Final Brief Oral Argument Not Yet Scheduled

Nos. 16-1099 & 16-1136

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAYNES BUILDING SERVICES, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAYNES BUILDING SERVICES, LLC	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 16-1099 & 16-1136
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	31-CA-093920
	)	
Respondent/Cross-Petitioner	)	
	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board ("the Board") certify the following:

A. Parties, Intervenors, Amici. Haynes Building Services LLC ("the Company") is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. The Company, the Board's General Counsel, and J. Tadeo Gomez-Flores appeared before the Board in Case 31-CA-093920.

B. Ruling Under Review. The case involves the Company's petition to review and the Board's cross-application to enforce a Decision and Order the Board issued on February 23, 2016, reported at 363 NLRB No. 125.

C. Related cases. The ruling under review has not previously been before the Court or any other court.

/s/ Linda Dreeben
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Dated at Washington, DC
this 13th day of September, 2016

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Haynes Building Services, LLC ("the Company") for review, and the cross-application of the National Labor

Relations Board for enforcement, of a Board Order issued against the Company, reported at 363 NLRB No. 125, 2016 WL 737040 (Feb. 23, 2016). (A. 355-72.)[1]

The Board had jurisdiction over this matter under Section 10(a) of the National Labor Relations Act ("NLRA," 29 U.S.C. §§ 151, 160(a)). The Board's Decision and Order is final under Section 10(e) and (f) of the NLRA, which provides the basis for this Court's jurisdiction. 29 U.S.C. § 160(e) and (f). The petition and cross-application were timely; the NLRA imposes no time limit on such filings.

STATEMENT OF THE ISSUES

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

2. Whether the Board is entitled to summary affirmance of the uncontested finding that the Company unlawfully maintained an agreement that

[1] "A." refers to the Appendix filed with the Company's opening brief. "SA" refers to the Supplemental Appendix that the Board filed simultaneously with this brief. "Br." references the Company's opening brief and "Amicus" references the brief of amicus curiae Chamber of Commerce. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

employees would reasonably construe as barring the filing of charges with the Board.

3. Whether the Board properly rejected the Company's challenges to the complaint's validity.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are contained in the Statutory Addendum.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The Company provides commercial janitorial services from its place of business in Monrovia, California. (A. 355; A. 4.) At all material times, the Company required applicants, as a condition of employment, to sign a Notice to Applicant ("Notice"). (A. 355; A. 4.) The Notice, translated from its original Spanish, provides: "I agree to submit to an obligatory arbitration for all disputes and complaints that arise from the submission of this application. Furthermore, if I am hired by this Company, I am in agreement that all disputes or complaints that cannot be resolved within the Company and informally shall be submitted to obligatory arbitration conducted under the Association of Arbitration's rules." (A. 355; A. 49.)

After employees receive an offer of employment, but before starting work, the Company asks them to sign an Employment Agreement ("Agreement"). This

Agreement obligates employees to arbitrate "[a]ll disputes, controversies, or claims that arise[] from, involve[], affect[] or [are] in some way related to the current agreement or [are] in breach [of] that same agreement, or if it arises from, involves, affects, or is in some way related with your employment or with the conditions of your employment, or with the termination of your employment." (A. 356; A. 52-53.)

J. Tadeo Gomez-Flores signed the Notice and the Agreement on January 27 and January 29, 2009, respectively. (A. 356; A. 51, 54.) On October 11, 2012, after his employment with the Company had ended, Gomez-Flores filed a class-action wage-and-hour lawsuit against the Company in California Superior Court. (A. 356; A. 55-69.) On November 19, 2012, in response to the lawsuit, the Company sought to enforce the Agreement by sending a demand letter to Gomez-Flores' counsel stating that "where, as here, an arbitration agreement is silent on class arbitration, class arbitration is not permitted." (A. 356; A. 40.) The letter then stated that the Company was "demand[ing]" that Gomez-Flores "submit his individual claims alleged in the lawsuit to final and binding arbitration in accordance with the terms of the Agreement." (A. 356; A. 40.) The Company threatened to "promptly move to compel arbitration" if Gomez-Flores did not "dismiss the lawsuit and pursue his individual claims in arbitration." (A. 356; A. 41.)

II. PROCEDURAL HISTORY

On July 3, 2013, pursuant to an amended charge filed by Gomez-Flores, Acting General Counsel Lafe E. Solomon issued a corrected complaint alleging that the Company violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by maintaining and enforcing an arbitration agreement that prohibits employees from engaging in activity protected by Section 7 of the NLRA, 29 U.S.C. § 157. (A. 355; A. 16, 32-33.) The complaint also alleged that the Company violated Section 8(a)(1) because employees would reasonably construe the Notice as preventing them from filing charges with the Board. (A. 355; A. 32-33.) The Company admitted many factual allegations, but denied that employees were required to sign the Agreement. (A. 355; A. 44.)

On the basis of a stipulated record, an administrative law judge issued a decision and recommended order finding that the Company violated the Act by maintaining the Notice, which employees would reasonably construe as barring the filing of charges with the Board. (A. 355; A. 83-93.) The judge dismissed the remaining allegations. (A 357.) In doing so, the judge found that the Company did not require its employees to sign the Agreement as a condition of employment and reasoned further that because the Company, apart from sending the demand letter, took no action to enforce the Agreement and never moved to compel arbitration, it did not maintain or enforce the Notice and the Agreement so as to

"interfere with, restrain, or coerce" its employees in the exercise of their Section 7 rights. (A. 366.) The judge also concluded that recent Supreme Court decisions, post-dating *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), *petition for reh'g en banc denied*, 5th Cir. No. 12-60031 (Apr. 16, 2014), on which the Acting General Counsel relied for the theory of his case, rendered *D.R. Horton*'s rationale no longer viable. (A. 368-72.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On February 23, 2016, the Board (Chairman Pearce and Member Hirozawa; Member Miscimarra, dissenting) issued a Decision and Order. Applying its decisions in *D.R. Horton*, and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *petition for reh'g en banc denied*, 5th Cir. No. 14-60800 (May 13, 2016), *cert. petition filed*, No. 16-307 (Sep. 9, 2016) the Board, in disagreement with the administrative law judge, found that the Company violated Section 8(a)(1) by maintaining or threatening to enforce the Notice and the Agreement in a manner that requires employees to waive their right to pursue class or collective actions in all forums. (A. 357.) The Board, contrary to the judge, determined that employees

would reasonably understand that signing the Agreement was a condition of hire.[2] (A. 357.) The Board also rejected the judge's finding that Supreme Court precedent called into question the continued vitality of *D.R. Horton* and found that the Company, by sending its demand letter threatening court action, applied its arbitration policy in a manner that coerced employees in the exercise of their Section 7 rights. (A. 355 n.6.) Finally, in agreement with the judge, the Board found that the Company violated Section 8(a)(1) because employees would reasonably construe the Notice as barring the filing of unfair-labor-practice charges. (A. 357.)

To remedy those violations, the Board ordered the Company to cease and desist from the unfair labor practices found and from any like or related interference with employees' Section 7 rights. (A. 359.) Affirmatively, the Board ordered the Company to rescind or revise the Notice and the Agreement to make clear that they do not constitute a waiver of employees' right to maintain employment-related joint, class, or collective actions "in all forums" (A. 359) and that they do not bar or restrict employees' right to file Board charges; notify all applicants and current and former employees who signed the Notice and the

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[2] Before the Court, the Company does not challenge the Board's finding that signing the Agreement was a condition of hire. In any event, the Board has now held that an arbitration agreement that precludes collective action in all forums is unlawful even when voluntary. *See On Assignment Staffing Servs.*, 362 NLRB No. 189, 2015 WL 5113231, *1, *6-9 (Aug. 27, 2015), *rev'd*, No. 15-60642, 2016 WL 3685206 (5th Cir. June 6, 2016).

Agreement that they have been rescinded or revised; and post a remedial notice. (A. 359.)

