No. 13-16599

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN MORRIS AND KELLY McDANIEL

Plaintiffs-Appellants

v.

ERNST & YOUNG LLP, and ERNST & YOUNG U.S., LLP

Defendants-Appellees

No. 5:12-cv-04964-RMW

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS *AMICUS CURIAE* URGING PARTIAL REVERAL IN SUPPORT OF PLAINTIFFS-APPELLANTS

MEREDITH L. JASON
Deputy Assistant General Counsel

KIRA DELLINGER VOL
Supervisory Attorney
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570
(202) 273-2945/0656

RICHARD F. GRIFFIN, JR.
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
NANCY E. KESSLER PLATT
Deputy Assistant General Counsel
KEVIN P. FLANAGAN
Supervisory Attorney
PAUL A. THOMAS
Attorney

National Labor Relations Board

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STATEMENT OF AMICUS

The National Labor Relations Board submits this brief pursuant to the Court's October 30, 2015 Order. The Board is an independent federal agency created by Congress to enforce and administer the National Labor Relations Act, 29 U.S.C. § 151 et seq. ("NLRA"). In *D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013) (Graves, J., dissenting), *reh'g denied*, No. 12-60031 (Apr. 16, 2014), the Board held that an employer violates the NLRA when it imposes on employees, as a condition of employment, an arbitration agreement that requires them to resolve all work-related disputes through individual arbitration. The Board further found that the Federal Arbitration Act, 9 U.S.C. § 1, et seq. ("FAA"), does not dictate a different result. *Id.* The Board reexamined and reaffirmed *D.R. Horton* in *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), *enforcement denied in relevant part*, __ F. 3d __, 2015 WL 6457613 (5th Cir. Oct. 26, 2015).[1]

This case is on appeal from a decision of the District Court for the Northern District of California that enforced an arbitration agreement mandating individual arbitration of work-related disputes. *Morris v. Ernst & Young LLP*, 2013 WL 3460052 (July 9, 2013). In doing so, the District Court specifically rejected the

[1] The Board plans to petition the Fifth Circuit for rehearing *en banc*.

argument that the agreement violates the NLRA, "declin[ing] to defer to the [Board's] decision in *D.R. Horton*." *Id.* at *10. Both parties argue the merits of *D.R. Horton* before this Court; neither has discussed the Board's subsequent *Murphy Oil* decision.

Presently, two cases are pending before the Court on petitions to review Board Orders applying *D.R. Horton* and *Murphy Oil*. *See Countrywide Fin. Corp. v. NLRB*, Case Nos. 15-72700, 15-73222 (opening brief due Mar. 15, 2016); *Hoot Winc LLC v. NLRB*, Case Nos. 15-72839, 15-72931 (opening brief due Feb. 18, 2016).

Because the Court has been asked in this case to rule on the validity of the *D.R. Horton* (and *Murphy Oil*) decisions, the Board submits this brief to present and defend its decisions.

I. THE BOARD'S *D.R. HORTON* AND *MURPHY OIL* DECISIONS

In two seminal decisions, *D.R. Horton* and *Murphy Oil*, the Board held that an employer violates the NLRA "when it requires employees covered by the [NLRA], as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." *Murphy Oil*, 2014 WL 5465454, at *2 (quoting *D.R. Horton*, 2012 WL 36274, at *1). Briefly, the Board held that employees' right to act together for mutual aid or

protection, guaranteed by Section 7 of the NLRA, 29 U.S.C. § 157, includes the right to pursue work-related legal claims concertedly. *Murphy Oil*, 2014 WL 5465454, at *1, 6; *D.R. Horton*, 2012 WL 36274, at *2-4 & n.4. It further held that an employer acts contrary to the command of Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), which prohibits interference with Section 7 rights, by denying employees any forum in which they can join together to seek vindication of their legal claims and instead requiring employees to arbitrate individually all workplace disputes. *Murphy Oil*, 2014 WL 5465454, at *2, 6; *D.R. Horton*, 2012 WL 36274, at *1, 5-6. In doing so, the Board relied on the longstanding labor-law principle that individual contracts cannot lawfully require an employee to waive Section 7 rights as a condition of employment. *Murphy Oil*, 2014 WL 5465454, at *2, 6; *D.R. Horton*, 2012 WL 36274, at *1, 5-6.

In those same decisions, the Board carefully detailed why its holding did not conflict with the FAA's mandate that arbitration agreements be enforced according to their terms. *Murphy Oil*, 2014 WL 5465454, at *7, 9-13; *D.R. Horton*, 2012 WL 36274, at *10-16. It noted that the Supreme Court has identified several exceptions to the FAA's mandate, all of which preclude enforcement of arbitration agreements requiring the prospective waiver of an employee's Section 7 right to act in concert with others for mutual aid or protection. *Murphy Oil*, 2014 WL 5465454, at *6, 10-13 & n.43; *D.R. Horton*, 2012 WL 36274, at *11-15.

