

Nos. 16-70069 & 16-70267

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

**PHILMAR CARE, LLC,
A CALIFORNIA LIMITED LIABILITY COMPANY**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

JUAN CORTES

Respondent/Intervenor

**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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**BRIEF FOR
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JURISDICTIONAL STATEMENT

This case is before the Court on the petition for review of Philmar Care, LLC, a California limited liability company (“Philmar”), and the cross-application for enforcement of the National Labor Relations Board (“the Board”), of a Board

Order issued against Philmar. The Board's Decision and Order, reported at 363 NLRB No. 57 (Dec. 11, 2015), is final under Section 10(e) and (f) of the National Labor Relations Act ("the NLRA"), as amended, 29 U.S.C. § 151, et seq., 160(e) and (f).

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

STATEMENT OF ISSUES

1. Whether the Board reasonably found that Philmar violated Section 8(a)(1) of the NLRA by maintaining an agreement barring employees from concertedly pursuing work-related claims in any forum, arbitral or judicial.
2. Whether the Board reasonably found that Philmar violated Section 8(a)(1) of the NLRA by enforcing the unlawful agreement.

RELEVANT STATUTORY PROVISIONS

Relevant statutes are contained in the statutory addendum to this brief, except for those already included in Philmar's opening brief.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Philmar operates a skilled nursing facility in Sylmar, California. (ER.26; ER.3.)¹ Since at least September 2011, Philmar has maintained an "Employee Acknowledgment and Agreement" ("the Agreement"). (ER.21 n.4, 26; ER.4.)

The Agreement states, in relevant part:

I also understand that the Facility utilizes a voluntary system for alternative dispute resolution, which involves binding arbitration to resolve all disputes, which may arise out of the employment context. Because of the mutual benefits (such as reduced expenses and increased efficiency) which private binding arbitration can provide both the Facility and myself, I voluntarily agree that any claim, dispute, and/or controversy [. . .] arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Facility, whether based on tort, contract, statutory, or equitable law, or otherwise (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Worker's Compensation Act, and Employment Development Office claims) shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act.

(ER.21; ER.1-2, 4-5.) There is no language in the Agreement addressing whether arbitration may be conducted on a class or collective basis. (ER.21.) The parties stipulated that from September 2, 2011 through October 30, 2012, Philmar

¹ Citations are to the Excerpts of Record ("ER") filed with Philmar's opening brief and Supplemental Excerpts of Record ("SER") filed with this brief. Where applicable, references preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." refers to Philmar's opening brief.

required employees to sign the Agreement as a condition of employment. (ER.21, 27; ER.5.)

Juan Cortes worked for Philmar from about September 7, 2011 through October 30, 2012, and signed the Agreement as part of the hiring process. (ER.21, 26; ER.5.) On April 18, 2013, Cortes filed a class-action wage-and-hour complaint against Philmar in Los Angeles Superior Court, on behalf of himself and others similarly situated. (ER.21, 26; ER.5, SER.4-21.)

On May 9, 2014, Philmar filed a motion seeking to dismiss the case and compel individual arbitration of Cortes's class-action claims. (ER.21, 26-27; ER.5-6, SER.22-53.) Philmar argued that Cortes was required to arbitrate his claims individually because the Agreement did not explicitly authorize class-wide arbitration. (SER.28, 34-39.) Since then, it is undisputed that Philmar has interpreted the Agreement as requiring individual arbitration. (ER.21, 27; ER.6.) On August 15, 2014, the Superior Court granted Philmar's motion and stayed Cortes's class-wide claims. (ER.21, 27; ER.6, SER.54-69.)

II. PROCEDURAL HISTORY

On July 21, 2014, Cortes filed an unfair-labor-practice charge with the Board's Regional Office in Los Angeles. (ER.26; SER.70-72.) After an investigation, the Board's General Counsel issued a complaint alleging that Philmar violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by

maintaining an agreement requiring employees, as a condition of employment, to submit all employment-related claims to binding arbitration, and by enforcing that agreement to compel individual arbitration of Cortes's class-wide claims. (ER.26; SER.73-84.) By agreement of the parties, the case was transferred to an administrative law judge on a stipulated record. (ER.25-26; SER.1-3.)

On May 6, 2015, the judge issued a recommended decision finding that Philmar violated Section 8(a)(1) of the NLRA by maintaining and enforcing the Agreement, which required employees, as a condition of employment, to resolve through binding arbitration any claims "aris[ing] out of the employment context." (ER.21, 27-28.) In making her findings, the judge relied on the Board's decisions in *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), *petition for rehearing en banc denied*, No. 12-60031 (5th Cir. Apr. 16, 2014), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *petition for certiorari filed*, No. 16-307 (U.S. Sept. 9, 2016). (ER.27-29.) Initially, the judge determined that employees would have reasonably believed that the Agreement restricted their right under Section 7 of the NLRA, 29 U.S.C. § 157, to pursue joint, class, or collective legal action over employment-related claims. (ER.28; ER.5.) Regarding the condition-of-employment allegation, the parties stipulated that employees were required to sign the

Agreement as a condition of employment during the period from September 2, 2011 through October 30, 2012. Based on that stipulation, the judge found that the Agreement was a mandatory rule imposed in violation of the NLRA only during that time period. (ER.27-28; ER.5.) The judge further found that Philmar violated Section 8(a)(1) by enforcing the Agreement to compel individual arbitration of Cortes's claims. (ER.29.)