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.). To the extent possible, both must be given effect. Applying its decisions in *D.R. Horton* and *Murphy Oil*, the Board reasonably held that the Notice and the Agreement violate 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 establish that Section 7 of the NLRA protects employees' right to pursue work-related legal claims concertedly. It also makes clear that employers may not restrict Section 7 rights through work rules, or induce employees to waive those rights prospectively in individual agreements. Such restrictions or waivers violate Section 8(a)(1), which bars interference with Section 7 rights. Accordingly, the Company, by maintaining or threatening to enforce an agreement in a manner that requires its 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 Notice and the Agreement. The Company threatened to apply the Notice

and the Agreement in a manner that denies its employees their right to act in concert. For that reason, the Notice and the Agreement, as applied, violate the NLRA and therefore fit within the FAA's saving clause, which exempts from enforcement arbitration agreements that are subject to general contract defenses such as illegality. As the Board found, the Notice and the Agreement violate the NLRA for reasons unrelated to arbitration, and which have consistently been applied to various types of individual contracts. The Supreme Court's FAA jurisprudence does not compel a different result. The Court has enforced agreements requiring individual arbitration in other contexts, but has never held that the FAA mandates enforcement of an arbitration agreement that directly violates another federal statute. Such a result would run counter to the longstanding principle that when two coequal statutes can be harmonized, courts should give effect to both.

The Board is also entitled to summary affirmance of that part of its order finding that the Company's maintenance of the Notice independently violates Section 8(a)(1) because employees would reasonably construe it as restricting their Section 7 right to file charges with the Board. As the Board found, employees would understand the Notice's broad statement that any employment-related claim is subject to arbitration as prohibiting them from filing charges with the Board. The Company does not contest this finding before the Court. Accordingly, the

Board is entitled summary enforcement of the uncontested remedial portion of its Order.

The Company raises three procedural defenses to the validity of the complaint, all of which lack merit. First, in arguing that enforcement of the Board's Order should be denied because the Board lacked a valid quorum at the time the unfair-labor-practice complaint issued, the Company overlooks that the NLRA provides independent authority to the General Counsel to initiate complaint proceedings. That authority does not depend on a Board quorum. Second, in arguing that Regional Director Mori Rubin, the agent of the General Counsel who issued the complaint, was invalidly appointed by an improperly constituted Board, the Company disregards that a properly constituted Board subsequently authorized Rubin's appointment and that Rubin thereafter reviewed and ratified her prior administrative actions as regional director. Finally, in arguing that the complaint was invalid under this Court's precedent holding that Acting General Counsel Solomon was serving in violation of the Federal Vacancies Reform Act, the Company does not acknowledge that, consistent with that precedent, a Presidentially-appointed, Senate-confirmed General Counsel, Richard F. Griffin, Jr., subsequently ratified the complaint underlying the Board's decision and Order.

STANDARD OF REVIEW

In enacting the NLRA, Congress established the Board and charged it with the primary authority to interpret and apply the statute. *See Garner v. Teamsters, Chauffeurs & Helpers Local 776*, 346 U.S. 485, 490 (1953). Accordingly, the Board's reasonable interpretation of the NLRA is entitled to affirmance. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1868-71 (2013) (to reject agency interpretation of statute within its expertise requires showing that "the statutory text forecloses" agency's interpretation) (reaffirming *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996) (Board "need not show that its construction is the *best* way to read the statute"); *Cmty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1083 (D.C. Cir. 2003) (Court "review[s] with deference" Board decisions that implicate its expertise in labor relations). The Court does not defer to the Board's interpretation of statutes other than the NLRA. *See United Food & Commercial Workers Int'l Union Local 400 v. NLRB*, 222 F.3d 1030, 1035 (D.C. Cir. 2000).

ARGUMENT

I. THE COMPANY VIOLATED SECTION 8(a)(1) OF THE NLRA BY MAINTAINING OR THREATENING TO ENFORCE AN ARBITRATION AGREEMENT THAT REQUIRES EMPLOYEES, AS A CONDITION OF EMPLOYMENT, TO WAIVE THEIR RIGHT TO PURSUE CLASS OR COLLECTIVE ACTIONS IN ALL FORUMS

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

Section 7 guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other concerted activities* for the purpose of collective bargaining or other *mutual aid or protection*, and . . . to refrain from any or all of such activities." 29 U.S.C. § 157 (emphasis added). As explained below, courts have long upheld the Board's construction of Section 7 as protecting concerted pursuit of work-related legal claims, consistent with the language and purposes of the NLRA. That construction falls squarely within the Board's expertise and its responsibility for delineating federal labor law generally, and Section 7 in particular. *See NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984) (noting that "the task of defining the scope of [Section] 7 'is for the Board to perform in the first instance as it considers the wide variety of cases that come before it'") (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978)); *accord Venetian Casino Resort, LLC v. NLRB*, 484 F.3d 601, 606 (D.C. Cir. 2007).

Central to this case is the Board's holding that the right of employees to engage in concerted activity for mutual aid or protection – the "basic premise" upon which our national labor policy has been built, *Murphy Oil*, 2014 WL 5465454, at *1 – includes concerted *legal* activity. The reasonableness of the Board's view was confirmed by the Supreme Court in *Eastex*, 437 U.S. at 565-66 & n.15-16. In that case, the Court recognized that Section 7's broad guarantee reaches beyond immediate workplace disputes to encompass employees' efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship," including "through resort to administrative and judicial forums." *Id*. at 565-66; *see also Quicken Loans, Inc. v. NLRB*, Nos. 14-1231, 14-1265, 2016 WL 4056091, at *1 (D.C. Cir. July 29, 2016) (recognizing *Eastex*'s broad interpretation of Section 7 rights).

Indeed, as *Eastex* notes, for decades the Board has held concerted legal activity to be protected. *Id*. at 565-66 & n.15. That line of cases dates back to *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-50 (1942), in which the Board found protected three employees' joint lawsuit filed under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq. It continues, unbroken and with court approval, through modern NLRA jurisprudence. *See, e.g.*, *Morris v. Ernst & Young, LLC*, No. 13-16599, 2016 WL 4433080, at *2 (9th Cir. Aug. 22, 2016),

petition for cert. filed, No. 16-300 (Sep. 8, 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 (7th Cir. 2016), *petition for cert. filed*, No. 16-285 (Sep. 2, 2016) ("[F]iling a collective or class action suit constitutes 'concerted activit[y]' under Section 7."); *Brady v. Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under [Section] 7 . . . ."); *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188-89 (D.C. Cir. 2000) (concerted petitions for injunctions against workplace harassment).[3]

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.*

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

W. Addition Cmty. Org., 420 U.S. 50, 62 (1975). Protecting employees' ability to resolve workplace disputes collectively in an adjudicatory forum effectively serves that purpose because collective lawsuits are an alternative to strikes and other disruptive protests. *D.R. Horton*, 357 NLRB at 2279-80; *see Salt River Valley Water Users' Ass'n v. NLRB*, 206 F.2d 325, 328 (9th Cir. 1953) (in response to dissatisfaction with wages, employee collected signatures to represent coworkers in negotiations or FLSA litigation). Conversely, denying employees access to concerted litigation "would only tend to frustrate the policy of the [NLRA] to protect the right of workers to act together to better their working conditions." *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962).