Finally, in *Murphy Oil*, the Board acknowledged a number of federal court decisions that had questioned or refused to follow its *D.R. Horton* decision, many of which described their holdings as compelled by Supreme Court FAA precedent. The Board noted that, contrary to certain courts' assertions, "no decision of the Supreme Court speaks directly to the issue" the Board decisions address. *Murphy Oil*, 2014 WL 5465454, at *2. Not one involved the Section 7 right to engage in concerted activity; not one enforced an arbitration agreement that waived a substantive federal right central to the statute that created it.

Because the arbitration agreement before the Court in this case requires each employee to arbitrate any dispute with Ernst & Young "in separate proceedings," it explicitly restricts employees from exercising their Section 7 rights to join together in pressing their legal claims against their employer. As such, the agreement is illegal under long-established NLRA principles. Accordingly, as more fully explained in the following section, the FAA does not mandate its enforcement against statutory employees entitled to the NLRA's protections.[2]

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[2] The Board takes no position on whether the plaintiffs in this case are "employees" under Section 2(3) of the NLRA, 29 U.S.C. § 152(3), entitled to the statute's protections. *See* Ernst & Young Br. 25 n.6. Regardless, the agreement is unlawful as to Ernst & Young employees who *do* benefit from the NLRA's protections because it restricts their Section 7 rights. *Cf. Chesapeake Energy Corp.*, 362 NLRB No. 80, 2015 WL 1956197, at *2 n.3 (2015) (finding arbitration agreement unlawful as to statutory employees even though charge was brought by supervisor), *petition for review pending*, 5th Cir. Case No. 15-60326.

II. INDIVIDUAL AGREEMENTS THAT WAIVE EMPLOYEES' RIGHT TO PURSUE CONCERTED WORK-RELATED LEGAL CLAIMS VIOLATE THE NLRA; THE FAA DOES NOT REQUIRE ENFORCEMENT OF SUCH UNLAWFUL WAIVERS

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

Section 7 of the NLRA confers on statutory 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." 29 U.S.C. § 157. In *Eastex, Inc. v. NLRB*, the Supreme Court held that Section 7's protection extends beyond the workplace, and specifically includes concerted efforts "to improve working conditions through resort to administrative and judicial forums…." 437 U.S. 566, 566 (1978). And the Supreme Court has affirmed the Board's broad construction of protected concerted activity, recognizing that "there is no indication that Congress intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way." *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 835 (1984); *see also Eastex*, 437 U.S. at 565-66 & n.15 (same); *accord NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 264-67 (9th Cir. 1995).

Concerted legal activity to address workplace issues is as at least as deserving of Section 7 protection as other forms of concerted activity undertaken for mutual aid or protection. The NLRA protects collective rights "not for their own sake but as an instrument of the national labor policy of minimizing industrial strife." *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975). Protecting employees' ability to resolve workplace disputes collectively in an adjudicatory forum well serves that purpose, as well as the NLRA's objective to "'restor[e] equality of bargaining power between employers and employees.'" *Murphy Oil*, 2014 WL 5465454, at *1 (quoting 29 U.S.C. § 151). Concerted pursuit of legal remedies has far less potential for economic disruption than many indisputably protected concerted activities, like strikes and boycotts. *Id*. at *10-11. Denying employees the safety valve of concerted litigation, like denying them the safety valve of walking out in protest of working conditions, "would only tend to frustrate the policy of the [NLRA] to protect the right of workers to act together to better their working conditions." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).[3]

[3] While Section 7's language has not changed since 1935, the procedural avenues for collective legal activity have expanded; Federal Rule of Civil Procedure 23 class actions, for example, date from 1966. *See Murphy Oil*, 2014 WL 5465454, at *19. The Board has emphasized that its position is not that the NLRA creates procedural rights that legislatures have not afforded to others. *Id*. at *18. Rather, Section 7 protects employees' right to act in concert "to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-

This Court's *Salt River Valley Water Users' Association v. NLRB* decision aptly illustrates those principles. 206 F.2d 325 (9th Cir. 1953). There, unrest over the employer's wage policies prompted an employee to circulate a petition among co-workers designating him as their agent to seek back wages under the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. ("FLSA"). Recognizing that concerted activity "is often an effective weapon for obtaining [benefits] to which [employees] … are already 'legally' entitled," *id*. at 328, the Court upheld the Board's holding that Section 7 protected the employees' effort to exert group pressure on the employer to redress their work-related claims through resort to legal processes.