III. THE BOARD'S DECISION AND ORDER

On December 11, 2015, the Board (Members Hirozawa and McFerran; Member Miscimarra, dissenting) issued a Decision and Order affirming the judge's rulings, findings, and conclusions, and adopting her recommended order as modified. (ER.21-23.) Although the Board adopted the judge's finding that Philmar violated Section 8(a)(1) of the NLRA by maintaining and enforcing the binding arbitration provision, it did not adopt the judge's entire rationale regarding Philmar's unlawful maintenance of the Agreement. Specifically, the Board, noting that the Agreement "does not expressly address whether employees may assert a group or class grievance in arbitration," did not rely on the judge's finding that employees would reasonably construe the Agreement to restrict Section 7 activity. (ER.21.) Instead, relying on Philmar's motion to compel and its subsequent admitted interpretation of the Agreement as requiring individual binding arbitration, the Board found that Philmar violated Section 8(a)(1) of the NLRA by

unlawfully applying the Agreement so as to restrict employees from engaging in concerted legal activities protected by Section 7. (ER.21.) Further, relying on its decision in *On Assignment Staffing Services, Inc.*, 362 NLRB No. 189, 2015 WL 5113231 (Aug. 27, 2015), *enforcement denied*, No. 15-60642 (5th Cir. June 6, 2016), the Board held that whether Philmar required employees to sign the Agreement as a condition of employment was irrelevant to whether Philmar unlawfully maintained the Agreement.² (ER.21 n.4.) Finally, the Board adopted the judge's finding that Philmar, in filing its motion to compel, unlawfully

² *On Assignment*, which was decided after the administrative law judge issued her decision, held that agreements precluding collective action in all forums are unlawful even when they are not mandatory conditions of employment. 2015 WL 5113231, at *1, 5-11. As noted below, neither before the Board nor in its opening brief to this Court did Philmar challenge the Board's *On Assignment*-based rationale for holding that Philmar unlawfully maintained a rule barring collective action in any forum, whether arbitral or judicial. *See infra* note 3 (discussing this Court's decision in *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1075-77 (9th Cir. 2014)). Rather, Philmar rests its case entirely on a challenge to the Court's decision in *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 987 (9th Cir. 2016), *petition for certiorari filed*, No. 16-300 (U.S. Sept. 8, 2016). Accordingly, the validity of the Board's *On Assignment* decision is not before the Court in this case.

By contrast, in two other pending cases, the Board is urging this Court to apply the principles of *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005), to decide whether *On Assignment* is based on a reasonable construction of the NLRA and, if so, entitled to deference, notwithstanding circuit precedent pre-dating *On Assignment* that reached a different result. *See Nijjar Realty, Inc. v. NLRB*, Nos. 15-73921 & 16-70336 (9th Cir.) (briefing completed); *Douglas O'Connor, et al. v. Uber Techs., Inc.*, No. 15-17420 (9th Cir. Dec. 10, 2015). Should the Court disagree with the Board's position that the *On Assignment* issue is not before it in this case, the Board respectfully requests that it be granted leave to brief that issue in this case as well.

enforced its Agreement so as to interfere with the employees' Section 7 rights. (ER.22.)

The Board's Order requires that Philmar cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the NLRA. (ER.22.) Affirmatively, the Order requires Philmar to: rescind the Agreement in all of its forms, or revise it in all of its forms to make clear that the Agreement does not constitute a waiver of employees' right to maintain employment-related joint, class, or collective actions in all forums; notify all current and former employees who were bound by the Agreement of the change; notify the Superior Court of California of the change, and that Philmar no longer opposes Cortes's action based on the Agreement; reimburse attorneys' fees and expenses incurred by Cortes and any other plaintiff in opposing Philmar's motion to compel arbitration; and post a remedial notice. (ER.22-23.)

SUMMARY OF ARGUMENT

In *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *petition for certiorari filed*, No. 16-300 (U.S. Sept. 8, 2016), this Court held that, under Sections 7 and 8(a)(1) of the NLRA, employers may not require employees to sign individual contracts prospectively waiving their right to pursue joint, class, or collective legal action over work-related claims. The Court further held that the

Federal Arbitration Act (“the FAA”), 9 U.S.C. § 1, et seq., does not mandate enforcing arbitration agreements that unlawfully waive employees’ collective-legal-action rights. Specifically, the Court noted that, under the FAA’s saving clause, *id.* § 2, generally applicable contract defenses like illegality under federal law are equally available against arbitration agreements. Therefore, the Court concluded that an arbitration agreement that violates the NLRA cannot be enforced against the employees who signed it.