Protecting employees' concerted pursuit of legal claims also advances the congressional objective of "restoring equality of bargaining power between employers and employees." 29 U.S.C. § 151; *accord Murphy Oil*, 2014 WL 5465454, at *1. Indeed, recognizing that concerted activity "is often an effective weapon for obtaining [benefits] to which [employees] . . . are already 'legally' entitled," the Ninth Circuit upheld the Board's holding that Section 7 protected employees' effort to exert group pressure on the employer to redress their work-related claims through resort to legal processes. *Salt River*, 206 F.3d at 328. Similarly, the Supreme Court has acknowledged a long history of statutory employees exercising their Section 7 right to band together to take advantage of the

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

The Company (Br. 17-20) faults the Board for acting contrary to the Rules Enabling Act by transforming Rule 23's procedural right to litigate a class action into a substantive right. But the Company's claim relies on the mistaken premise that Rule 23 is the source of the employees' right to engage in concerted legal action. The source of that right, however, is the NLRA. *See Morris*, 2016 WL 4433080, at *4 n.3 ("Rule 23 is not the source of employee rights; the NLRA is."); *Lewis*, 823 F.3d at 1161 ("Rule 23 is not the source of the collective right here; Section 7 of the NLRA is."). As the Board has emphasized, what Section 7 protects in this context is statutory employees' right to act in concert "to *pursue* joint, class, or collective claims *if and as available*, without the interference of an employer-imposed restraint." *Murphy Oil*, 2014 WL 5465454, at *2 (second emphasis added). The NLRA requires that employers refrain from interfering with employees' exercise of their right to collective legal action, regardless of whether

employees are entitled to any particular procedural mechanisms for exercising those rights.[4]

The Company's emphasis (Br. 17-20) on Rule 23 should not lead to the conclusion that concerted legal action is a new development that has been anachronistically imported into labor law. Joint and collective claims of various forms long predate Rule 23, *Lewis*, 823 F.3d at 1153-54, as do the Board's earliest decisions finding that Section 7 protects the collective legal pursuit of work-related claims. *See* pp. 13-20. Nor does it matter that modern class-action procedures were not available to employees in 1935 when the NLRA was enacted. The NLRA

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[4] For the first time, the Company argues (Br. 21-23) that Section 382 of the California Code of Civil Procedure, which authorizes class actions in California, creates only a procedural right, and the Board has acted contrary to state law by transforming class-action procedure into a substantive right. The Company then posits that the Board will "take this position with respect to all state class action statutes," and that as a result, the "substantive right to pursue a class action might differ in character, depending on the statute [used by the party pursuing] the class action." (Br. 22.) The Company failed to raise this issue to the Board. Under Section 10(e) of the NLRA, "[n]o objection that has not been urged before the Board . . . shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e); *accord Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (court lacks jurisdiction to consider issue not raised before Board); *Local 900, IUE v. NLRB*, 727 F.2d 1184, 1191-92 (D.C. Cir. 1984). The Company's failure to make the above objection to the Board renders the Court without jurisdiction to consider it.

In any event, the Company's argument misses the mark for the same reasons outlined above with regard to Rule 23. The Board's decision does not convert a procedural right into a substantive one. The substantive right flows from the NLRA.

was drafted to allow the Board to respond to new developments. *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (recognizing Board's "responsibility to adapt the [NLRA] to changing patterns of industrial life"). The relevant point is that when class-action procedures became available, the NLRA barred employers from interfering with their employees' Section 7 right to use those new procedures for their mutual aid or protection. In any event, the Company's arbitration agreement, as the Company sought to apply it, would preclude its employees even from pursuing joint claims, notwithstanding that the procedural device of joinder existed in 1935.

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

B. The Company Violated Section 8(a)(1) by Maintaining or Threatening To Enforce the Notice and the Agreement in a Way that Interferes with Employees' Section 7 Rights

An employer violates Section 8(a)(1) of the NLRA by maintaining a work rule that "would reasonably tend to chill employees in the exercise of their Section

7 rights." *NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 481 (1st Cir. 2011) (quoting *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999)). A rule that explicitly restricts Section 7 conduct is invalid on its face. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). Otherwise, the rule will be found invalid if: "(1) employees would reasonably construe the language [of the rule] to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Ne. Land Servs.*, 645 F.3d at 482 (*quoting Lutheran Heritage*, 343 NLRB at 647) (alteration in *Ne. Land Servs.*). Here, the Company imposed the Notice and the Agreement on all employees as a condition of employment, which carries an "implicit threat" that failure to comply will result in loss of employment. Accordingly, the Board appropriately used its work-rule standard to find that the Company's actions in threatening to enforce the Notice and the Agreement were unlawful. *D.R. Horton*, 357 NLRB at 2283; *see also Ne. Land Servs.*, 645 F.3d at 481-83 (applying to employment contract); *U-Haul Co.*, 347 NLRB 375, 377-78 (2006) (same), *enforced*, 255 Fed. App'x 527 (D.C. Cir. 2007).

The Notice and the Agreement do not explicitly prohibit collective action in all forums; therefore, the Board properly examined the agreements under the third prong of *Lutheran Heritage*. 343 NLRB at 647 (rule unlawful if applied to restrict Section 7 rights). Under that prong, it is the rule's *application*, in and of itself, to

protected conduct that establishes the rule's unlawfulness. It does not matter that the rule or policy does not explicitly restrict Section 7 activity; enforcement alone constitutes an unfair labor practice. *See Hitachi Capital Am. Corp.*, 361 NLRB No. 19, 2014 WL 3897175, at *3 (Aug. 8, 2014) (unnecessary to determine whether rule is facially overbroad when that rule was applied to restrict Section 7 activity).

1. The Company threatened to apply the Notice and the Agreement to restrict employees' Section 7 activity

The Company does not dispute, nor could it, that it sought to enforce the Notice and the Agreement when it issued its demand letter. The letter insisted that Gomez-Flores withdraw his class-action lawsuit and submit his claim to individual arbitration or face a motion to compel arbitration. The demand "made clear [the Company's] interpretation and application of the Notice and Arbitration Agreement: arbitration was the exclusive forum for resolving employment claims, and arbitration could only be conducted on an individual basis." (A. 357.)

The coercive character of the Company's threat does not evaporate because the Company did not file a motion to compel. *See Three D, LLC*, 361 NLRB No. 31, 2014 WL 4182705, at *1 n.3 (Aug. 22, 2014), *enforced*, 629 Fed. App'x 33 (2d Cir. 2015) (finding an unlawful threat, even where not acted upon, was sufficiently coercive conduct to violate Section 8(a)(1)). By sending the letter, the Company "acted to compel employees to follow a route that foreclosed them from

collectively pursuing their employment claims in all forums, arbitral and judicial." (A. 357-58.) As the Board explained, the Company's conduct "is precisely what the Board enjoined in *D.R. Horton*." (A. 358.) *See D.R. Horton*, 357 NLRB at 2288 ("[E]mployers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial."). By interpreting and threatening to apply the Agreement "to restrict activity protected by Section 7 of the Act," the Company lent an unlawful meaning to the Agreement, "render[ing it] unlawful." *Hitachi Capital*, 2014 WL 3897175, at *4. Accordingly, the Board properly found (A. 357-58) that the Company's application of the Agreement to curb the employees' Section 7 rights rendered the Agreement unlawful under the third prong of *Lutheran Heritage*.

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

As the Board explained in *D.R. Horton*, 357 NLRB at 2280-81, and *Murphy Oil*, 2014 WL 5465454, at *1, *6, restrictions on Section 7 rights are unlawful even if, like here, they take the form of agreements between employers and employees. In *National Licorice Co. v. NLRB*, the Supreme Court held that individual contracts in which employees prospectively relinquish their right to present grievances "in any way except personally," or otherwise "stipulate[] for the renunciation … of rights guaranteed by the [NLRA]," are unenforceable and "a continuing means of thwarting the policy of the [NLRA]." 309 U.S. 350, 360-61

(1940); *accord Lewis*, 823 F.3d at 1155; *Morris*, 2016 WL 4433080, at *4. As the Court explained, "employers cannot set at naught the [NLRA] by inducing their workmen to agree not to demand performance of the duties which [the statute] imposes." *Nat'l Licorice*, 309 U.S. at 364. Similarly, in *NLRB v. Stone*, the Seventh Circuit held that individual contracts requiring employees to adjust their grievances with their employer individually violate the NLRA, even when "entered into without coercion." 125 F.2d 752, 756 (7th Cir. 1942); *see also J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) (individual contracts conflicting with Board's function of preventing NLRA violations "obviously must yield or the [NLRA] would be reduced to a futility").

