Similarly, in *CompuCredit*, the Court distinguished the core, substantive “guarantee” of the Credit Repair Organizations Act (“CROA”) from a provision that contemplated the possibility of a judicial forum for vindicating the core right. 132 S. Ct. at 671 (holding that contract “parties remain free to specify” their choice of judicial forum “so long as the *guarantee*” of the Act “is preserved.” (emphasis in original)). Contract parties can agree on the procedural terms they like (such as resolving disputes in arbitration), but they may not agree to leave the substantive protections of federal law at the door.

to concerted employee activity cannot be waived in an arbitration agreement.<sup>11</sup>

The dissent ignores this fundamental component of the Supreme Court’s arbitration jurisprudence and argues that we must first locate a “contrary congressional command” before preventing the enforcement of an invalid contract term. But as the Seventh Circuit put it, “this argument puts the cart before the horse.” *Epic Sys.*, 823 F.3d at 1156. Rather, “[b]efore we rush to decide whether one statute eclipses another, we must stop to see if the two statutes conflict at all.” *Id.* The saving clause in the FAA prevents the need for such a conflict.

The dissent and Ernst & Young insist that we must effectively ignore the saving clause and first search to see which of two statutes will “trump” the other. But this is not the way the Supreme Court has instructed us to approach statutory construction. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (“[W]hen 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.” (citation omitted)). Nor is a hunt for statutory conflict the “single question” the Supreme Court has told us to ask when examining the FAA’s interaction with other federal statutes. Dissent at 35–36. Indeed, if we first had to locate a conflict between the FAA and other statutes, the FAA’s saving clause would serve no purpose, which cannot be the case. *TRW Inc. v. Andrews*, 534

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<sup>11</sup> An individual can opt-out of a class action, or opt-in to a collective action, in federal court (both procedural mechanisms). This does not enable an employer to require the same individual to waive the substantive labor right to initiate concerted activities set forth in the NLRA.

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U.S. 19, 31 (2001) (“a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant” (citation omitted)); see *Epic Sys.*, 823 F.3d at 1157 (holding that there is no inherent conflict between the FAA and the NLRA).<sup>12</sup> Instead, we join the Seventh Circuit in treating the interaction between the NLRA and the FAA in a very ordinary way: when an arbitration contract professes to waive a substantive federal right, the saving clause of the FAA prevents the enforcement of that waiver.<sup>13</sup>

Thus, the dissent’s citations to cases involving the waiver of *procedural* rights are misplaced. *CompuCredit*, for example, was a choice-of-judicial-forum case that addressed the waiver of procedural rights. In the Supreme Court’s words, the case concerned “whether claims under the [CROA] can proceed in an arbitrable forum.” 132 S. Ct. at 673. In today’s case, the issue is not whether any particular forum, including arbitration, is available but rather which substantive rights must be available within the chosen forum. And the Supreme Court has repeatedly held that the core, substantive “rights” created by federal law survive contract terms that purport their waiver. Such was the case in *CompuCredit*, where the Court concluded that the use of a judicial forum contemplated by the CROA could be waived

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<sup>12</sup> Neither the text of the FAA nor the Supreme Court’s arbitration cases support the dissent’s theory that the FAA’s saving clause functions differently when a federal, as opposed to state, statute renders a contract term susceptible to an illegality defense.

<sup>13</sup> Because we see no inherent conflict between the FAA and the NLRA, we make no holding on which statute would win in a fight, nor do we opine on the meaning of their respective dates of passage, re-passage, and amendment.

so long as “*the guarantee of the legal power to impose liability*—is preserved.” 132 S. Ct. at 671 (emphasis in original). In other words, parties can choose their forums but they cannot contract away the basic guarantees of a federal statute.

*Gilmer* was also a judicial-choice-of-forum case that addressed the waiver of procedural rights. There the Supreme Court again distinguished between a waivable procedural right (to use a court for class claims rather than arbitration) and a nonwaivable substantive right (to be free from age discrimination). 500 U.S. at 27–29. Not surprisingly, the Court held that the procedural right to use class proceedings in federal court could be waived. *Id.* at 32.<sup>14</sup>

*Italian Colors*, as well, was a judicial forum case that endorsed the distinction between a statute’s basic guarantee and the various ways litigants may go about vindicating it. The Court was careful to distinguish between the matters “involved in *proving* a statutory remedy” and whether an agreement “constitute[s] the elimination of the *right to pursue* that remedy.” *Italian Colors*, 133 S. Ct. at 2311. The plaintiffs objected that it would be infeasible to pursue their antitrust claims against the defendant without the ability to form a class. The Court rejected this argument, noting that so long as the substantive federal right remains—there, the right to pursue antitrust claims in some forum—then the arbitration agreements would be enforced according to their terms. *Id.* at 2310–12.