In this case, Philmar maintains an Agreement with its employees that it admittedly interprets as requiring employees to individually arbitrate all their employment-related claims. So construed, the Agreement prohibits employees from pursuing any collective legal action, in any arbitral or judicial forum, against their employer. Philmar does not dispute that the Agreement is unlawful under this Court’s *Morris* decision, but argues instead that *Morris* was wrongly decided. In response, the Board submits that *Morris* correctly upheld the Board’s view that arbitration agreements that prospectively waive the right to concerted legal action are unlawful under federal labor law. Therefore, because Philmar does not dispute that *Morris* is the governing law of this Circuit, this Court should hold that Philmar’s Agreement, like the agreement in *Morris*, is exempt from enforcement pursuant to the FAA.

The Court should also enforce the Board's reasonable finding that Philmar violated Section 8(a)(1) by taking steps to enforce the unlawful Agreement when it moved to compel individual arbitration in Los Angeles Superior Court. Because Philmar acted to prevent employees from exercising their Section 7 right to engage in collective legal activity, that motion had an illegal objective under federal law, and therefore it was not protected petitioning under the First Amendment.

STANDARD OF REVIEW

When Congress enacted the NLRA, it entrusted the Board 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, “[t]he Board’s reasonable interpretations of the NLRA command deference.” *Morris*, 834 F.3d at 981; *see also City of Arlington v. FCC*, ___ U.S. ___, 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. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984))). The Court does not defer to the Board’s interpretation of statutes other than the NLRA. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002).

ARGUMENT

I. THE BOARD REASONABLY FOUND THAT PHILMAR VIOLATED SECTION 8(a)(1) OF THE NLRA BY MAINTAINING AN AGREEMENT THAT BARS EMPLOYEES FROM CONCERTEDLY PURSUING EMPLOYMENT-RELATED CLAIMS IN ANY FORUM

In *Morris*, this Court agreed with the Board's holding in *Horton* and *Murphy Oil* that an employer violates the NLRA when it requires employees to sign agreements prospectively waiving their right to pursue work-related disputes through joint, class, or collective claims. 834 F.3d at 979-84. The Court further held that the FAA does not mandate enforcing arbitration agreements that violate the NLRA by prospectively waiving employees' Section 7 rights. *Id.* at 984-86. Philmar stipulated that it interprets the Agreement as requiring individual arbitration of all work-related claims, as did the agreement found unlawful in *Morris*. And while Philmar claims *Morris* was wrongly decided, its position hangs entirely on arguments that *Morris* expressly rejected.

A. In *Morris*, This Court Held That Individual Agreements, Which Prospectively Waive Employees' Section 7 Rights, Violate Section 8(a)(1) of the NLRA

Section 7 of the NLRA guarantees employees “the right to self-organization, to form, join, or assist labor organizations, . . . and to engage in *other concerted activities* for the purpose of collective bargaining or other *mutual aid or protection*” 29 U.S.C. § 157 (emphases added). With judicial approval, including that of this Court, the Board has consistently held that the right to engage

in concerted activity for mutual aid or protection includes concerted *legal* activity. *See Horton*, 357 NLRB at 2278 & n.4 (citing cases); *see also, e.g., Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1152 (7th Cir. 2016) (“Section 7’s ‘other concerted activities’ have long been held to include ‘resort to administrative and judicial forums.’” (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978), and citing cases)), *cert. pet. filed*, No. 16-285 (U.S. Sept. 2, 2016). Indeed, *Morris* held that “[t]he pursuit of a concerted work-related legal claim clearly falls within the literal wording of [Section] 7.” 834 F.3d at 982 (internal quotation marks and citation omitted); *see also Salt River Valley Water Users’ Ass’n v. NLRB*, 206 F.2d 325, 328 (9th Cir. 1953) (holding that Section 7 protects employees’ efforts to exert group pressure on employer through resort to legal processes, and noting that concerted activity “is often an effective weapon for obtaining [benefits] to which [employees] . . . are already ‘legally’ entitled”). That established precedent belies Philmar’s claim that the NLRA-protected right to engage in collective legal action comes from “other rules and laws” such as Federal Rule of Civil Procedure 23. (Br. 30-31.) The Court squarely rejected that proposition in *Morris* when it explained that “Rule 23 is not the source of employee rights; the NLRA is.” 834 F.3d at 982 n.3 (“*Eastex* settles this question by expressly including concerted legal activity within the set of protected [Section] 7 activities. 437 U.S. at 566.”); *see also Lewis*, 823 F.3d at 1161 (same).

Whereas Section 7 guarantees employees the right to engage in concerted legal activity, Section 8(a)(1) of the NLRA enforces that right by making it unlawful for employers to “interfere with, restrain, or coerce employees in [its] exercise.” 29 U.S.C. § 158(a)(1). As this Court explained in *Morris*, “Section 8 has long been held to prevent employers from circumventing the NLRA’s protection for *concerted* activity by requiring employees to agree to *individual* activity in its place.” 834 F.3d at 983. Specifically, 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 are “a continuing means of thwarting the policy of the [NLRA].” 309 U.S. 350, 360-61, 364 (1940) (“employers cannot set at naught the [NLRA] by inducing their workmen to agree not to demand performance of the duties which [the statute] imposes”); *see also NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942) (individual contracts requiring employees to adjust their grievances individually with their employer violate the NLRA, even when “entered into without coercion”).