Consistent with those long established principles, the Board in a variety of contexts unrelated to arbitration has held that Section 8(a)(1) bars individual contracts that prospectively waive Section 7 rights. *See, e.g.*, *First Legal Support Servs., LLC*, 342 NLRB 350, 362-63 (2004) (unlawful to have employees sign contracts stripping them of right to organize); *McKesson Drug Co.*, 337 NLRB 935, 938 (2002) (unlawful to insist that employee sign, as condition of avoiding discharge, broad waiver of rights, both present and future, to file any lawsuit, unfair-labor-practice charges, or other legal action).[5]

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[5] Collective waivers negotiated on behalf of employees by their exclusive bargaining representative, by contrast, are permissible. For example, a union may waive the employees' right to engage in an economic strike, for the term of a

The principle that an employer may not lawfully induce an employee prospectively to waive her Section 7 rights flows from the unique characteristics of those rights and the practical circumstances of their exercise. Protected concerted activity – of unorganized workers, in particular – often arises spontaneously when employees are presented with actual workplace problems and have to decide among themselves how to respond. *See, e.g.*, *Wash. Aluminum*, 370 U.S. at 14-15 (concerted activity spurred by extreme cold in plant); *Salt River*, 206 F.2d at 328 (concerted activity prompted by violations of minimum-wage laws). The decision whether collectively to walk out of a cold plant or to join other employees in a wage-and-hour lawsuit is materially different from the decision of an individual employee – made in advance of any concrete grievance – to agree to refrain from *any* future concerted activity, regardless of the circumstances. *See Nijjar Realty, Inc.*, 363 NLRB No. 38, 2015 WL 7444737, at *5 (Nov. 20, 2015) (noting that such waivers are made "at a time when the employees are unlikely to have an awareness of employment issues that may now, or in the future, be best addressed

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

by collective or class action"), *petition for review filed*, No. 15-73921 (9th Cir. Dec. 30, 2015).

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, 217-18 (1972) (Section 7 protects right of employees who resign from union not to take part in strike they once supported). By the same token, employees must be able to decide whether "to engage in … concerted activity which they decide is appropriate," *Plastilite Corp.*, 153 NLRB 180, 183 (1965), *enforced in relevant part*, 375 F.2d 343 (8th Cir. 1967); *see also Serendippity-Un-Ltd.*, 263 NLRB 768, 775 (1982) (same), when the opportunity for such activity arises, even after previously deciding not to do so when circumstances were different. *See Pattern Makers' League of N. Am. v. NLRB*, 473 U.S. 95, 101-07 (1985) (union could not maintain rule prospectively restricting employee resignations); *Mission Valley Ford Truck Sales*, 295 NLRB 889, 892 (1989) (employer could not hold employee to "earlier unconditional promises to refrain from organizational activity"). In this context, prospective individual waivers, like the contract struck down in *National Licorice*, 309 U.S. at 361, impair the "full freedom" of the signatory employees to decide, at the appropriate time, whether to participate in concerted activity.

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

Individual prospective waivers of Section 7 rights undermine the core purposes of the NLRA by weakening all employees' *collective* right to band together for mutual aid or protection. An employee's ability to engage in concerted activity depends on her ability to communicate with and appeal to fellow employees to join in that action. *See, e.g.*, *Signature Flight Support*, 333 NLRB 1250, 1257 (2001) (finding employee efforts "to persuade other employees to engage in concerted activities" protected), *enforced mem.*, 31 Fed. App'x 931 (11th Cir. 2002); *Am. Fed'n of Gov't Emps.*, 278 NLRB 378, 382 (1986) (describing as "indisputable" that one employee "had a Section 7 right to appeal to [another employee] to join" in protected activity); *Harlan Fuel Co.*, 8 NLRB 25, 32 (1938) (rights guaranteed to employees by Section 7 include "full freedom to receive aid,

advice and information from others concerning [their self-organization] rights"). But such real-time appeals would be futile if employees are picked off one-by-one through individual waivers. While an employee not bound by a prospective waiver may choose in a particular instance not to assist her coworkers, an employee who has waived her Section 7 rights prospectively can never assist her coworkers regardless of the force of their appeals for assistance. Such prospective, individual restrictions thus diminish each employee's right to mutual aid and protection and the ability of employees together to advance their interests in the workplace.

Finally, where, as here, the prospective waiver of Section 7 rights operates to bar only concerted *legal* activity, the result is to limit the employees' options to comparatively more disruptive forms of concerted activity at a time when workplace tensions are high and employees are deciding which, if any, concerted response to pursue. As the Board has explained, *D.R. Horton*, the peaceful resolution of labor disputes is a core objective of the NLRA, and that objective is ill-served by individual arbitration agreements that prospectively waive employees' right to consider the option of concerted legal action along with other collective means of advancing their interests as employees. 357 NLRB at 2279-80.

In sum, the Company's threatened application of the Notice and the Agreement so as to bar a key form of concerted activity violates Section 8(a)(1) of the NLRA. And it is no less unlawful for being styled an agreement, in light of the

longstanding prohibition on individual contracts that prospectively waive Section 7 rights. That the Company used the particular vehicle of an arbitration agreement subject to the FAA to impose that prospective bar likewise does not excuse its restriction of Section 7 rights; it cannot "attempt 'to achieve through arbitration what Congress has expressly forbidden'" under the NLRA. *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 676 (4th Cir. 2016) (quoting *Graham Oil v. ARCO Prods. Co.*, 43 F.3d 1244, 1249 (9th Cir. 1994)). As explained more fully below, such agreements thus are not entitled to enforcement under the FAA.[6]

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

The Company's principal defense is that the FAA precludes enforcement of the Board's Order barring the prospective waiver of employees' Section 7 right to

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[6] As discussed above (pp. 12-13), the Board is owed deference to its expertise in applying the Act to labor controversies, and, therefore, the Board's findings that Section 7 is critical to the NLRA and encompasses concerted legal activity, and that agreements restricting that right are unlawful under Section 8(a)(1), are each entitled to considerable deference. *See City Disposal*, 465 U.S. at 829 (Board has prerogative to define Section 7); *Garner*, 346 U.S. at 490 (Board has primary authority to interpret and apply NLRA); *see also City of Arlington*, 133 S. Ct. at 1871 (statutory interpretation within agency's expertise should be accepted unless "foreclose[d]" by the statutory text); *Chevron*, 467 U.S. at 842-43; *see generally* Note, *Deference and the Federal Arbitration Act: The NLRB's Determination of Substantive Statutory Rights*, 128 HARV.L.REV. 907, 919 (2015) (explaining that "[t]h[e] [FAA] context does not alter the conclusion that … the NLRB's determination is an interpretation of the statute the agency administers and is thus within *Chevron*'s scope").

seek to improve working conditions through collective litigation. But that position contravenes the settled principle that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1972); *see also POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014). As demonstrated below, agreements that are unlawful under the NLRA are exempted from enforcement by the FAA's saving clause. There is thus no difficulty in fully enforcing each statute according to its terms.

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

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

Co., 388 U.S. 395, 404 n.12 (1967) (FAA's purpose is "to make arbitration agreements as enforceable as other contracts, but not more so").

The FAA's saving clause is an express limitation on the FAA's mandate to enforce arbitration agreements as written and, consequently, on the broad federal policy favoring arbitration. 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, as do ostensibly general defenses "that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. 339.

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

As described above (pp. 23-28), the Board, with court approval, has consistently rejected, as unlawful under the NLRA, a variety of individual

contracts that are unrelated to arbitration because they prospectively restrict Section 7 rights. *Nat'l Licorice*, 309 U.S. at 360-61, 364. It has set aside settlement agreements that require employees to agree not to engage in concerted protests, *Bon Harbor Nursing & Rehab. Ctr.*, 348 NLRB 1062, 1078 (2006); *Bethany Med. Ctr.*, 328 NLRB 1094, 1105-06 (1999), and has found unlawful a separation agreement that was conditioned on the departing employee's agreement not to help other employees in workplace disputes, *Ishikawa Gasket Am.*, 337 NLRB 175, 175-76 (2001). The Board has also found waivers of an employee's right to engage in concerted-legal action are unlawful in contracts that do not provide for arbitration. *See Convergys Corp.*, 363 NLRB No. 51, 2015 WL 7750753, at *1 & n.3 (Nov. 30, 2015) (application for employment), *petition for review filed*, No. 15-60860 (5th Cir. Dec. 9, 2016); *cf. LogistiCare Solutions, Inc.*, 383 NLRB No. 85, 2015 WL 9460027, at *1 (Dec. 24, 2015) (employee handbook), *petition for review filed*, No. 15-60029 (5th Cir. Jan. 14, 2016). That unbroken line of precedent, dating from shortly after the NLRA's enactment, demonstrates that illegality under the NLRA has consistently served to invalidate a variety of contracts, not just arbitration agreements, and does not derive its meaning from arbitration. 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." 2016 WL 4433080, at *6. "The same provision in a

contract that required court adjudication as the exclusive remedy would equally violate the NLRA." *Id.* at *5.