Based on those same principles, and consistent with the NLRA's text and declaration of national labor policy, the Board for decades has, with court approval, held that Section 7 protects concerted legal activity. That line of cases dates to *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-50 (1942), where the Board found an FLSA suit by three employees protected. It continues, unbroken, through modern NLRA jurisprudence. *See Brady v. Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of

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imposed restraint." *Id*. at *2, 22. Accordingly, the Board's legal position is not impaired by recognizing, as the Board does, that Rule 23 does not "establish an entitlement to class proceedings for the vindication of statutory rights." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013); *see also D.R. Horton*, 737 F.3d at 357.

employees to achieve more favorable terms or conditions of employment is 'concerted activity' under [Section] 7….") (citing *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188 (D.C. Cir. 2000) (concerted petitions for injunctions against workplace harassment were Section 7 activity)); *Altex Ready Mixed Concrete Corp. v. NLRB.*, 542 F.2d 295, 297 (5th Cir. 1976) ("filing by employees of a labor related civil action is protected activity under [S]ection 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)).[4]

In sum, the Board's construction of Section 7 to encompass concerted legal activity that advances work-related concerns is supported by longstanding Board and court precedent, and reflects the Board's judgment that legal activity accomplishes the congressional goal of avoiding strife and economic disruptions with particular effectiveness. That judgment falls squarely within the Board's area of expertise and responsibility. *See City Disposal*, 465 U.S. at 829 (quoting *Eastex*, 437 U.S. at 568) ("[T]he task of defining the scope of [Section] 7 'is for the

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[4] *See also 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); *Moss Planing Mill Co.*, 103 NLRB 414, 418 (1953) (concerted wage claim), *enforced*, 206 F.2d 557 (4th Cir. 1953).

Board to perform in the first instance as it considers the wide variety of cases that come before it….'").

B. Section 8(a)(1) of the NLRA Proscribes Individual Contracts That Prospectively Waive Employees' Section 7 Rights

Employer conduct violates Section 8(a)(1) if it "reasonably tends to interfere" with employees' Section 7 rights. *NLRB v. Bighorn Beverage*, 614 F.2d 1238, 1241 (9th Cir. 1980). Accordingly, as the Board reiterated in *Murphy Oil*, 2014 WL 5465454, *11, individual agreements between employers and employees that prospectively waive Section 7 rights are unlawful.[5]

Longstanding Board and court precedent establishes that principle. In *National Licorice Co. v. NLRB*, the Supreme Court held that individual contracts in which employees relinquished their right to present grievances "in any way except personally" or otherwise "stipulate[] for the renunciation … of rights guaranteed by the [NLRA]" were unenforceable, and were "a continuing means of thwarting the policy of the [NLRA]." 309 U.S. 350, 361 (1940). As the Court explained,

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[5] As the Board explained in *Murphy Oil*, 2014 WL 5465454, *13, barring employers from requiring that individual employees waive their NLRA right to engage in concerted activity in future disputes is consistent with the well-established legal principle that a *union* can prospectively waive some of a represented employee's Section 7 rights. *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). The validity of those waivers is premised on their negotiation by a collective-bargaining representative freely chosen by the employees and subject to the duty of fair representation. *Metro. Edison*, 460 U.S. at 705; *Vincennes Steel Corp.*, 17 NLRB 825, 832 (1939), *enforced*, 117 F.2d 169 (7th Cir. 1941).

"employers cannot set at naught the [NLRA] by inducing their workmen to agree not to demand performance of the duties which [the statute] imposes." *Id*. at 364. The Seventh Circuit, agreeing with the Board, held in *NLRB v. Stone* 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"). And, applying that same principle, the Board has regularly set aside settlement agreements that require employees, as a condition of reinstatement, to prospectively waive the right to engage in concerted activity. *See, e.g.*, *Bon Harbor Nursing & Rehab. Ctr.*, 348 NLRB 1062, 1073, 1078 (2006) (employer unlawfully conditioned employees' reinstatement, after dismissal for non-union concerted protected protest, on agreement not to engage in further similar protests); *Bethany Med. Ctr.*, 328 NLRB 1094, 1005-06 (1999) (same); *cf. Ishikawa Gasket Am., Inc.*, 337 NLRB 175, 175-76 (2001) (employer unlawfully conditioned employee's severance payments on agreement not to help other employees in disputes against employer or to act "contrary to the [employer's] interests in remaining union-free"), *enforced*, 354 F.3d 534 (6th Cir. 2004).[6]

[6] Relying on those cases, the Board held in *On Assignment Staffing Services, Inc.*,

The well-established proposition that the NLRA bars all types of agreements between employers and individual employees that purport to restrict Section 7 rights is consistent with longstanding federal labor policy. For example, in the Norris-LaGuardia Act (29 U.S.C. § 101, et seq.), enacted three years before the NLRA, Congress declared unenforceable "any undertaking or promise" in conflict with the federal policy of protecting employees' freedom (among others) to act concertedly for mutual aid or protection. 29 U.S.C. § 102, 103. That statute also bars judicial restraint of concerted litigation "involving or growing out of any labor dispute" based on employer-employee agreements. 29 U.S.C. § 104.