In sum, relying on both *National Licorice* and *Stone*, this Court made clear that an employment agreement requiring resolution of all work-related disputes in “separate proceedings” constituted a restriction that was the “very antithesis” of

employees' Section 7 right to engage in collective legal activity. *Morris*, 834 F.3d at 983; *accord Lewis*, 823 F.3d at 1155.

B. Philmar Violated Section 8(a)(1) of the NLRA by Unlawfully Maintaining an Agreement that Prohibited Concerted Legal Activity in any Forum

Applying those well-accepted principles, which this Court embraced in *Morris*, the Board properly found (ER.21) that Philmar unlawfully maintained the Agreement in violation of Section 8(a)(1). *See Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647, 649 (2004) (rule unlawful if applied to restrict Section 7 rights; mere maintenance of unlawful rule violates Section 8(a)(1)). In doing so, the Board relied on Philmar's admission (ER.6), which Philmar does not dispute on appeal, that it interprets the arbitration provision to require employees to assert covered claims only in individual arbitration. Indeed, Philmar cannot dispute this interpretation since its motion to compel squarely stated its position that the Agreement prohibits employees from pursuing any class or collective claims. (SER.34-39.) And while Philmar "respectfully disagrees" with *Morris* (Br. 32), it does not dispute that the legal principles upheld in *Morris* apply to the Agreement even after it ceased being a condition of employment in October 2012.³ Therefore,

³ As noted *supra* note 2, neither before the Board nor this Court has Philmar disputed the Board's holding (ER.21 n.4) that whether Philmar required its employees to sign the Agreement as a condition of employment is irrelevant to the Board's finding of a violation. The Board acknowledges that in *Johnmohammadi*, this Court held that an arbitration agreement with a class-action waiver that ceased

because employees “must be able to initiate a work-related legal claim together in some forum,” *Morris*, 834 F.3d at 980, the Board reasonably found that Philmar’s maintenance of the Agreement violated Section 8(a)(1). *See, e.g., Albertsons Inc.*, 351 NLRB 254, 259 (2007) (employer unlawfully maintained confidentiality rule by applying it to restrict Section 7 activity).

C. This Court Has Held That the FAA Does Not Mandate Enforcement of Arbitration Agreements That Violate the NLRA by Prospectively Waiving Section 7 Rights

Philmar does not dispute the substantial body of federal law—embraced in *Morris*—supporting the Board’s view that employers cannot lawfully require employees to prospectively waive their Section 7 rights as a condition of employment. Instead, Philmar contends that the NLRA’s protections lose all force

to be a condition of employment if employees followed an opt-out procedure did not “interfere with, restrain, or coerce” employees within the meaning of Section 8(a)(1). 755 F.3d at 1075-77; *see also Morris*, 834 F.3d at 982 n.4 (distinguishing its ruling from *Johnmohammadi*). But before the Board, Philmar did not contest the Board’s finding that the Agreement was unlawful irrespective of whether or not it was voluntary. For that reason, the Court is jurisdictionally barred from considering the matter now. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court [absent] extraordinary circumstances.”); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (explaining that when a party “could have objected to the Board’s decision in a petition for reconsideration or rehearing[,] . . . failure to do so prevents consideration of the question by the courts.” (citation omitted)); *Union of Painter & Allied Trades, Dist. 15, Local 159 v. NLRB*, 656 F.3d 860, 867 (9th Cir. 2011) (same). In addition, Philmar has waived any argument regarding the alleged voluntary nature of the Agreement by failing to raise it in its opening brief. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) (“[O]n appeal, arguments not raised by a party in its opening brief are deemed waived.” (citation omitted)).

because its collective-action waiver is couched as an arbitration agreement, and therefore implicates the FAA. But Philmar’s position—that the FAA precludes enforcement of the Board’s Order barring the prospective waiver of employees’ Section 7 right to engage in collective litigation—contravenes the settled principle, followed by this Court in *Morris*, that “when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see also POM Wonderful LLC v. Coca-Cola Co.*, ___ U.S. ___, 134 S. Ct. 2228, 2236-39 (2014); *Morris*, 834 F.3d at 987. As this Court found in *Morris*, and as demonstrated below, agreements that are unlawful under the NLRA are exempted from enforcement by the FAA’s saving clause. 834 F.3d at 984-85. There is thus no difficulty in fully enforcing each statute according to its terms. Indeed, as this Court has recognized, application of the FAA to this case “does not dictate a contrary result” than under the NLRA. *Id.* at 984.

The FAA’s saving clause 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). Read together, that enforcement mandate and the limitation in the saving clause reflect the FAA’s purpose of placing arbitration agreements “on equal footing with all other contracts.” *DIRECTV, Inc. v. Imburgia*, ___ U.S. ___, 136 S. Ct. 463, 468,

471 (2015) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)). Consistent with that principle, the Supreme Court has made clear that “th[e] saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses . . . , but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal quotation marks and citation omitted). As *Morris* recognized, illegality is one such generally applicable contract defense recognized under FAA law. 834 F.3d at 985; *see also* *Buckeye Check Cashing*, 546 U.S. at 444 (explaining that illegality is a valid defense under the FAA’s saving clause); *accord* *Lewis*, 823 F.3d at 1157.