Moreover, unlike the courts, whose hostility to arbitration prompted enactment of the FAA, *see Concepcion*, 563 U.S. at 339, the Board harbors no prejudice against arbitration, *see Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 271 (1964) (discussing the Board's policies favoring arbitration as means of peacefully resolving workplace disputes). Nothing in the Board's *D.R. Horton* decision prohibits an employer from requiring arbitration of all *individual* work-related claims; as the Board explained, "[e]mployers remain free to insist that *arbitral* proceedings be conducted on an individual basis." *D.R. Horton*, 357 NLRB at 2288. 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), *petition for review filed*, No. 16-60001 (5th Cir. Jan 4, 2016) (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. *See Morris*, 2016 WL 4433080, at *6 ("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.”). Such an agreement unlawfully restricts employees’ Section 7 right to decide for themselves, at the time an actual workplace dispute arises, whether or not to join with others in seeking to enforce their employment rights. *D.R. 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*, 2016 WL 4433080, at *6-7. 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*, 2016 WL 4433080, at *8-9 (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*, 2016 WL 4433080, at *10; *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 falls comfortably within the FAA’s saving-clause exception. In other words, the Board’s finding that the Company violated the NLRA by maintaining agreements

that require arbitration of all work-related claims on an individual basis adheres to the FAA policy of enforcing arbitration agreements on the same terms as other contracts. There is no conflict between either the express statutory requirements, or animating policy considerations, of the FAA and NLRA with respect to that unfair-labor-practice.[7]

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[7] For that reason, it is unnecessary to reach the question, which the Company (Br. 27-32) and the Chamber address (Amicus 13-24), of whether the NLRA clearly contains a "contrary congressional command" overriding the FAA. That inquiry is designed to determine which statutory command controls when another federal statute conflicts with the FAA and the two cannot be reconciled. Here, there is no conflict between the statutes; both can – and should – be given effect. *Morton*, 417 U.S. at 551; *accord Lewis*, 823 F.3d at 1157 (finding "no conflict between the NLRA and the FAA, let alone an irreconcilable one"); *Morris*, 2016 WL 4433080, at *8. The Company's contention (Br. 32-33) that the *Lewis* court erred by not starting its analysis with a search for a contrary congressional command misunderstands "the way the Supreme Court has instructed us to approach statutory construction." *Morris*, 2016 WL 4433080, at *8. Before determining "whether one statute eclipses another," it must first be determined "if the two statutes conflict at all." *Lewis*, 823 F.3d at 1156. As explained above, the saving clause "prevents the need for such a conflict," and if locating such a conflict were a necessary starting point, the "saving clause would serve no purpose." *Morris*, 2016 WL 4433030, at *8.

Nevertheless, it is evident that Section 8(a)(1) of the NLRA expressly commands employers not to interfere with their employees' Section 7 right to engage in concerted activity for mutual aid or protection. To the extent an arbitration agreement bars concerted pursuit of claims in any forum, whether arbitral or judicial, its enforcement under the FAA would inherently conflict with those NLRA provisions.

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

The Company is mistaken in its contention (Br. 24-26) that the Board's position is foreclosed by Supreme Court precedent enforcing agreements that require individual arbitration in other contexts. The Supreme Court has never considered whether agreements requiring individual arbitration must be enforced under the FAA despite the NLRA's protection of the right of statutory employees to pursue work-related claims concertedly. Nor has the Court found enforceable an arbitration agreement that violates a federal statute – as the Agreement violates Section 8(a)(1). For a court to find that a contract that violates the NLRA does not fit within the FAA's saving clause would be to fail to give effect to the settled principle that courts should regard two co-equal statutes as effective. *Morton*, 417 U.S. at 551.

None of the Supreme Court FAA cases that the Company (Br. 24, 25) or the Chamber (Amicus 8, 15) cites involve arbitration agreements that impair core provisions of another federal statute, much less directly violate such a statute. Instead, the Court has enforced arbitration agreements over challenges based on statutory provisions only where the agreements were consistent with the animating purposes of those particular statutes. For example, in *Gilmer v. Interstate/Johnson Lane Corp.*, which involved a challenge to arbitration of claims under the Age Discrimination in Employment Act ("ADEA"), the Court determined that

Congress' purpose in enacting the ADEA was "to prohibit arbitrary age discrimination in employment." 500 U.S. 20, 27 (1991). Because the substantive rights of individual employees to be free of age-based discrimination could be adequately vindicated in individual arbitration, the Court held that an arbitration agreement could be enforced. The Court rejected arguments that ADEA provisions affording a judicial forum and an optional collective-action procedure precluded enforcement of an arbitration agreement, explaining that Congress did not "'intend[] the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum.'" *Id.* at 29 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).[8]

Unlike the statutory provisions at issue in the Supreme Court's FAA cases – where protecting collective action against individual employee waiver is not an objective of the statutes – the NLRA provisions protecting collective action are

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[8] The Supreme Court has consistently maintained that same analytical focus on statutory purpose when assessing challenges to the enforcement of arbitration agreements based on provisions in other federal statutes. *See, e.g.*, *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 671 (2012) (judicial-forum provision not "principal substantive provision[]" of Credit Repair Organizations Act); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (judicial-forum and venue provisions in Securities Act not "so critical that they cannot be waived"); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 235-36 (1987) (Exchange Act provision not intended to bar regulation when "chief aim" was to preserve exchanges' power to self-regulate).

foundational, underlying the entire architecture of federal labor law and policy. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (characterizing the rights protected by Section 7 as "fundamental"). Under the mode of statutory analysis used in cases like *Gilmer*, that is a crucial distinction. As the Board explained in *Murphy Oil*, "[t]he core objective of the [NLRA] is the protection of workers' ability to act in concert, in support of one another." 2014 WL 5465454, at *1.

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*, 2016 WL 4433080, at *8 ("Without § 7, the [NLRA]'s entire structure and policy 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. And other NLRA provisions further demonstrate the central role Section 7 rights play in federal labor policy and the importance of Section 8's proscription of interference with those rights. Section 9 establishes procedures, such as elections and exclusive representation, to implement representational Section 7 rights. 29 U.S.C. § 159. And Section 10 empowers the Board to prevent violations of Section 8. 29 U.S.C. § 160. Thus, the NLRA's various provisions all lead back to Section 7's guarantee of employees' right to

join together "to improve terms and conditions of employment or otherwise improve their lot as employees." *Eastex*, 437 U.S. at 565.

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

Unlike in *Gilmer* and similar cases cited by the Company and the Amicus, concerted activity under the NLRA is 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 covered by the NLRA from engaging in concerted legal action in any forum is not like a waiver of the optional collective-action mechanisms in statutes like the ADEA or FLSA. Rather, it is akin to a contract providing that employees can be fired on the basis of age contrary to the ADEA, or will not be paid the minimum wage dictated

by the FLSA. The Supreme Court has never held that an arbitration agreement may waive such rights or violate the statutes that create and protect them. To the contrary, the Court has repeatedly emphasized that it will not sanction the enforcement of arbitration agreements that prospectively waive "substantive" federal rights. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013); *Mitsubishi Motors*, 473 U.S. at 637 n.19; *accord Morris*, 2016 WL 4433080, at *8.

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.[9]

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[9] Because Section 7 is only implicated when the agreement applies to work-related claims of statutory employees, it poses no impediment to enforcement of arbitration agreements that apply to consumer, commercial, or other non-employment-related claims, or that involve employees exempt from NLRA coverage, such as statutory supervisors or managers. *See, e.g.*, *Gilmer*, 500 U.S. at 23 (age-discrimination claim by manager); *CompuCredit*, 132 S. Ct. at 673 (consumer claims under Credit Repair Organization Act); *Rodriguez de Quijas*, 490 U.S. at 483 (investor claims under Securities Act). The Company, therefore, overstates the Board's holding by contending that the Board has interpreted the NLRA as "barring all arbitration agreements with class action waivers." (Br. 33.)