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<sup>14</sup> In fact, the arbitration procedures in *Gilmer* allowed for collective proceedings. *Id.* The plaintiff simply preferred court adjudication.

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The dissent misreads these cases to require a conflict between the FAA and the substantive provisions of other federal statutes. But as the Supreme Court has repeatedly made clear, there is a limiting principle built into the FAA on what may be waived in arbitration: where substantive rights are at issue, the FAA's saving clause works in conjunction with the other statute to prevent conflict.

The interaction between the NLRA and the FAA makes this case distinct from other FAA enforcement challenges in at least three additional and important ways.

First, because a substantive federal right is waived by the contract here, it is accurate to characterize its terms as "illegal." The dissent objects that a term in an arbitration contract can only be "illegal" if Congress issues a contrary command specifically referencing arbitration. But then it proceeds to cite cases where no substantive federal rights were waived. In those cases, the conflict between contract terms and federal law was less direct. In *Italian Colors*, for example, the Court concluded that the antitrust laws establish no statutory right to pursue concerted claims: the acts "make no mention of class actions." *Id.* at 2309. In contrast, the federal statutory regime in this case does exactly the opposite. Where the antitrust laws are silent on the issue of concerted legal redress, the NLRA is unambiguous: concerted activity is the touchstone, and a ban on the pursuit of concerted work-related legal claims interferes with a core, substantive right.

Second, the enforcement defense in this case has nothing to do with the adequacy of arbitration proceedings. In *Concepcion* and *Italian Colors*, the Court held that arguments about the adequacy of arbitration necessarily yield to the policy of the FAA. *Concepcion*, 563 U.S. at 351; *Italian*

*Colors*, 133 S. Ct. at 2312. The Court “specifically rejected the argument that class arbitration [is] necessary to prosecute claims ‘that might otherwise slip through the legal system.’” *Italian Colors*, 133 S. Ct. at 2312 (quoting *Concepcion*, 563 U.S. at 351). Here, the NLRA’s prohibition on enforcing the “separate proceedings” clause has nothing to do with the adequacy of arbitration. The dissent and Ernst & Young attempt to read *Concepcion* for the proposition that concerted claims and arbitration are fundamentally inconsistent. But *Concepcion* makes no such holding. *Concepcion* involved a consumer arbitration contract, not a labor contract, and there was no federal statutory scheme that declared the contract terms illegal. 563 U.S. at 338. The defense in that case was based on a judge-made state law rule. In contrast, the illegality of the contract term here follows directly from the NLRA. Arbitration between groups of employees and their employers is commonplace in the labor context. It would no doubt surprise many employers to learn that individual proceedings are a “fundamental” attribute of workplace arbitration. *See also Gilmer*, 500 U.S. at 32 (noting that employer’s arbitration “rules also provide for collective proceedings”).<sup>15</sup>

Third, the enforcement defense in this case does not specially “disfavor” arbitration. The dissent makes dire predictions about the future of workplace arbitration if the

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<sup>15</sup> The dissent suggests that employee-claimants could act in “concert” by simply hiring the same lawyers. This is not what the NLRA contemplates by the term “concert.” An employer could not, for example, require its employees to sign a pledge not to join a union but remain in conformity with the NLRA by suggesting that employees hire similar attorneys to represent them in wage negotiations. *See also City Disposal Sys.*, 465 U.S. at 834–35 (discussing the term “concert” in federal labor law at the time of the NLRA’s passage).

“separate proceedings” clause is invalidated. However, our holding is not that arbitration may not be used in workplace disputes. Quite the contrary. Rather, our holding is simply that when arbitration or any other mechanism is used exclusively, substantive federal rights continue to apply in those proceedings. The only role arbitration plays in today’s case is that it happens to be the forum the Ernst & Young contract specifies as exclusive. The contract here would face the same NLRA troubles if Ernst & Young required its employees to use *only* courts, or *only* rolls of the dice or tarot cards, to resolve workplace disputes—so long as the exclusive forum provision is coupled with a restriction on concerted activity in that forum. At its heart, this is a labor law case, not an arbitration case.