In sum, all individual contracts that prospectively waive Section 7 rights violate Section 8(a)(1) "no matter what the circumstances that justify their execution or what their terms." *J.I. Case*, 321 U.S. at 337. By definition, that

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362 NLRB No. 189, 2015 WL 5113231 (2015), *petition for review filed*, 5th Cir. No. 15-60642, that individual contracts cannot prospectively waive Section 7 rights even if the waiver is voluntary. Prior to *On Assignment*, this Court read *J.I. Case* more narrowly in *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1076-77 (9th Cir. 2014). Eventually, the Court may have to decide whether the statute permits the Board to take a different view. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.") However, the Court need not resolve that issue here, because *Johnmohammadi* expressly cited the fact that employees could opt out of Bloomingdale's arbitration agreement to distinguish that case from the Board's decision in *D.R. Horton* which involved, as here, an agreement imposed as a condition of employment. 755 F.3d at 1075-77.

prohibition encompasses contracts – including arbitration agreements governed by the FAA – that require employees to arbitrate all work-related disputes individually. As explained more fully below, because arbitration agreements prospectively waiving Section 7 rights are unlawful under the NLRA, such agreements are not entitled to enforcement under the FAA.

C. The FAA Does Not Mandate Enforcement of Arbitration Agreements That Prospectively Waive Section 7 Rights

The Supreme Court explained in *AT&T Mobility LLC v. Concepcion* that Congress enacted the FAA "in response to widespread judicial hostility to arbitration agreements." 131 S. Ct. 1740, 1745 (2011). 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. Described as the "primary substantive provision of the [FAA]," Section 2 reflects "both a liberal federal policy favoring arbitration, … and the fundamental principle that arbitration is a matter of contract." *Concepcion*, 131 S. Ct. at 1745 (internal quotations omitted). Accordingly, "courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *Id*.

The Supreme Court has also made clear that the federal policy favoring arbitration has its limits; crucially, the Court has repeatedly emphasized that it will not sanction the enforcement of arbitration agreements that prospectively waive

"substantive" federal rights, which it defines as those central to the statutes that create them. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985). The Board's *D.R. Horton* and *Murphy Oil* decisions are consistent with that principle because the contracts they find unlawful waive core NLRA rights. Moreover, an agreement that effects such a waiver falls within the FAA's savings clause, which preserves all grounds sufficient "in equity for the revocation of any contract." 9 U.S.C. § 2; *Concepcion*, 131 S. Ct. at 1746. Such an agreement also contravenes the "congressional command" that employers not interfere with the right of their employees to engage in concerted activity for mutual aid or protection. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). Accordingly, any such agreement is unenforceable under the FAA against a statutory employee.

1. To determine whether a right is "substantive," and therefore unwaivable, the Supreme Court looks to the statute creating the right

The Supreme Court has made clear that "a substantive waiver of federally protected civil rights will not be upheld." *Pyett*, 556 U.S. at 273. It reaffirmed that principle in *Italian Colors*, emphasizing the key distinction between judicial-forum waivers that are enforceable under the FAA and prospective waivers of substantive rights that are not. The Court explained that barring substantive waivers would

preclude "an arbitration agreement forbidding the assertion of certain statutory rights." 133 S. Ct. at 2310 (quoting *Mitsubishi*, 473 U.S. at 637 n.19).

Crucially, the Supreme Court's FAA cases instruct that whether a right is substantive for FAA purposes turns on an examination of the statute that created that right and asks whether the right is critical to the goals of that statute. For example, in *Gilmer v. Interstate/Johnson Lane Corp.*, the Court looked to the animating purpose of the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq. ("ADEA"), in determining that an arbitration agreement could be enforced despite the ADEA's judicial-forum provision and a provision creating an optional collective-litigation procedure. 500 U.S. 20, 27-28 (1991). To begin its analysis, the Court determined that Congress' purpose in enacting the ADEA was "to prohibit arbitrary age discrimination in employment" and address related issues. *Id.* at 27. The Court then rejected the challenge to arbitration based on the statute's judicial-forum provision because it found that Congress did not "'intend[] the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum…." 500 U.S. at 29 (quoting *Mitsubishi*, 473 U.S. at 628); *see also Pyett*, 556 U.S. at 267 n.9, 275 ("[I]t [was] the [*Gilmer*] Court's fidelity to the ADEA's text" that led to decision that the ADEA permitted waiver of a judicial forum.). The Court similarly rejected the argument that arbitration would impermissibly conflict with the statute's collective-action

provision, finding that although the ADEA provided the possibility of proceeding collectively, it did not limit the right of employees to agree to resolve their individual claims on an individual basis. *Id.* at 32 (noting, also, that applicable arbitration scheme provided for collective proceedings).