The Company's (Br. 24) and the Chamber's (Amicus 24) reliance on *Concepcion* is flawed for similar reasons. As described above (pp. 30-34), 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 class-wide 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. at 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…." *Lewis*, 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*, 2016 WL 4433080, at *10 (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.[10] 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").

The Board is not, contrary to the Company's claim, "incentivizing class actions" before the courts or undermining the FAA's "core objectives." (Br. 26.) Instead, 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. Rather, the Board acknowledges an employer's right "to insist

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

that *arbitral* proceedings be conducted on an individual basis," so long as employees remain free to bring joint, class, and collective claims in another forum. *Horton*, 357 NLRB at 2288 (emphasis in original). Furthermore, to the extent that the employer voluntarily agrees to arbitrate employee claims on a collective basis, the Board has recognized that the employer may legitimately restrict employees from exercising their collective-litigation rights in court. *SolarCity Corp.*, 2015 WL 9315535, at *5 n.15.[11]

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[11] There is, accordingly, no basis for the Chamber's claim (Amicus 25-26) that "faced with the prospect of class arbitration," employers "would simply abandon arbitration altogether – to the detriment of employees, businesses, and the economy as a whole." To the extent the Chamber maintains (Amicus 26-29) that arbitration is a better means of resolving workplace disputes for employees, as well as employers, its assumption of the role of "workers' champion" may fairly be viewed with "suspicion." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996).

In any event, nothing in the Board's rule precludes employees from making that decision for themselves at the time a claim or grievance arises and collective litigation is a real option. In that context, Section 7 gives employees the right to decide whether to pursue individual arbitration or to forego that 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 personally be affected), *enforced*, 387 F.3d 908 (D.C. Cir. 2004); *Caval Tool Div.*, 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 an aggrieved individual who has the only "immediate stake in the outcome" enlarges the power of employees to secure redress for their grievances and "is 'mutual aid' in the most literal sense").

The Company thus misreads the Supreme Court's FAA cases as dispositive of the issue here, and as standing for the broad proposition that the FAA demands enforcement of arbitration agreements that violate a co-equal federal statute. *See Alexander v. Sandoval*, 532 U.S. 275, 282-84 (2001) (instructing parties not to treat Supreme Court decisions as authoritative on issues of law Court did not decide). The Fifth Circuit made a similar error in rejecting the Board's rationale in *D.R. Horton*.[12] That court cited prior FAA cases like *Gilmer* for the proposition that

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[12] 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 & 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); *Patterson v. Raymours Furniture Co.*, No. 15-2820-CV, 2016 WL 4598542, at *2 (2d Cir. Sep. 2, 2016) (relying on *Sutherland* to reject the Board's *Horton* analysis, but expressly noting that had the court not been bound by that holding, the "forcefully stated" opinions in *Lewis* and *Morris* "might well have persuaded" it to find such waivers unenforceable). The Eighth Circuit's decision in *Cellular Sales of Mo., 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.

The Company's reliance (Br. 26, 29) 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 Eleventh Circuit addressed whether the FLSA precludes a collective-action waiver, but it did not address the NLRA. *See* 745 F.3d at 1334-1336. In *Richards*, the Ninth Circuit found that the employees had waived any argument based on the Board's decision in *D.R. Horton*. *See* 744 F.3d at 1075 & n.3. The Ninth Circuit's more recent decision in *Morris* has squarely addressed the question and rejected the Fifth Circuit's position. *See* 2016 WL 4433080, at *4. The critical point is that none of those decisions relied on by the Company addresses the Board's saving-clause

"there is no substantive right to class procedures under the [ADEA]" or "to proceed collectively under the FLSA." 737 F.3d at 357. But 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*, 2016 WL 4433080, at *4, 9; *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*, 2016 WL 4433080, at *6.

In sum, prospective waivers of the right to bring concerted legal action are unlawful under the NLRA even if they do not offend the ADEA or other statutes granting individual rights. Just because an employer's action is not prohibited by one statute "does not mean that [it] is immune from attack on other statutory grounds in an appropriate case." *Emporium Capwell*, 420 U.S. at 72; *see also New York Shipping Ass'n, Inc. v. Fed. Mar. Comm'n*, 854 F.2d 1338, 1367 (D.C. Cir. 1988) ("[T]here is no anomaly if conduct privileged under one statute is

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argument. *See Lewis*, 823 F.3d at 1159. District court decisions rejecting the Board's position suffer from the same analytical flaws.

nonetheless condemned by another; we expect persons in a complex regulatory state to conform their behavior to the dictates of many laws, each serving its own special purpose."). The NLRA's protection of, and prohibition on interference with, concerted activity is what distinguishes it from other employment statutes and what renders agreements that require *individual* arbitration unlawful under the NLRA and unenforceable under the FAA.

II. THE BOARD IS ENTITLED TO SUMMARY AFFIRMANCE OF ITS UNCONTESTED FINDING THAT THE COMPANY UNLAWFULLY MAINTAINED AN AGREEMENT THAT EMPLOYEES WOULD REASONABLY CONSTRUE AS BARRING THE FILING OF CHARGES WITH THE BOARD

The Board found that the Company maintained a mandatory notice that employees would reasonably conclude precludes them from filing unfair-labor-practice charges with the Board in violation of Section 8(a)(1). (A. 358) As explained above (pp. 20-21), under *Lutheran Heritage*, a workplace rule that employees would reasonably construe as restricting Section 7 activity is also unlawful. The Company does not challenge the Board's finding in this regard (Br. 6 n.1). Accordingly, the Board is entitled to summary affirmance of that uncontested finding and summary enforcement of that portion of its Order. *See Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 765 (D.C. Cir. 2012) (granting summary enforcement where party does not contest violations before the court).

III. THE BOARD PROPERLY REJECTED THE COMPANY'S CHALLENGES TO THE COMPLAINT'S VALIDITY

The Company (Br. 36-48) interposes three procedural defenses to the validity of the complaint initiating the proceedings before the Board. Relying on *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held three recess appointments to the Board in January 2012 invalid under the Recess Appointments Clause, and on *SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015), *cert. granted*, 136 S. Ct. 2489 (June 20, 2016), which found that Acting General Counsel Solomon was serving in violation of the Federal Vacancies Reform Act, the Company claims that the Board, the Regional Director, and the General Counsel lacked authority to issue a complaint. As shown below, these defenses lack merit.

A. The Board's General Counsel Enjoys Independent Authority and Can Lawfully Act Absent a Quorum

Citing Section 3(b) of the Act (29 U.S.C. §153 (b)), which provides, in relevant part, that "three members of the Board shall, at all times, constitute a quorum of the Board," the Company claims (Br. 37) that issuance of an unfair-labor-practice complaint cannot be exercised by the Board or its agents in the absence of a quorum. The Company argues that under *Noel Canning*, the Board lacked a quorum when the complaint issued in this case, rendering the General Counsel without the authority to issue a complaint. The Company's argument fails

to acknowledge the separate, independent functions of the Board and General Counsel—the former has independent adjudicatory authority and the latter has independent prosecutorial authority. *SW Gen.*796 F.3d at 78 n.7 (citing *Haleston Drug Stores v. NLRB*, 187 F.2d 418, 421 n.3 (9th Cir. 1951)); *see also Beverly Health & Rehab. Servs., Inc. v. Feinstein*, 103 F.3d 151, 152 (D.C. Cir. 1996) (the NLRA establishes a "split-enforcement system, assigning all prosecutorial functions to the General Counsel . . . and all adjudicatory functions to the Board").