Further, nothing in the Supreme Court’s recent arbitration case law suggests that a party may simply incant the acronym “FAA” and receive protection for illegal contract terms anytime the party suggests it will enjoy arbitration less without those illegal terms. We have already held that *Concepcion* supports no such argument:

The Supreme Court’s holding that the FAA preempts state laws having a “disproportionate impact” on arbitration cannot be read to immunize all arbitration agreements from invalidation no matter how unconscionable they may be, so long as they invoke the shield of arbitration. Our court has recently explained the nuance: “*Concepcion* outlaws discrimination in state policy that is *unfavorable* to arbitration.”

*Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 927 (9th Cir. 2013) (quoting *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1160 (9th Cir.2013)). Do not be misled. Arbitration is consistent with, and encouraged by, the NLRA following today's opinion.

At bottom, the distinguishing features of today's case are simple. The NLRA establishes a core right to concerted activity. Irrespective of the forum in which disputes are resolved, employees must be able to act in the forum *together*. The structure of the Ernst & Young contract prevents that. Arbitration, like any other forum for resolving disputes, cannot be structured so as to exclude all concerted employee legal claims. As the Supreme Court has instructed, when "private contracts conflict with" the NLRA, "they obviously must yield or the Act would be reduced to a futility." *J.I. Case*, 321 U.S. at 337.<sup>16</sup>

### III

In sum, the "separate proceedings" provision of the Ernst & Young contract interferes with a substantive federal right protected by the NLRA's § 7. The NLRA precludes contracts that foreclose the possibility of concerted work-related legal claims. An employer may not condition employment on the requirement that an employee sign such a contract.

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<sup>16</sup> We recognize that our sister Circuits are divided on this question. We agree with the Seventh Circuit, the only one that "has engaged substantively with the relevant arguments." *Epic Sys.*, 823 F.3d at 1159; *but see Murphy Oil II*, 808 F.3d at 1018 (enforcing employer's concerted action waiver under the FAA); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–54 (8th Cir. 2013).

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It is “well established . . . that a federal court has a duty to determine whether a contract violates the law before enforcing it.” *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982). Because the district court’s order compelling arbitration was based, at least in part, on the separate proceedings provision, we must vacate the order and remand to the district court to determine whether the “separate proceedings” clause is severable from the contract. We take no position on whether arbitration may ultimately be required in this case.

In addition, because the contract’s conflict with the NLRA is determinative, we need not—and do not—reach plaintiff’s alternative arguments regarding the Norris LaGuardia Act, the FLSA, or whether Ernst & Young waived its right to arbitration.<sup>17</sup>

**REVERSED AND REMANDED.**

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IKUTA, Circuit Judge, dissenting:

Today the majority holds that § 7 of the National Labor Relations Act (NLRA) precludes employees from waiving the right to arbitrate their disputes collectively, thus striking at the heart of the Federal Arbitration Act’s (FAA) command to enforce arbitration agreements according to their terms. This decision is breathtaking in its scope and in its error; it is

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<sup>17</sup> Putative-amici labor scholars’ motion for leave to file an *amicus* brief is denied. See Fed. R. App. P. 29(e). The motion for judicial notice of additional authorities is also denied. See *Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 658 F.3d 936, 940 n.2 (9th Cir. 2011).

directly contrary to Supreme Court precedent and joins the wrong side of a circuit split. I dissent.

I

The plaintiffs in this case, Stephen Morris and Kelly McDaniel, entered into an agreement with Ernst & Young that included a program for resolving covered disputes. The parties agreed that the program was “the sole method for resolving disputes within its coverage.” Under the program, the parties agreed they would first try to resolve a covered dispute by mediation. If that failed, either party could choose to proceed to binding arbitration. The agreement set forth the applicable procedures. Subparagraph K provided:

Separate Proceedings. If there is more than one Covered Dispute between the Firm and an Employee, all such Covered Disputes may be heard in a single proceeding. Covered Disputes pertaining to different Employees will be heard in separate proceedings.

As the Supreme Court has explained, such a waiver of class actions is typical in the arbitration context because the class procedural mechanism “interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). Among other problems, “there is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process.” *Id.* at 347. Class mechanisms also eviscerate the principal benefits of arbitration — speed and informality, “mak[ing] the process slower, more costly, and more likely to generate procedural morass than final judgment.” *Id.* at 348.