In other FAA decisions, the Supreme Court has repeatedly rejected challenges to the enforcement of arbitration agreements based on statutory provisions that are ancillary to the congressional goals of the statutes in question.[7] But the Supreme Court has never enforced an arbitration agreement that extinguishes a right core to the statute creating that right. And it has never examined whether Section 7 provides statutory employees with a substantive federal right to pursue work-related legal claims concertedly. As discussed below, under the mode of analysis used by the Court in its FAA cases, the Section 7 right

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[7] *See, e.g.*, *CompuCredit*, 132 S. Ct. at 671 (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). Other courts have followed suit. *See Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475, 478 (8th Cir. 1988) (under ERISA's structure, arbitration agreement waiving judicial forum "does not carry with it the waiver of any substantive duties or liabilities" created by the statute); *Carter v. Countrywide Credit Indus.*, 362 F.3d 294, 298 (5th Cir. 2004) (FLSA judicial-forum, collective-action, and attorneys-fee provisions not substantive according to reasoning in *Gilmer*).

to litigate employment claims concertedly is substantive and may not be prospectively waived.

2. Section 7 creates the substantive right upon which the NLRA and federal labor policy are constructed

The inquiry into whether collective legal pursuit of work-related claims is a "substantive" right within the meaning of the Supreme Court's FAA jurisprudence entails two distinct issues: (1) whether such concerted legal activity is a Section 7 right; and (2) whether Section 7 is the "critical" or "principal" right (see p.15 n.7) that Congress enacted the NLRA to protect. The Board definitively answered both of those questions in the affirmative in *D.R. Horton* and *Murphy Oil*. As it found, and as detailed above (pp.5-8), there can be no doubt that Section 7's protection encompasses concerted legal activity to redress work-related grievances. As the Board further found, and as detailed below, Section 7 is the foundational right underlying the entire architecture of federal labor law and policy. Both findings are consistent with the language and policies of the NLRA and grounded in decades of caselaw. And, with respect to both issues, the Board's determination is indisputably entitled to considerable deference.[8]

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[8] *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1868-71 (2013) (rejection of statutory interpretation within agency's expertise requires showing it is "foreclose[d]" by the statutory text) (reaffirming *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *Garner v. Teamsters Chauffeurs & Helpers Local 776*, 346 U.S. 485, 490 (1953) (Board has primary authority to interpret and apply NLRA); *City Disposal*, 465 U.S. at 829 (Board has prerogative

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. That collective right – to band together for mutual protection in all efforts to improve working conditions – is the NLRA's distinctive feature. Because of it, the NLRA is, as the Board has emphasized, "unique among workplace statutes," which typically protect individual rights. *Id.* at *1.

In upholding the constitutionality of the NLRA, the Supreme Court characterized the Section 7 right as "fundamental." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937). That fundamental status is manifest in the structure of the NLRA: Section 7 lies at the statute's core. In Section 8, Congress prohibited employers and unions alike from restraining or coercing employees in the exercise of Section 7 rights. 29 U.S.C. § 158(a)(1) and (b)(1). Section 9 establishes procedures to implement representational Section 7 rights (e.g., elections, exclusive representation). 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

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to define Section 7) (quoting *Eastex*, 437 U.S. at 568). *See generally*, Note, *Deference and the Federal Arbitration Act: The NLRB's Determination of Substantive Statutory Rights*, 128 HARV.L.REV. 907 (2015) (because "determining whether a statutory right is substantive or procedural for the purposes of the FAA depends upon an analysis of the statutory scheme creating the right," the Board's determination, based on its NLRA interpretation, is entitled to *Chevron* deference).

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

Finally, the right to engage in collective action for mutual protection is not only critical to the NLRA, but is the "basic premise" of national labor policy. *Murphy Oil*, 2014 WL 5465454, at *1. That is evidenced by Congress' consistent focus on protecting that right, even in earlier labor legislation such as the Norris-LaGuardia Act. *See* p.11. Once the appropriate deference is given to the Board's determination that Section 7 is critical to the NLRA and to federal labor policy – i.e., substantive for FAA purposes – it is self-evident that an agreement requiring employees to individually arbitrate work-related disputes, which by definition deprives them of that right, is unenforceable against statutorily protected employees.