Contrary to the Company's assertions, Section 3(d) of the Act (29 U.S.C. § 153 (d)), not Section 3(b), is the starting point for determining the General Counsel's authority.[13] As the Court has explained, "Section 153(d) of the [NLRA] dictates that the General Counsel is the '*final* authority . . . in respect of the investigation of charges and issuance of complaints . . . and in respect of the prosecution of such complaints before the Board.'" *Beverly Health & Rehab.*, 103 F.3d at 153 (emphasis added) (quoting 29 U.S.C. § 153(d)). In short, because of Section 3(d), "[t]he NLRB General Counsel is statutorily independent from the Board." *SW Gen.*, 796 F.3d at 80; *see also Pallet Cos.*, 361 NLRB No. 33, 2014

[13] Under Section 3(d), the General Counsel "shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . [and] the prosecution of such complaints before the Board." 29 U.S.C. § 153(d).

WL 4246687, at *1 (Aug. 27, 2014), *enforced*, 634 Fed. App'x 800 (D.C. Cir. 2015).

Thus, the General Counsel's authority to investigate unfair-labor-practice charges and prosecute complaints derives not from any power "delegated" by the Board, as the Company claims, (Br. 40), but, rather, flows directly from the text of the NLRA.[14] In enacting Section 3(d), "Congress intended to create an officer *independent of the Board* to handle prosecutions." *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 127 (1987) (emphasis added). As the Supreme Court has found, the NLRA's legislative history shows that the acts of the General Counsel are not acts of the Board. *Id.* at 128-29; *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975) ("Congress has delegated to the Office of General Counsel on 'behalf of the Board' the unreviewable authority to determine whether a complaint shall be filed").[15]

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[14] Contrary to the Company's assertion (Br. 40), *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 475 (D.C. Cir. 2009), does not support its claim that authority delegated by the Board to the regional directors and the General Counsel lapsed when the Board lost a quorum. *Laurel Baye* is inapplicable because, as explained, the prosecutorial authority exercised by the General Counsel, and the regional directors as his agents, derives from the statute, not the Board.

[15] Though the Company's brief is not entirely clear, to the extent the Company challenges the General Counsel's authority to delegate his prosecutorial authority to regional directors during the time the Board lacks a quorum, this argument likewise fails. As courts and the Board have recognized, regional directors' authority to issue complaints is based on the General Counsel's delegation of

Accordingly, contrary to the Company's claim, a General Counsel's authority to issue and prosecute complaints, and, in turn, a regional directors' authority to do so, are unaffected by the Board's composition.

B. The Board Ratified Regional Director's Rubin's Appointment; Rubin Ratified Her Prior Actions

The Company asserts (Br. 37, 40) that the absence of a Board quorum rendered Regional Director Rubin's appointment void and precluded her from issuing any complaint. The Company's argument fails to consider that the Board subsequently ratified Regional Director's Rubin's appointment and Rubin ratified her prior actions.

On July 18, 2014, following the Supreme Court's decision in *Noel Canning*, a fully Senate-confirmed five-member Board "ratif[ied] *nunc pro tunc*" and "expressly authorize[d]" the selection of Rubin as Regional Director, whose original appointment occurred when the Board, pursuant to *Noel Canning*, was improperly constituted. (SA 4, 6); *see also Bloomingdale's, Inc.*, 363 NLRB No. 172, 2016 WL 1743245, at *1 n.3 (Apr. 29, 2016), *petition for review filed*, No.

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authority to them, not on any power delegated by the Board. *See, e.g., Sears, Roebuck*, 421 U.S. at 139 ("Charges are filed in the first instance with one of the Board's . . . Regional Directors, to whom the General Counsel has delegated the initial power to decide whether or not to issue a complaint"); *Dunn v. Retail Clerks Int'l Ass'n*, 307 F.2d 285, 288 (6th Cir. 1962) ("By regulation, the General Counsel has delegated authority to Regional Directors to issue such complaints"); *Pallet*, 2014 WL 4246687, at *1 ("When a Regional Director or other designated Board agent issues a complaint, he acts for, and with authority delegated by, the General Counsel.").

16-71338 (9th Cir. May 6, 2016) (providing procedural history of Regional Director Rubin's appointment). And on July 30, Regional Director Rubin determined that, in her estimation, the actions taken "between [her] initial appointment and the [Board's] ratification [of her selection] were legally authorized and entirely proper." (SA 6.) As such, Regional Director Rubin "affirm[ed] and ratif[ied] any and all actions taken by [her] or on [her] behalf during that period. . . ." from her appointment until July 18. Rubin's ratification of her prior actions encompassed "all actions in unfair labor practice cases, including but not limited to conducting investigations . . . [and] issuing complaints." (SA 6.)

Agency ratification is a proper and accepted practice, approved by the courts as a remedy for actions taken by improperly appointed government officials or bodies. *See, e.g., Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 117-20 (D.C. Cir. 2015) (discussing precedent for considering the validity of decisions made after the replacement of an improperly appointed official). These two ratifications, curing any defect in Rubin's appointment and her actions prior to the Board's ratification, are consistent with actions taken by other agencies and approved by this Court. *See Doolin Sec. Sav. Bank, FSB v. Office of Thrift Supervision*, 139 F.3d 203, 213-14 (D.C. Cir. 1998) (upholding cease-and-desist order issued by the validly appointed Director, which effectively ratified action of the "acting director" who initiated the case, even if acting director

was illegally appointed); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 707 (D.C. Cir. 1996) (holding that reconstituted FEC could properly ratify prior decisions made when it was unconstitutionally constituted); *see also Laurel Baye*, 564 F.3d at 476 (in holding that two-member Board lacked required quorum, Court suggested that "a properly constituted Board . . . may also minimize the dislocations engendered by our decision by ratifying or otherwise reinstating . . . previous decisions"). Most recently, the Third Circuit Court of Appeals, relying on this Court's decisions in *Legi-Tech* and *Doolin*, addressed directly analogous circumstances and, noting that ratification should be "applied flexibly," found that the Board's ratification and reappointment of a regional director appointed during the absence of a quorum and that regional director's ratification of his own actions were proper. *Advanced Disposal Servs. East, Inc. v. NLRB*, 820 F.3d 592, 602-05 (3d Cir. 2016).

In sum, the Company's unsupported claims challenging Regional Director Rubin's authority fail to account for the subsequent ratifications. Consistent with this Court's precedent, the Board properly took steps to cure any defects.

C. General Counsel Griffin Properly Ratified the Complaint

The Company argues (Br. 43-48) that *SW General* requires vacatur of the Board's Decision and Order because Solomon was invalidly designated as the Acting General Counsel when he issued the corrected complaint. The Company's argument overlooks a critical distinction between *SW General* and this case;

namely, here, General Counsel Griffin ratified the original complaint and its continued prosecution. Under *SW General*, this crucial difference dictates an entirely different result, and moots any argument that *SW General* requires vacatur.[16]

In *SW General*, the Court determined that Solomon was serving in violation of the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. §§ 3345 et seq., between January 5, 2011, and November 4, 2013. *SW General*, 796 F.3d at 82. The Court also recognized that the Board's General Counsel is one of several officers expressly exempted from FVRA's "void-ab-initio" and "no-ratification" provisions. *Id.* at 79 (discussing 5 U.S.C. § 3348(e)). As the Company acknowledges (Br. 44), the Court treated "the actions of an improperly serving Acting General Counsel [as] *voidable*, not void," indicating that any statutory defect in actions could be cured through ratification by a properly appointed General Counsel. *SW Gen.*, 796 F.3d at 79 (emphasis in original). Here, because General Counsel Griffin, who was sworn into office on November 4, 2013, and whose appointment is undisputedly valid, ratified the prior actions of Acting General Counsel Solomon, the Company cannot show that the Court should void Solomon's actions.

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[16] The Board disagrees with the decision in *SW General*. After having granted the petition for certiorari, the Supreme Court will hear argument in *SW General* on November 7, 2016.

This Court's precedent confirms that a properly appointed official can subsequently validate decisions made by those whose appointments were improper. In *Doolin*, for example, the Court upheld a cease-and-desist order issued by a validly appointed official, which implicitly ratified the prior action of a possibly improperly appointed "acting" official. 139 F.3d at 213; *accord Legi-Tech*, 75 F.3d at 709 (treating the ratification of new, properly reconstituted commission as an "adequate remedy"); *see also Intercollegiate Broad.*, 796 F.3d at 124 ("[A] court's holding that there has been an Appointments Clause violation does not meant that the violation cannot be remedied by a new, proper appointment."); *SW Gen.*, 796 F.3d at 79 (observing the absence of a curative measure, unlike in *Doolin*, because the General Counsel did not ratify the original complaint).