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Notwithstanding the agreement to arbitrate, Morris brought a complaint in federal district court alleging that Ernst & Young had violated the Fair Labor Standards Act (FLSA) and analogous state law by improperly classifying him and other employees as exempt employees who were not entitled to overtime wages. (McDaniel was later added as a plaintiff.) Morris purported to bring the action as a class action under Rule 23 of the Federal Rules of Civil Procedure and as a collective action under 29 U.S.C. § 216(b) of the FLSA.<sup>1</sup> After some procedural complications not relevant here, Ernst & Young moved to compel arbitration under its agreement. Morris argued that the “Separate Proceedings” clause of his agreement violated § 7 of the NLRA. The district court rejected this argument. In reversing, the majority holds that employees may not be required to waive the use of a class action mechanism in arbitrating or litigating their claims. To the extent the Supreme Court has held that class actions are inconsistent with arbitration, *see Conception*, 563 U.S. at 344, the majority effectively cripples

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<sup>1</sup> Section 216(b) provides a class action mechanism similar to that contemplated by Rule 23, although it requires voluntary opt in by the members of the class. It states, in pertinent part:

An action to recover the liability prescribed in [§ 216(b)] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b).

the ability of employers and employees to enter into binding agreements to arbitrate.

## II

Under the FAA, agreements to arbitrate are “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; *Concepcion*, 563 U.S. at 339. As the Supreme Court has repeatedly explained, the FAA was enacted to overcome “widespread judicial hostility to arbitration agreements.” *Concepcion*, 563 U.S. at 339. The Supreme Court’s cases have “repeatedly described the Act as embod[y]ing [a] national policy favoring arbitration and a liberal federal policy favoring arbitration agreements.” *Id.* at 346 (internal quotation marks and citations omitted). The FAA’s national policy applies to the states, *see, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), and forecloses any state statute or common law rule that attempts “to undercut the enforceability of arbitration agreements,” *id.* at 16, unless the savings clause in § 2 is applicable, *see Concepcion*, 563 U.S. at 344; *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). Therefore, when a party claims that a state law prevents the enforcement of an arbitration agreement, the court must determine whether that law is preempted by the FAA or is rescued from preemption by the FAA’s savings clause. *See Concepcion*, 563 U.S. at 339–42.

But when a party claims that a federal statute makes an arbitration agreement unenforceable, the Supreme Court takes a different approach. In determining whether the FAA’s mandate requiring “courts to enforce agreements to arbitrate according to their terms” has been overridden by a different federal statute, the Supreme Court requires a showing that

such a federal statute includes an express “contrary congressional command.” *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (internal quotation marks omitted). The burden is on the party challenging the arbitration agreement to show that Congress expressly intended to preclude a waiver of the judicial forum. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). “If such an intention exists, it will be discoverable in the text of the [federal act], its legislative history, or an ‘inherent conflict’ between arbitration and the [federal act’s] underlying purposes.” *Id.* “Throughout such an inquiry, it should be kept in mind that ‘questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.’” *Id.* (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

Contrary to the majority’s focus on whether the NLRA confers “substantive rights,” in every case considering a party’s claim that a federal statute precludes enforcement of an arbitration agreement, the Supreme Court begins by considering whether the statute contains an express “contrary congressional command” that overrides the FAA. *See, e.g., Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013); *CompuCredit*, 132 S. Ct. at 669, *Gilmer*, 500 U.S. at 29.<sup>2</sup> To date, in every case in which the Supreme Court has conducted this analysis of federal statutes, it has harmonized the allegedly contrary statutory language with the FAA and allowed the arbitration agreement at issue to be

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<sup>2</sup> The Supreme Court has applied the same approach, and reached the same conclusion, in upholding a collective bargaining agreement with a mandatory arbitration clause governed by the NLRA. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265–74 (2009).

enforced according to its terms.<sup>3</sup> Thus in *CompuCredit*, the Court considered a purported “contrary congressional command” in the Credit Repair Organization Act (CROA), 15 U.S.C. § 1679 et seq., which the plaintiffs claimed precluded consumers from entering an arbitration agreement that waived their right to litigate an action in a judicial forum. 132 S. Ct. at 669. The plaintiffs pointed to the language in CROA that required a business to tell a consumer that “[y]ou have a right to sue,” 15 U.S.C. § 1679c(a), that provided for actual and punitive damages in both individual legal actions and class actions, *id.* § 1679g, and that provided that “[a]ny waiver by any consumer of any protection provided by or any right of the consumer” was void and could “not be enforced by any Federal or State court,” *id.* § 1679f(a).