3. An arbitration agreement's unlawful waiver of substantive Section 7 rights brings the agreement within the exception to enforcement described in the FAA's savings clause

Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, *save* upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). Under that "savings clause," an arbitration agreement is unenforceable if a standard contract defense, which would serve to nullify any contract, applies. Conversely, defenses that only affect 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." *See Concepcion*, 131 S. Ct. at 1746-47.

One established contract defense is illegality. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-84 (1982) ("[A] federal court has a duty to determine whether a contract violates federal law before enforcing it."); *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]"). Applying that defense, the Court in *Kaiser Steel* held that a contract that required an employer to cease doing business with another company, in violation of the NLRA, would be unenforceable. 455 U.S. at 78. And, as described (p.9-10), the Board and the courts have repeatedly rejected, as contrary to the NLRA, a variety of private contracts that seek to restrict Section 7 rights as a condition of employment. *See, e.g., Nat'l Licorice Co.*, 309 U.S. at 361; *Stone*, 125 F.2d at 756; *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 175-76 (2001), *enforced*, 354 F.3d 534 (6th Cir. 2004). That unbroken line of precedent, dating from just a few years after the NLRA's enactment, demonstrates that illegality under the NLRA has consistently served to invalidate a variety of contracts, not just arbitration agreements.

Because the defense of illegality is unrelated to the fact that an agreement to arbitrate is at issue, it falls comfortably within the FAA's savings clause. In other

words, the FAA's policy favoring arbitration and the NLRA's specific right to concerted activity are "capable of co-existence," *id*. at *8 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)), and Congress gave no indication that the FAA must trump other statutory rights, including the NLRA, under those circumstances. *Id*. at *9 (citing *Morton*, 417 U.S. at 551 ("courts are not at liberty to pick and choose among congressional enactments")). The Board's *D.R. Horton* and *Murphy Oil* decisions thus effectuate the congressional intent animating both the NLRA and the FAA by barring enforcement of only those arbitration agreements depriving parties of specific federal rights that Congress enacted legislation to protect.

4. The NLRA embodies a congressional command overriding FAA enforcement of contracts waiving Section 7 rights against statutory employees

Enforcement of an arbitration agreement may be precluded if, "[l]ike any statutory directive, [the FAA's] mandate [has been] overridden by a contrary congressional command." *CompuCredit*, 132 S. Ct. at 669 (quoting *McMahon*, 482 U.S. at 226). Such a command may be explicit, or may be deduced from either a statute's text or legislative history, or from an "inherent conflict" between its provisions and the FAA. *Gilmer*, 500 U.S. at 26; *McMahon*, 482 U.S. at 227. The Board has justifiably found both an express textual command and an equally prohibitive implicit conflict in the NLRA.

The text of the NLRA expressly commands employers not to interfere with their employees' right to engage in concerted activity for mutual aid or protection. As discussed above, that right encompasses the right of employees to join together to pursue their legal claims. To the extent an arbitration agreement bars concerted pursuit of claims in any forum, whether arbitral or judicial, it infringes that right. *See Murphy Oil*, 2014 WL 5465454, at *12. The absence of explicit language in the NLRA overriding the FAA is of little import, given that, when the NLRA was enacted in 1935, and reenacted in 1947, the courts had never applied the FAA to employment contracts. *Id*. at *10. Indeed, it was not until 2001 that the Supreme Court definitively ruled that the FAA applied to such contracts. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (finding exclusion of certain employment contracts from the FAA's coverage referred only to contracts covering transportation workers).[9]

[9] There is no merit to the suggestion (Ernst & Young Br. 22-23 (quoting *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013)) that the recodification of the FAA after the NLRA's enactment was significant. As the Board explained in *Murphy Oil*, "[u]nder established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'" 2014 WL 5465454, at *15 & n.65 (quoting *Finley v. U.S.*, 490 U.S. 545, 554 (1989); citing *Anderson v. Pac. Coast S.S. Co.*, 225 U.S. 187, 199 (1912); *Bulova Watch Co. v. U.S.*, 365 U.S. 753, 758 (1961)); *see also Murphy Oil*, 2014 WL 5465454, at *15 (noting nothing in text or history of recodification suggests intent to restrict the then "relatively new and undeniably prominent" NLRA and Norris-LaGuardia Act).

Moreover, as the Board also found, an interpretation of the FAA that enables employers to require individual employees to waive Section 7 rights would present an inherent conflict with the NLRA, given the essential nature of Section 7 to that statute. *Murphy Oil*, 2014 WL 5465454, at *13; *D.R. Horton*, 2012 WL 36274, at *11. The FAA cannot be used to shield employer efforts to abrogate the NLRA.