Illegality is also a well-established contractual defense under the NLRA. This Court recognized as much when it held that individual contracts prospectively waiving employees’ collective-legal-action rights violate Section 8(a)(1). *See* *Morris*, 834 F.3d at 983 (“Individual contracts . . . may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act” (quoting *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944))); *see also, e.g.,* *Nat’l Licorice*, 309 U.S. at 360-61. Thus, “when ‘private contracts conflict with’ the NLRA, ‘they obviously must yield or the [NLRA] would be reduced to a futility.’” *Morris*, 834 F.3d at 990 (quoting *J.I. Case*, 321 U.S. at 337).

Illegality under the NLRA satisfies the criteria of the FAA's saving clause because it "does not 'derive [its] meaning from the fact that an agreement to arbitrate is at issue.'" *Morris*, 834 F.3d at 984 (alteration in original) (quoting *Concepcion*, 563 U.S. at 339). In *Concepcion*, the Supreme Court held that a judge-made rule, which applied state unconscionability principles to consumer contracts of adhesion, fell outside the saving clause because, as applied, it specifically disfavored arbitration agreements. 563 U.S. at 341-44. By contrast, the Board's rule applies equally to any contract, regardless whether it contains an arbitration clause, making this case, "[a]t its heart, . . . a labor law case, not an arbitration case." *Morris*, 834 F.3d at 989. Indeed, this Court noted in *Morris* that an employer would equally violate the NLRA if it required employees to individually resolve work-related disputes *in court*. *Id.* at 985 ("[Illegality of collective-action waiver] has nothing to do with arbitration as a forum."); *see also Lewis*, 823 F.3d at 1158 ("If [employer's agreement] had permitted collective arbitration, it would not have run afoul of Section 7[.]"). And, in fact, the Board has found concerted-legal-action waivers that did *not* require arbitration unlawful as well. *See Convergys Corp.*, 363 NLRB No. 51, 2015 WL 7750753, at *1 & n.3 (Nov. 30, 2015), *review pet. pending*, No. 15-60860 (5th Cir.) (argued Sept. 28, 2016); *LogistiCare Sols., Inc.*, 363 NLRB No. 85, 2015 WL 9460027, at *1 (Dec. 24, 2015), *review pet. pending*, No. 16-60029 (5th Cir.) (argued Sept. 28, 2016).

Therefore, because the Agreement is unlawful for reasons unrelated to arbitration, “the FAA treats the [Agreement] like any other,” and therefore it is unenforceable under the savings clause. *Morris*, 834 F.3d at 985.

In sum, it is well settled that private contracts are not enforceable if they violate federal law. The FAA incorporates that principle into its saving clause, under which illegality, as an existing ground “at law or in equity for the revocation of any contract,” provides a basis upon which to revoke arbitration agreements. Illegality is also a well-established defense against individual agreements that require employees to prospectively waive their Section 7 rights, including the right to collectively pursue work-related legal claims. Finally, when it is invoked under the NLRA, the illegality defense does not derive its meaning “from the fact that an agreement to arbitrate is at issue,” *Concepcion*, 563 U.S. at 339, but from Section 7’s protection of the right to engage in concerted activity for mutual protection, which “extends far beyond collective litigation or arbitration.” *Lewis*, 823 F.3d at 1158. Thus, the Board’s finding that Philmar’s Agreement violates the NLRA does not offend the FAA’s general mandate to enforce arbitration agreements according to their terms. Consistent with *Morris*, the Court should therefore uphold the Board’s finding.

In claiming that *Morris* was wrongly decided, Philmar recycles arguments that this Court already considered and rejected. Philmar contends (Br. 31) that the

Agreement does not fall within the FAA’s saving clause exception because concerted activity under the NLRA is merely a procedural means of vindicating a statutory right that can be contractually waived. This Court has rejected that contention, explaining that the very structure of the NLRA demonstrates that “[t]he rights established in [Section] 7 . . . are the central, fundamental protections of the [NLRA], . . . [w]ithout [which] the Act’s entire structure and policy flounder.” *Morris*, 834 F.3d at 986.

Furthermore, in contrast to the statutes Philmar relies on to support its “merely procedural” claim, Congress put the force of law behind Section 7 rights, making it an unfair labor practice—enjoinable by a cease and desist order, *see* 29 U.S.C. § 160(c)—for an employer to interfere with the Section 7 right of employees to engage in concerted activity for mutual aid and protection. *See* 29 U.S.C. § 158(a)(1). Because of that added safeguard, an arbitration agreement waiving employees’ right to engage in concerted legal activity is not like a waiver of the optional collective-action procedures in statutes like the Fair Labor Standards Act (“the FLSA”) or the Age Discrimination in Employment Act (“the ADEA”). While those statutes authorize covered individuals to engage in collective legal action, *see* 29 U.S.C. § 216(b) (FLSA), 29 U.S.C. § 626(b) (ADEA), they do not make it a violation of law to interfere with those collective rights as the NLRA does in Section 8(a)(1). Because of Section 8(a)(1), the right

of employees to engage in concerted activity for mutual aid and protection is an enforceable right, equivalent to the ADEA right of employees to be free of age discrimination or the FLSA right of employees to be paid the minimum wage.