The Supreme Court rejected this claim. Overruling the Ninth Circuit, the Court held that had Congress meant to prohibit arbitration clauses, “it would have done so in a manner less obtuse than what respondents suggest.” *CompuCredit*, 132 S. Ct. at 672. According to the Court, when Congress wants to restrict the use of arbitration “it has done so with a clarity that far exceeds the claimed indications in the CROA.” *Id.* The Supreme Court gave two examples of what would constitute a sufficiently clear “contrary congressional command”:

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<sup>3</sup> Only *Wilko v. Swan* held that the Securities Act of 1933 contained an unwaivable right to a judicial forum for claims under the Act, thereby precluding the enforcement of an arbitration agreement between parties to a sale of securities. 346 U.S. 427, 432–37 (1953). But the Court expressly overruled *Wilko* in *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, rejecting its reasoning as “pervaded . . . by the old judicial hostility to arbitration.” 490 U.S. 477, 480 (1989) (internal quotation marks omitted); *see also Pyett*, 556 U.S. at 266–67.

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“No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.” *Id.* (quoting 7 U.S.C. § 26(n)(2) (2006 ed., Supp. IV)).

“Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy.” *Id.* (quoting 15 U.S.C. § 1226(a)(2) (2006 ed.)).

Because the language in the two CROA provisions cited by plaintiffs did not expressly state that a predispute arbitration agreement was unenforceable, the Court determined that they were consistent with enforcement of an arbitration agreement. The “right to sue” language, for instance, merely allowed parties to enter into an agreement requiring initial arbitral adjudication, which then could be reviewed in a court of law. *Id.* at 670–71. Because the CROA was “silent on whether claims under the Act can proceed in an arbitrable forum,” the Court held that “the FAA requires the arbitration agreement to be enforced according to its terms.” *Id.* at 673.

In *Gilmer*, plaintiffs claimed the Age Discrimination in Employment Act of 1967 (ADEA) contained a contrary congressional command to the FAA’s mandate. 500 U.S. at 27–30. Specifically, the plaintiffs pointed to language allowing employees to litigate in court as providing an unwaivable right to access a judicial forum: “[a]ny person aggrieved may bring a civil action in any court of competent

jurisdiction for such legal or equitable relief as will effectuate the purpose of this chapter,” 29 U.S.C. § 626(c)(1); *Gilmer*, 500 U.S. at 27. They also pointed to language they claimed precluded employees from waiving the right to bring a class action: “The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in section . . . 216,” 29 U.S.C. § 626(b), where § 216(b) (also at issue here) states that an action under the FLSA may be brought in court “by any one or more employees for and in behalf of himself or themselves and other employees similarly situated,” although the represented employees must consent. In other words, the plaintiffs argued that because the ADEA explicitly provided for a class mechanism, the statute precluded the enforcement of an arbitration agreement that included a class action waiver.

The Supreme Court rejected this argument. Once again, the statutory language was not sufficiently clear to prevent the enforcement of arbitration agreements that included a class action waiver. Looking closely at the text of the statute, the Court noted that while Congress allowed for judicial resolution of claims, it “did not explicitly preclude arbitration or other nonjudicial resolution of claims.” *Gilmer*, 500 U.S. at 27–29. Moreover, “the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.” *Id.* at 32. Thus, the language on which the plaintiffs relied was entirely consistent with enforcing an arbitration agreement that precluded a class mechanism. *See also Italian Colors*, 133 S. Ct. at 2311 (“In *Gilmer* . . . we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue . . . expressly permitted collective actions.”). Turning to the ADEA’s legislative history, the Supreme Court found nothing showing a

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congressional intention to preclude waiver of a judicial forum. *Gilmer*, 500 U.S. at 29. Indeed, the Court found in the ADEA a “flexible approach to resolution of claims” and other indicia that Congress did not intend to preclude individual arbitration of disputes. *Id.* at 29–31.