On October 22, 2015, General Counsel Griffin issued a notice of ratification of "the issuance and continued prosecution of the complaint" in this case. (SA 1.) The ratification noticed provided that, "[a]fter appropriate review and consultation with [] staff," General Counsel Griffin "decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act." (SA

1.)[17] Griffin's ratification directly responded to the Court's concern in *SW General* that it "cannot be confident that the complaint against Southwest would have issued under an Acting General Counsel other than Solomon." 796 F.3d at 80. By ratifying the issuance and continued prosecution of the complaint against the Company, General Counsel Griffin eliminated any uncertainty as to whether a lawfully serving General Counsel would issue a complaint against the Company.[18] *See Intercollegiate Broad.*, 796 F.3d at 118-19 ("de novo review" by properly appointed members sufficiently cured taint caused by invalid members' prior actions).

As the Court has made clear, once there is a proper appointment, the subsequent proceeding is "constitutionally suspect only if there is sufficient continuing taint arising from the first." *Id.* at 124 (citing *Legi-Tech*, 75 F.3d at 708 n.5 ("[T]he issue is not whether Legi-Tech was prejudiced by the original [decision], which it undoubtedly was, but whether, given the FEC's remedial

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[17] The Board served a copy of the Notice of Ratification on all parties of record, including the Company, and it is in the case record. (SA 3.)

[18] General Counsel Griffin's express re-authorization of the complaint puts to rest the Company's false assertion that "any claim that a different General Counsel would have engaged in the same action is highly implausible." (Br. 47.) *See H&M Int'l Transp., Inc.*, 363 NLRB No. 189, 2016 WL 2772293, at *4 n.2 (May 11, 2016) (observing that General Counsel Griffin's ratification of complaint issued by Acting General Counsel Solomon eliminated any uncertainty expressed in *SW General* regarding the actions of a subsequent, properly appointed General Counsel).

actions, there is sufficient remaining prejudice to warrant dismissal.")). Here, a properly appointed official, General Counsel Griffin, subsequently ratified the actions of, under this Court's precedent, an improperly serving official, Acting General Counsel Solomon, and the Company cannot show any continuing taint or remaining prejudice post-ratification. Instead, after receiving notice that the properly appointed General Counsel deemed the original complaint and its continued prosecution to be a "proper exercise of [his] broad and unreviewable discretion," (SA 1), the Company remained silent and lodged no objection to the ratification. Its silence continued when the Board issued its decision four months later, notwithstanding the Board's decision in *Boeing Co.*, 362 NLRB No. 195, 2015 WL 5113238, at *1 n.1 (Aug. 27, 2015), *petition for review filed*, No. 15-72894 (9th Cir. Sep. 18, 2015), in which the Board rejected a *SW General* challenge as moot because General Counsel Griffin had ratified Acting General Counsel Solomon's complaint. The Board's decision here, moreover, cited precedent approving ratification as a remedy for actions taken by improperly appointed officials—where the Company had challenged those actions—thus notifying the Company that the Board was invoking and relying on ratification principles as it proceeded to handle the case. (A. 355 n.3, citing *Tortillas Don Chavas*, 361 NLRB No. 10, 2014 WL 3897178, at *1 n.1 (Aug. 8, 2014) (post *Noel-Canning* Board "ratified . . . and expressly authorized the selection" of

administrative law judge) and *Pallet*, 2014 WL 4246687, at *2 (Board ratified and expressly authorized selection of Regional Director Walsh, who affirmed and ratified his pre-ratification actions)).[19] The Company's silence persists before this Court, and its opening brief does not reference this or any ratification.

The Company's arguments (Br. 45-46) why the Court should reject, as it did in *SW General*, any attempt by the Board to escape the consequences of the complaint issued under Acting General Counsel Solomon are irrelevant. Such contentions wholly ignore the October 22, 2015 ratification, which, as discussed above, the Board relied on to cure any defect caused by Solomon's designation deemed invalid under *SW General*. Because the ratification cured any defect in the complaint, *SW General* not only does not require vacatur, it, and other circuit precedent, mandate a contrary result. *See SW Gen.*, 796 F.3d at 80-81; *Doolin*, 139 F.3d 213-14; *Legi-Tech*, 75 F.3d at 709; *accord Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1191-92 (9th Cir. 2016) (upholding the ratification of prior decisions made by a director, who served in violation of FVRA but was subsequently properly appointed).

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[19] The Company also ignores that other parties before the Board seized the opportunity to challenge the ratification. *See, e.g.*, *Adriana's Ins. Servs.*, 364 NLRB No. 17, 2016 WL 3085828, at *1 n.1 (May 31, 2016) (noting that employer filed response challenging Griffin's ratification notice), *petition for review filed*, No. 16-1190 (D.C. Cir. June 10, 2016).

In sum, none of the procedural challenges to the complaint is persuasive. The Board took proper curative measures at every turn, and the Company's challenges fail.

CONCLUSION

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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National Labor Relations Board

September 2016

STATUTORY ADDENDUM

9 U.S.C. § 2

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.

5 U.S.C. § 3348

(a) In this section--
(1) the term “action” includes any agency action as defined under section 551(13); and
(2) the term “function or duty” means any function or duty of the applicable office that--
(A)(i) is established by statute; and
(ii) is required by statute to be performed by the applicable officer (and only that officer); or
(B)(i)(I) is established by regulation; and
(II) is required by such regulation to be performed by the applicable officer (and only that officer); and
(ii) includes a function or duty to which clause (i)(I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs.
(b) Unless an officer or employee is performing the functions and duties in accordance with sections 3345, 3346, and 3347, if an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office--
(1) the office shall remain vacant; and
(2) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office), only the head of such Executive agency may perform any function or duty of such office.

(c) If the last day of any 210-day period under section 3346 is a day on which the Senate is not in session, the second day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period.
(d)(1) An action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided by subsection (b), in the performance of any function or duty of a vacant office to which this section and sections 3346, 3347, 3349, 3349a, 3349b, and 3349c apply shall have no force or effect.
(2) An action that has no force or effect under paragraph (1) may not be ratified.
(e) This section shall not apply to--
(1) the General Counsel of the National Labor Relations Board;
(2) the General Counsel of the Federal Labor Relations Authority;
(3) any Inspector General appointed by the President, by and with the advice and consent of the Senate;
(4) any Chief Financial Officer appointed by the President, by and with the advice and consent of the Senate; or
(5) an office of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) if a statutory provision expressly prohibits the head of the Executive agency from performing the functions and duties of such office.

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 hereby 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.

29 U.S.C. § 153(b)

(b) Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof,

except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

29 U.S.C. § 153(d)

(d) General Counsel; appointment and tenure; powers and duties; vacancy

There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

29 U.S.C. § 157

Right of employees as to organization, collective bargaining, etc.

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 of 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 158(a)(3)of this title.

29 U.S.C. § 158

(a) Unfair labor practices by employer

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 157 of this title;

29 U.S.C. § 159

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided*

further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) Determination of bargaining unit by Board

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) Hearings on questions affecting commerce; rules and regulations

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

(d) Petition for enforcement or review; transcript

Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) Secret ballot; limitation of elections

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

29 U.S.C. § 160(a)

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation

except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

29 U.S.C. § 160(e)

(e) Petition to court for enforcement of order; proceedings; review of judgment

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 proceedings, as provided in 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 questions 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.

29 U.S.C. § 160(f)

(f) Review of final order of Board on petition to court

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.

29 U.S.C. § 102

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

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

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.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAYNES BUILDING SERVICES, LLC	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 16-1099 & 16-1136
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	31-CA-093920
	)	
Respondent/Cross-Petitioner	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,844 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
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Dated at Washington, DC
this 13th day of September, 2016

UNITED STATES COURT OF APPEALS
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	)	
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	)	

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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

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Dated at Washington, DC
this 13th day of September, 2016