The Supreme Court has never held that arbitration agreements can be a means for employees to prospectively waive core enforceable rights like the ones the ADEA, the FLSA, or the NLRA protect from employer interference. 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.*, ___ U.S. ___, 133 S. Ct. 2304, 2310 (2013); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985); *accord Morris*, 834 F.3d at 985-88. Thus, because Section 7 rights are “central” and “fundamental” to the Act, the Court must find, as it did in *Morris*, that “the right to concerted employee activity cannot be waived in an arbitration agreement.” 834 F.3d at 986. Indeed, as this Court made clear in *Morris*, “[Section] 7 rights would amount to very little if employers could simply require their waiver.” *Id.* at 983.

Philmar also gains no ground with its claim that *Morris* was wrongly decided because the Court, in finding that the arbitration agreement at issue there was exempt from enforcement under the saving clause, applied the incorrect legal framework. Specifically, Philmar contends that Supreme Court precedent requires

this Court to consider whether the NLRA contains a “contrary congressional command” that overrides the FAA. (Br. 25-29.) That argument misunderstands “the way the Supreme Court has instructed [this Court] to approach statutory construction,” and merely restates a position that this Court has explicitly rejected. *See Morris*, 834 F.3d at 987-90. The contrary-congressional-command inquiry is used to determine which statutory command controls when a federal statute conflicts with the FAA and the two *cannot* be reconciled. *See, e.g., Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 227-42 (1987) (holding that FAA’s enforcement mandate applies to agreements to arbitrate claims under Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act because neither statute reflects congressional command against arbitrating such claims). However, the rules of statutory construction dictate that courts must first determine if two statutes actually conflict before deciding which one eclipses the other. *See Morton*, 417 U.S. at 551 (“[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”); *accord Morris*, 834 F.3d at 987. Here, the Board’s finding that the NLRA bars enforcement of collective-action waivers does not conflict with the FAA because the saving clause “permits agreements to arbitrate to be invalidated by generally applicable contract defenses.” *Concepcion*, 563 U.S. at 339.

For these reasons, this Court was correct in holding that, absent any conflict between these two statutes, both can—and should—be given effect. *Morris*, 834 F.3d at 987 n.13 (“[W]e see no inherent conflict between the FAA and the NLRA[.]”); *see also Lewis*, 823 F.3d at 1157 (same). As the Court explained, 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*, 834 F.3d at 987.⁴

⁴ Philmar’s “contrary command” argument is deficient for the further reason that the Supreme Court’s contrary command cases are addressed to a different issue: whether Congress precluded “a waiver of judicial remedies for the statutory rights at issue.” *Shearson/Am. Express*, 482 U.S. at 227. The Board rule at issue here is not based on any assertion that arbitration is not an allowable forum for vindicating statutory claims. To the contrary, the Board has a long history of deferring to arbitration decisions resolving statutory issues. *See Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 271 (1964). Consistent with that policy, the Board has expressly recognized that employers may insist that all individual work-related claims be resolved in arbitration so long as employees may assert class or collective claims in some forum, arbitral or judicial. *Horton*, 357 NLRB at 2288. Further, to the extent that employers agree that employees may bring collective claims in arbitration, the Board recognizes that employers may insist on collective arbitration and bar their employees from bringing collective claims in court. *SolarCity Corp.*, 363 NLRB No. 83, 2015 WL 9315535, at *5 n.15 (Dec. 22, 2015), *review pet. filed*, No. 16-60001 (5th Cir. Jan 4, 2016) (stayed pending resolution of Supreme Court proceedings in *Murphy Oil*).

In other words, as this Court has recognized, this case is not about the availability or adequacy of arbitration as a forum for resolving statutory rights, but the NLRA’s grant to employees of an enforceable statutory right to engage in collective legal action for their mutual aid and protection either in court or in arbitration. *Morris*, 834 F.3d at 985, 988-89.

II. PHILMAR VIOLATED SECTION 8(a)(1) OF THE NLRA BY ENFORCING THE UNLAWFUL WAIVER

As discussed above, Section 8(a)(1) of the NLRA makes it unlawful for employers to “interfere with, restrain, or coerce employees in the exercise of” their Section 7 rights. 29 U.S.C. § 158(a)(1). Here, Philmar moved the Superior Court to compel individual arbitration of Cortes’s class-action wage-and-hour claims. (ER.21-22, 29; SER.22-53.) In so doing, Philmar effectively foreclosed employees from pursuing collective legal action in any forum, judicial or arbitral. *See Countrywide Fin. Corp.*, 362 NLRB No. 165, 2015 WL 4882655, at *5 (Aug. 14, 2015) (noting that this conduct is precisely what the Board enjoined in *Horton*), *review pet. filed*, No. 15-72700 (9th Cir. Aug. 28, 2016); *see also Morris*, 834 F.3d at 984 (“The NLRA obstacle is a ban on initiating, in any forum, concerted legal claims[.]”). By applying its Agreement “to restrict activity protected by Section 7 of the Act,” Philmar lent an unlawful meaning to the Agreement, thus “render[ing] it unlawful.” *Hitachi Capital Am. Corp.*, 361 NLRB No. 19, 2014 WL 3897175, at *4 (Aug. 8, 2014). It is of no moment that the Agreement did not explicitly restrict Section 7 activity; the enforcement alone constitutes an unfair labor practice. *Id.* at *3. Therefore, the Board reasonably found (ER.21-22, 29) that Philmar violated Section 8(a)(1) by enforcing the Agreement in a manner that restricts its employees’ Section 7 right to engage in concerted legal activity. *See Lutheran Heritage*, 343 NLRB at 649 (rule unlawful if applied to restrict Section 7 rights).