D. The Supreme Court's FAA Jurisprudence Does Not Compel Rejection of the Board's *D.R. Horton* and *Murphy Oil* Decisions

The principal flaw in the decisions of courts that have rejected the Board's analysis – most notably the Fifth Circuit in *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013), and the Eighth Circuit in *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013) – is their erroneous premise, that the Supreme Court's FAA jurisprudence compels that result. The Fifth Circuit specifically held that "a substantive right to proceed collectively has been foreclosed," *D.R. Horton*, 737 F.3d at 361 (citing *Gilmer*, 500 U.S. at 32), and that the FAA's savings clause cannot serve to invalidate a waiver of concerted legal activity, *id.* at 359-60 (citing *Concepcion*, 131 S. Ct. 1740).[10] The reality, however, is that the Supreme Court

[10] *See also Owen*, 702 F.3d at 1054 (rejecting Board's "attempt[] to distinguish its conclusion from pro-arbitration Supreme Court decisions such as *Concepcion*," 131 S. Ct. 1740 (2011)). *See generally Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 & n.3 (9th Cir. 2013) (finding employees *D.R. Horton*-based argument waived, but noting that many courts have rejected the Board's analysis "on the ground that it conflicts with the explicit pronouncements of the Supreme Court….") (citing decisions rejecting and applying *D.R. Horton*), *amending and superseding* 734 F.3d 871, 873-74 (9th Cir. 2013).

has never considered the effect of a statutory employee's Section 7 right to pursue work-related claims concertedly on an arbitration agreement's concerted-action waiver. The conclusion of the Fifth and Eighth Circuits therefore overreads the key FAA cases, disregarding the Supreme Court's teaching that lower courts are not to treat its decisions as authoritative on issues of law the Court did not decide. *See UFCW Local 1036 v. NLRB*, 307 F.3d 760, 774 (9th Cir. 2002) (en banc) (citing *Alexander v. Sandoval*, 532 U.S. 275 (2001)).

That the Supreme Court has only addressed whether arbitration agreements requiring individual arbitration are enforceable in the context of other statutes (or judge-made rules) is critical. The NLRA is a distinctive statute and the rights Section 7 creates are materially different from those in other statutes. That is evident when, pursuant to the approach dictated by those same Supreme Court decisions, the animating purposes of the other statutes, and the rights they create, are examined and contrasted with the NLRA and Section 7. Such an analysis confirms the unique status of the NLRA among workplace statutes and dictates the different result with respect to the FAA's enforcement mandate.

In *Gilmer*, for example, the Supreme Court confronted the ADEA – another federal statute providing workplace protections, and which contains a provision allowing for collective action – and held that individual arbitration was not "inconsistent with the statutory framework and purposes of the ADEA." 500 U.S.

at 27; *see also* pp.14-15. That holding flows from the ancillary nature of the ADEA's collective-action provision, which is only as a means to effectuate Congress' ultimate goal to protect individuals from age-based discrimination in employment. *See Gilmer*, 500 U.S. at 27 (describing purpose of ADEA). The substantive right under the ADEA is the right to be free of discrimination. The ADEA's collective action provisions afford only ancillary procedural rights.[11] Crucially, under the ADEA – as well as the FLSA and other statutes providing specific, individual workplace rights – a party "'does not forgo [a] substantive right'" by agreeing to individual arbitration. *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628); *see also Carter*, 362 F.3d at 298-300.

Under the NLRA, by contrast, concerted activity is not merely a procedural means of vindicating a statutory right; rather, it is itself the core statutory right. Congress enacted Section 7 to establish employees' right to band together to advocate for changes, or enforce laws, that will "improve their lot as employees." *Eastex*, 437 U.S. at 565. In doing so, Congress' express purpose was to promote the free flow of commerce by protecting "the exercise by workers of full freedom of association," in unions or otherwise, to negotiate with their employers or

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[11] Similarly, "the principal purpose of the FLSA is to protect all covered workers from substandard wages and oppressive working hours." *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1150 (9th Cir. 2000) (internal quotation omitted).

otherwise undertake "mutual aid or protection." 29 U.S.C. § 151. Because the right to engage in concerted activity for mutual aid or protection is a core substantive right, an arbitration agreement precluding employees covered by the NLRA from exercising that right in any arbitral or judicial forum that could resolve their claims is akin to a contract requiring employees to agree, as a condition of employment, that they will not be paid the minimum wage dictated by the FLSA or can be fired on the basis of age contrary to the ADEA.