Finally, in *Italian Colors*, there was a purported “inherent conflict,” *Gilmer*, 500 U.S. at 26, between arbitration and the policies underlying the Sherman and Clayton Acts, 133 S. Ct. at 2310–12. According to plaintiffs, the cost of individually arbitrating their antitrust claims would so far exceed the potential recovery that requiring them to litigate their claims individually would render the plaintiffs unable to vindicate their federal statutory rights. *Id.* The Supreme Court rejected this argument. Examining the text of the acts, the Court noted that the federal acts “make no mention of class actions,” and were “enacted decades before the advent of Federal Rule of Civil Procedure 23.” *Id.* at 2309. The Court gave even less weight to the plaintiffs’ policy arguments. With respect to the argument that “federal law secures a nonwaivable *opportunity* to vindicate federal policies by satisfying the procedural strictures of Rule 23 or invoking some other informal class mechanism in arbitration,” the Court simply stated that “we have already rejected that proposition” in *Concepcion*. *Id.* at 2310. In *Concepcion*, the Court made clear that the FAA allows parties to waive the use of a class mechanism because such a mechanism “interferes with fundamental attributes of arbitration.” 563 U.S. at 344.

In sum, the Supreme Court consistently rejects claims that a “contrary congressional command” precludes courts from enforcing arbitration agreements according to their terms, including when such agreements waive the use of class mechanisms. In analyzing such arguments, the Court has

focused primarily on a single question: whether the text of the federal statute at issue expressly precludes the use of a predispute arbitration agreement for the underlying claims at issue. If the statute does not, the Court’s “healthy regard for the federal policy favoring arbitration,” *Moses H. Cone*, 460 U.S. at 24, leads it to conclude that there is no such contrary command, and the Court reads the purportedly contrary federal statute to allow the enforcement of the agreement to arbitrate. The Court has likewise rejected claims that the legislative history or policy of the federal statute requires a different result. See *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89–90 (2000) (noting that the Court has “rejected generalized attacks on arbitration that rest on ‘suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.’” (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989))).

### III

Here, the majority ignores the thrust of Supreme Court precedent and declares that arbitration is precluded because it interferes with a substantive right protected by § 7 and § 8 of the NLRA.<sup>4</sup> Section 7 states:

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<sup>4</sup> Although the majority cites *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), it does not defer to the NLRB’s interpretation of § 7 as overriding the command of the FAA in *In re D.R. Horton v. NLRB*, 357 NLRB No. 184 (2012), which was subsequently overruled by the Fifth Circuit. See *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013). Rather, the majority states that “the NLRA is unambiguous, and there is no need to proceed to the second step of *Chevron*.” Maj. Op. at 13.

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Employees shall have 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.

29 U.S.C. § 157. Section 8 merely makes it “an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7].” 29 U.S.C. § 158(a).

A

Nothing in this language comes remotely close to the examples of contrary congressional commands the Supreme Court identified in *CompuCredit*, where Congress expressly stated that “[n]o predispute arbitration agreement shall be valid or enforceable.” 132 S. Ct. at 672. The language of § 7 and § 8 of the NLRA neither mention arbitration nor specify the right to take legal action at all, whether individually or collectively. *See Italian Colors*, 133 S. Ct. at 2309 (“The Sherman and Clayton Acts make no mention of class actions.”). Applying Supreme Court precedent, we must conclude there is no “contrary congressional command” in the text of the NLRA.

Moreover, contrary to the majority, *Maj. Op.* at 6, nothing in either § 7 or § 8 creates a substantive right to the availability of class-wide claims that might be contrary to the FAA’s mandate. While the NLRA protects concerted activity, it does not give employees an unwaivable right to proceed as a group to arbitrate or litigate disputes. Rather, as

in *CompuCredit* and *Gilmer*, the language can be harmonized with enforcement of an arbitration agreement that waives class action mechanisms. According to a dictionary roughly contemporaneous with the passage of the NLRA, “concerted” action is action that is “mutually contrived or planned: agreed on.” Webster’s International Dictionary of the English Language 295 (1903 ed.). A natural reading of § 7’s right “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” enables employees to jointly arrange, plan, and carry out group efforts to dispute employer positions. In a legal context, this could include joint legal strategies, shared arguments and resources, hiring the same attorneys, or even requesting the Department of Labor to bring an independent action against the employer. But the language does not expressly preserve any right for employees to use a specific *procedural* mechanism to litigate or arbitrate disputes collectively; even less does it create an unwaivable right to such mechanism. Indeed, the text provides no basis for the majority’s conclusion that § 7 gives employees a substantive, unwaivable right to use Rule 23, § 216(b) of the FLSA, or any other procedural mechanism that might be available for bringing class-wide actions.<sup>5</sup> Accordingly, the Supreme Court’s precedent compels the conclusion that neither § 7 nor § 8 contains a “contrary congressional command” that precludes enforcing Morris’s arbitration agreement according to its terms. If this were not the case, the Court’s statement