Philmar is mistaken when it claims (Br. 36) that enforcing the Board's Order would violate its constitutional right to petition the government. The Supreme Court has recognized that the First Amendment does not protect petitioning that "has an objective that is illegal under federal law." *Bill Johnson's Rests. v. NLRB*, 461 U.S. 731, 737 n.5 (1983); accord *Small v. Operative Plasterers' & Cement Masons' Int'l Ass'n Local 200, AFL-CIO*, 611 F.3d 483, 491 (9th Cir. 2010). Under that exception, court action constitutes an unfair labor practice if "[o]n the surface" it "seek[s] objectives which [are] illegal under federal law." *Chauffeurs, Teamsters & Helpers Local 776 v. NLRB*, 973 F.2d 230, 236 (3d Cir. 1992). That is true regardless of the merits of the underlying lawsuit.⁵ *See id.*

Consequently, under settled law, the Board may restrain litigation that has the objective of enforcing an illegal contract, even if the suit is otherwise meritorious. *Id.*; *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003); *see also Murphy Oil*, 2014 WL 5465454, at *27-28 (and cases cited therein). The Board may also restrain litigation that is "aimed at achieving a result

⁵ In the absence of an illegal objective, retaliatory motive does not suffice to remove constitutional protection from a reasonably based lawsuit. *See Small*, 611 F.3d at 491 (citing *Bill Johnson's*, 461 U.S. at 731). In retaliatory-motive cases, the Board may find a lawsuit unlawful only if it is objectively baseless. *BE & K Const. Co. v. NLRB*, 536 U.S. 516, 531 (2002). Having found that Philmar proceeded from an illegal objective, the Board did not reach that issue. *See generally Small*, 611 F.3d at 492 (explaining that *BE & K* "left undisturbed" *Bill Johnson's* statement that lawsuits with illegal objectives under federal law are not protected petitioning).

incompatible with the objectives of the [NLRA].” *Manno Elec., Inc.*, 321 NLRB 278, 296-97 (1996) (halting employer lawsuit alleging that employees violated state law by engaging in union organizing and other Section 7-protected conduct), *enforced mem.*, 127 F.3d 34 (5th Cir. 1997); *see also Wright Elec., Inc. v. NLRB*, 200 F.3d 1162, 1166-67 (8th Cir. 2000) (holding Board could enjoin employer’s discovery request for union-authorization cards in state-court lawsuit because request interfered with employees’ right to organize under NLRA and thus had an illegal objective).

Through its petition to compel arbitration, Philmar sought to enforce the Agreement, an unlawful contract under Board precedent. *See Horton*, 357 NLRB at 2277; *Murphy Oil*, 2014 WL 5465454, at *6-15. In so doing, Philmar explicitly sought to prevent Cortes’s exercise of his Section 7 right to engage in concerted legal action over work-related claims. Therefore, the Board reasonably found (ER.22) that Philmar’s motion pursued an illegal objective and fell outside the protection of the First Amendment.

Citing *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), Philmar claims (Br. 35) that its interpretation of the Agreement was not unlawful. But that argument demonstrates Philmar’s misunderstanding of both *Stolt-Nielsen* and the effect of its motion to compel, which foreclosed employees from pursuing their Section 7 rights in any forum. *Stolt-Nielsen* holds that “a party

may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.” *Id.* at 684.

Indeed, as the Board explained, its decision does not conflict with *Stolt-Nielsen* because it does not require Philmar to submit to class arbitration; rather, the Board’s decision seeks Philmar’s compliance with Section 7 of the NLRA, which prevents an employer from “preclud[ing] collective action in all forums, judicial and arbitral, as [Philmar] did here.” (ER.22 n.4.) Moreover, as recognized by this Court, *Stolt-Nielsen* “does not require a court to enforce an illegal [contractual] term.” *Morris*, 834 F.3d at 985 n.8. At most, the Agreement’s silence on class arbitration means that courts may not presume Philmar consented to arbitrate claims on a class-wide basis. *Stolt-Nielsen*, 559 U.S. at 687. It does *not*, however, make it lawful for Philmar to enforce its Agreement in a manner that denies employees their right to pursue collective action in another, non-arbitral forum. *See Morris*, 834 F.3d at 985 n.8 (noting that *Stolt-Nielsen* would not prevent a court from severing a contractual requirement that arbitration proceed on an individual basis so as to “bring the arbitration provision into compliance with the NLRA”).