In *AT&T Mobility v. Concepcion*, another FAA case often cited as determinative of the issue presented here, *see, e.g.*, *Owen*, 702 F.3d at 1054; *D.R. Horton*, 737 F.3d at 359-60, the Supreme Court rejected the argument that a state-law, judge-made rule that often was applied to find agreements requiring individual arbitration unconscionable fell within the FAA's savings clause. 131 S. Ct. at 1750-53. Instead, the Court found that the FAA preempted the rule, which was intended to ensure prosecution of low-value claims by enabling consumers to bring them collectively. *Id.*; *see also Italian Colors*, 133 S. Ct. at 2312 & n.5.

In contrast to that "manufactured" rule, 131 S. Ct. at 1750-51, the Board's decisions protect a specific right embodied in, and central to the principal objective of, a *federal* statute.[12] Under the NLRA, concerted legal action is not an incentive

[12] The Board is not "dismissing [*Concepcion*] as a case involving preemption." *Italian Colors*, 133 S. Ct. at 2312 n.5. But, while not dispositive, it is relevant for

to pursue other claims but a key substantive right. For decades, employees covered by the NLRA, recognizing the strength in numbers, have exercised 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, e.g.*, *Salt River*, 206 F.2d at 328 (preparing for collective FLSA suit), and cases cited at p.7-8 & n.4.

In sum, because a different right is at stake when a statutory employee asserts his Section 7 rights than in the Supreme Court (and circuit court) cases that have enforced agreements requiring individual arbitration, a different result is unsurprising. Mandatory waivers of concerted legal action are unlawful under the NLRA even if they do not offend the ADEA, FLSA, or other statutes granting individual work-related 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 Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 71-72 (1975); *see also New York Shipping Ass'n, Inc. v. Fed. Mar. Comm'n*, 854 F.2d 1338, 1367 (D.C. Cir. 1988) ("[T]here is no anomaly if conduct privileged under one statute is nonetheless condemned by another; we

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purposes of a savings-clause analysis that Section 7 is a federal right not subject to preemption by the FAA.

expect persons in a complex regulatory state to conform their behavior to the dictates of many laws, each serving its own special purpose.").

The difference in outcome is warranted because employees covered by the NLRA have an additional right that other employees do not have. 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.

CONCLUSION

The Section 7 right to engage in concerted legal action to redress work-related claims is grounded in the NLRA's text and structure, has been approved by the Supreme Court, and furthers national labor policy. Protection of concerted activity is what animates the NLRA and distinguishes it from other employment statutes, and the Board's finding that Section 7 is critical to the NLRA – substantive for FAA purposes – is entitled to considerable deference. No Supreme Court case has ever held that the FAA may be used to shield employer efforts to abrogate that core employee right by requiring individual arbitration. To the contrary, enforcing a waiver of the NLRA right to engage in concerted activity – including pursuit of legal claims – offends the FAA principle that substantive rights cannot be waived, undermines the general contract defenses that the FAA preserves, and contravenes a contrary congressional command.

RICHARD F. GRIFFIN, JR.
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
NANCY E. KESSLER PLATT
Deputy Assistant General Counsel
KEVIN P. FLANAGAN
Supervisory Attorney
PAUL A. THOMAS
Attorney

s/ Meredith L. Jason
MEREDITH L. JASON
Deputy Assistant General Counsel

s/ Kira Dellinger Vol
KIRA DELLINGER VOL
Supervisory Attorney

National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570
(202) 273-2945/0656

November 2015

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FOR THE NINTH CIRCUIT

STEPHEN MORRIS AND KELLY McDANIEL	)	
Plaintiffs-Appellants,	)	No.13-16599
v.	)	
ERNST & YOUNG LLP, and ERNST & YOUNG U.S., LLP	)	
Defendants-Appellees	)	District Court Case No. 5:12-cv-04964-RMW

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 6,982 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

s/ Nancy E. Kessler Platt
Nancy E. Kessler Platt
Deputy Assistant General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 6th day of November, 2015

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CERTIFICATE OF SERVICE

I certify that, on November 6, 2015, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the appellate CM/ECF system. I further certify that it was served on all parties or their counsel of record, through the CM/ECF system if they are registered or, if they are not, at the addresses listed below:

Max Folkenflik
FOLKENFLIK & McGERITY
1500 Broadway
NEW YORK, NY 10036

Ross L. Libenson
Libenson Law
300 Lakeside Drive, Suite 1000
Oakland, CA 94612

Rex S. Heinke
Gregory William Knopp, I
Akin Gump Strauss Hauer & Feld LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067

H. Tim Hoffman
300 Lakeside Drive, Suite 1000
Oakland, CA 94612

s/ Nancy E. Kessler Platt
Nancy E. Kessler Platt
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
This 6th day of November, 2015