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<sup>5</sup> The majority claims that *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978), conclusively supports its view that § 7 of the NLRA includes a substantive right to class action procedures. Maj. Op. at 10–11 n.3. This is incorrect. The Court declined to delineate the rights that are provided by § 7 in an administrative or judicial forum, stating: “We do not address here the question of what may constitute ‘concerted’ activities in this context.” *Eastex, Inc.*, 437 U.S. at 566 n.15.

that *Gilmer* “had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions,” *Italian Colors*, 133 S. Ct. at 2311, would be meaningless. Under the majority’s reasoning, regardless whether a class action waiver survives express language in the ADEA, as *Gilmer* held, the waiver nevertheless is unenforceable in every action by an employee against an employer due to the unwaivable right to class procedures in the NLRA.

Nor does the legislative history of the NLRA demonstrate an intent to preclude individual resolution of disputes. The NLRA was enacted decades before Rule 23 created the modern class action in 1966. As the Fifth Circuit observed, in enacting the NLRA “Congress did not discuss the right to file class or consolidated claims against employers,” and therefore “the legislative history also does not provide a basis for a congressional command to override the FAA.” *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 361 (5th Cir. 2013). The majority does not cite any legislative history to the contrary.

Finally, there is no “inherent conflict between arbitration” and the “underlying purposes” of the NLRA. *Gilmer*, 500 U.S. at 26. The majority argues that the very purpose of the NLRA is to enable employees to engage in concerted activity, and therefore, it necessarily also has the purpose of enabling employees to engage in collective legal activity, including class actions. Maj. Op. at 9–10. Even assuming that concerted action is “the basic tenet of federal labor policy,” *id.* at 10, nothing in the NLRA suggests that this protection includes the right to resolve disputes using a particular legal procedure. The majority’s attempt to equate a substantive right to concerted action with a legal procedural

mechanism for resolving disputes has no basis in history or Supreme Court precedent. To the contrary, the Court has held that “the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.” *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 332 (1980). Moreover, as the Fifth Circuit pointed out, there is “limited force to the argument that there is an inherent conflict between the FAA and NLRA when the NLRA would have to be protecting a right of access to a procedure that did not exist when the NLRA was (re)enacted.” *D.R. Horton*, 737 F.3d at 362. Indeed, as the majority acknowledges, “federal labor policy favors and promotes arbitration.” Maj. Op. at 16 (emphasis added). See *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) (“[A]rbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.”); *Pyett*, 556 U.S. at 257 (“Parties generally favor arbitration precisely because of the economics of dispute resolution.”).

In sum, nothing in the text, legislative history, or purposes of § 7 precludes enforcement of an arbitration agreement containing a class action waiver.

## B

In order to avoid this conclusion, the majority disregards the Supreme Court’s guidance, and instead conflates the question whether “the FAA’s mandate has been overridden by a contrary congressional command,” *CompuCredit*, 132 S. Ct. at 669 (internal quotation marks omitted), with the question whether an employee’s agreement to arbitrate individually is invalid under the FAA’s savings clause, 9 U.S.C. § 2 (providing that an agreement to arbitrate “shall

be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”). The majority reasons that: (1) the “Separate Proceedings” requirement in Morris’s contract that all disputes must be resolved individually is illegal because it violates the NLRA; (2) a party may raise a defense that a contract provision is illegal, and such a defense is generally applicable and not related specifically to arbitration agreements; and therefore (3) in response to Ernst & Young’s motion to compel arbitration, Morris’s defense that the “Separate Proceedings” requirement is illegal is preserved by the FAA’s savings clause. In adopting this line of reasoning, the majority joins the Seventh Circuit (the only circuit with which the majority agrees). *See Lewis v. Epic Sys. Corp.*, — F.3d —, 2016 WL 3029464 (7th Cir. 2016) (holding that § 7 of the NLRA mandates collective legal action for employees, and therefore an arbitration agreement waiving such collective legal action is “illegal” and thus unenforceable under the FAA’s savings clause.)