Furthermore, it is no defense that, because some courts have rejected the Board’s *Horton* decision, Philmar may have “reasonably believed” that its Agreement was lawful and enforceable. (Br. 35-36.) The circuit split over the

Board's *Horton* rationale does not refute the Board's finding that Philmar's ultimate objective was, at the end of the day, illegal; at most, it shows only that Philmar's motion was not objectively baseless, which is irrelevant here. *See supra* note 5 (baselessness is not a factor in illegal-objective cases, only in retaliatory-motive cases). Contrary to Philmar's argument (Br. 36), the Board is not applying the "illegal objective" exception "so broadly" so as to "swallow the rule" that well-founded lawsuits are protected by the First Amendment. The Supreme Court removed constitutional protection from a "suit that has an objective that is illegal under federal law," regardless of its merit. *Bill Johnson's*, 461 U.S. at 737, n.5. Philmar does not, and cannot, dispute that its motion pursued an objective that was illegal under the NLRA; therefore, the Board properly determined that Philmar's motion fell well within the illegal-objective exception.⁶

⁶ To the extent Philmar invokes *Johnmohammadi*, 755 F.3d at 1072, to claim that its Agreement is lawful, the Court lacks jurisdiction to consider that argument because Philmar failed to raise it before the Board. *See supra* note 3 (discussing 29 U.S.C. § 160(e)). This jurisdictional bar extends to cases where the Board raises an issue *sua sponte* in the first instance, *Woelke*, 456 U.S. at 666, or in a dissent or response thereto. *See Contractors' Labor Pool, Inc. v. NLRB*, 323 F.3d 1051, 1061-62 (D.C. Cir. 2003); *Old Wick Materials, Inc. v. NLRB*, 732 F.2d 339, 343 (3d Cir. 1984). Furthermore, Philmar's contention that *Johnmohammadi* justifies its interpretation of the Agreement lacks merit because Philmar filed its motion to compel *before* this Court issued its decision in *Johnmohammadi*.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying Philmar's petition for review and enforcing the Board's Order in full.

STATEMENT OF RELATED CASES

The following cases, which are currently pending in this Court, raise the same or closely related issue of whether an arbitration agreement that waives employees' Section 7 right to concerted legal action violates Section 8(a)(1) of the NLRA. To Board counsel's knowledge, this list is exhaustive as of Nov. 22, 2016:

Douglas O'Connor, Thomas Colopy, Matthew Manahan, & Elie Gurfinkel v. Uber Technologies, Inc., Nos. 15-17420, 15-17422

Countrywide Financial Corp. v. NLRB, 15-72700

Hoot Winc, LLC and Ontario Wings, LLC v. NLRB, 15-72839

Nijjar Realty, Inc. v. NLRB, 15-73921 & 16-70336

CPS Security (USA), Inc. v. NLRB, 16-70488

Century Fast Foods, Inc. v. NLRB, 16-70686

Network Capital Funding Corp. v. NLRB, 16-70687

FAA Concord H, Inc. v. NLRB, 16-70694

Apple American Group, LLC v. NLRB, 16-70816

The Pep Boys Manny Moe & Jack of California v. NLRB, 16-71036

Kenai Drilling, Ltd. v. NLRB, 16-71148

Bloomington's, Inc. v. NLRB, 16-71338

Ralph's Grocery Co. v. NLRB, 16-71422

Covenant Care California, LLC v. NLRB, 16-71502

Valley Health System, LLC v. NLRB, 16-71647

Robert C. Munoz v. NLRB, 16-71915

Beena Beauty Holding, Inc. d/b/a Planet Beauty v. NLRB, 16-72015

NLRB v. AWG Ambassador, LLC, 16-73514

Respectfully submitted,

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November 2016

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHILMAR CARE, LLC, A CALIFORNIA)	
LIMITED LIABILITY COMPANY)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	Nos. 16-70069
)	16-70267
NATIONAL LABOR RELATIONS BOARD,)	
)	Board Case No.
Respondent/Cross-Petitioner)	31-CA-133242
)	
JUAN CORTES)	
)	
Respondent/Intervenor)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 7,207 words of proportionally spaced, 14-point type, and the word-processing software used was Microsoft Word 2010. The Board further certifies that the electronic version of the Board's brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel, and that the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

s/ Linda Dreeben
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Dated at Washington, DC
this 22nd day of November 2016

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THE NATIONAL LABOR RELATIONS ACT

29 U.S.C. § 160. Prevention of unfair labor practices

(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 proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

THE FAIR LABOR STANDARDS ACT

29 U.S.C. § 216. Penalties

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement,

promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

THE AGE DISCRIMINATION IN EMPLOYMENT ACT

29 U.S.C. § 626. Recordkeeping, investigation, and enforcement

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. . . . Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

UNITED STATES COURT OF APPEALS
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PHILMAR CARE, LLC, A CALIFORNIA)	
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)	
v.)	Nos. 16-70069
)	16-70267
NATIONAL LABOR RELATIONS BOARD,)	
)	Board Case No.
Respondent/Cross-Petitioner)	31-CA-133242
)	
JUAN CORTES)	
)	
Respondent/Intervenor)	
)	

CERTIFICATE OF SERVICE

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

s/ Linda Dreeben
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Dated at Washington, DC
this 22nd day of November 2016