This reasoning is contrary to the Supreme Court’s FAA jurisprudence. *Maj. Op.* at 14–17. First, the Supreme Court does not apply the savings clause to federal statutes; rather, it considers whether Congress has exercised its authority to override the FAA’s mandate to enforce arbitration agreements according to their terms. *See CompuCredit*, 132 S. Ct. at 669. If there is no “contrary congressional command,” i.e., an express statement such as “[n]o predispute arbitration agreement shall be valid or enforceable,” *id.*, then the Supreme Court will conclude that the federal statute at issue can be harmonized with the FAA. Second, the majority’s reasoning is specious because it is based on the erroneous assumption that the waiver of the right to use a collective mechanism in arbitration or litigation is “illegal.”

But such a waiver would be illegal only if it were precluded by a “contrary congressional command” in the NLRA, and here there is no such command.

Moreover, even if the FAA’s savings clause were applicable to a federal statute, the majority’s construction of § 7 and § 8 of the NLRA as giving employees a substantive, nonwaivable right to classwide actions would not be saved under that clause. As *Concepcion* explained, such a purported right would disproportionately and negatively impact arbitration agreements by requiring procedures that “interfere[] with fundamental attributes of arbitration.” *Concepcion*, 563 U.S. at 344. Because class procedures are generally “incompatible with arbitration,” *id.* at 351, and “nothing in [the FAA’s savings clause] suggests an intent to preserve [defenses] that stand as an obstacle to the accomplishment of the FAA’s objectives,” such rules do not fall within the confines of the savings clause, *id.* at 343. The majority’s argument that the nonwaivable right to class-wide procedures it has discerned in § 7 applies equally to arbitration and litigation and so is saved by the § 2 savings clause, *Maj. Op.* at 16–17, was expressly rejected in *Concepcion*, *see* 563 U.S. at 338 (rejecting plaintiffs’ argument that a state rule prohibiting class action waivers in adhesion contracts applied equally to judicial and arbitral proceedings and thus fit the § 2 savings clause).

The majority’s erroneous reasoning leads to a result that is directly contrary to Congress’s goals in enacting the FAA. Given that lawyers are unlikely to arbitrate on behalf of individuals when they can represent a class, *see id.*, 563 U.S. at 347, and an arbitrator cannot hear a class arbitration unless such a proceeding is explicitly provided for by agreement, *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662,

684 (2010), the employee’s purported nonwaivable right to class-wide procedures virtually guarantees that a broad swath of workplace claims will be litigated, *Concepcion*, 563 U.S. at 347. The majority’s reasoning is likewise contrary to the Supreme Court’s ruling that collective actions are not necessary to protect employees’ federal statutory rights. See *Gilmer*, 500 U.S. at 32; see also *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (“We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context.”).

#### IV

The Second, Fifth, and Eight Circuits have concluded that the NLRA does not invalidate collective action waivers in arbitration agreements. See *Cellular Sales of Missouri, LLC v. NLRB*, — F.3d —, 2016 WL 3093363, at \*2 (8th Cir. 2016); *D.R. Horton*, 737 F.3d at 362; *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013). These decisions are consistent with Supreme Court precedent, which has made it abundantly clear that arbitration agreements must be enforced according to their terms unless Congress has given an express contrary command.

In teasing out of the NLRA a “mandate” that prevents the enforcement of Morris’s arbitration agreement, the majority exhibits the very hostility to arbitration that the FAA was passed to counteract. The Court recognized in *Concepcion* that the pre-FAA judicial antagonism to arbitration agreements “manifested itself in ‘a great variety’ of ‘devices and formulas’ declaring arbitration against public policy.” 563 U.S. at 342 (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)). Today the

majority invents a new such formula. Because I would follow the Supreme Court precedent and join the majority of the circuits concluding that § 7 of the NLRA does not prevent the collective action waiver at issue here, I would hold that Morris's contract must be enforced according to its terms. I therefore dissent.

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

_____	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner	)	No. 16-1385
	)	
v.	)	Board Case No.
	)	07-CA-144404
ALTERNATIVE ENTERTAINMENT, INC.,	)	
	)	
Respondent	)	
_____	)	

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2016, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

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Dated at Washington, DC  
this 22nd day of August 2016