**No. 16-2109**

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

**YILKAL BEKELE**

**Plaintiff-Appellant**

**v.**

**LYFT, INC.**

**Defendant-Appellee**

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**APPEAL FROM THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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# BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE URGING REVERSAL IN SUPPORT OF PLAINTIFF-APPELLANT

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## Interest of the National Labor Relations Board and Source of Authority To File

The National Labor Relations Board is an independent agency created by Congress to administer the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, et seq. Its "reasonable construction" of the NLRA "is entitled to considerable deference." *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984); *accord NLRB v. Solutia, Inc.*, 699 F.3d 50, 60 (1st Cir. 2012) (Court will uphold Board's "reasonably defensible" constructions of NLRA).

In *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), *reh'g denied*, No. 12-60031 (Apr. 16, 2014), the Board held that an employer violates the NLRA when it imposes on employees an agreement that requires them to arbitrate all work-related disputes individually. *Id*. at 2277. The Board further found that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq., does not dictate a different result. *Id.* The Board reexamined and reaffirmed *Horton* in *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *reh'g denied*, 5th Cir. No. 14-60800 (May 13, 2016), *cert. granted*, No. 16-307 (Jan. 13, 2017).[1]

[1] The Board's petition for a writ of certiorari to the Fifth Circuit, which the Supreme Court has granted, requested that the Court resolve the conflict in the circuits over the validity of the Board's *Horton/Murphy Oil* rule. The Supreme Court also has granted certiorari in two private-party petitions seeking review of

This appeal is from a decision of the District Court for the District of Massachusetts that enforced an agreement requiring Lyft drivers to resolve any work-related claims against Lyft through individual arbitration. *Bekele v. Lyft, Inc.*, __ F.Supp.3d __, 2016 WL 4203412 (Aug. 9, 2016). The District Court rejected the argument that Lyft's agreement violates the NLRA. *Id.* at *18-*21. The Board submits this brief, authorized by Federal Rule of Appellate Procedure 29(a)(2), to defend its decisions in *Horton* and *Murphy Oil*, an issue of first impression in this Court. The Board supports the drivers' position that the Lyft agreement is unlawful if applied to statutory employees.[2]

## I. BACKGROUND: THE BOARD'S *HORTON* AND *MURPHY OIL* DECISIONS

In *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

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decisions of the Seventh and Ninth Circuits that upheld the Board's rule. *See Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, No. 16-285 (Jan. 13, 2017); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, No. 16-300 (Jan. 13, 2017); *see also Patterson v. Raymours Furniture Co.*, No. 15-2820-CV, ___ F. App'x ___, 2016 WL 4598542 (2d Cir. Sept. 14, 2016), *cert. pet. filed*, No. 16-388 (U.S. Sept. 22, 2016).

[2] The Board takes no position on whether Lyft's drivers are statutorily protected "employees" under Section 2(3) of the NLRA, 29 U.S.C. § 152(3), as the District Court "assume[d]." *Bekele*, 2016 WL 4203412, at *13. For convenience, the Board's brief refers to Lyft's drivers as "employees," but the Board's argument is limited to defending the Board's holding that employers cannot lawfully maintain or enforce individual-arbitration agreements to the extent such agreements apply to statutory employees.

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 *Horton*, 357 NLRB at 2277). The Board reasoned 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. *Id*. at *1, *6; *Horton*, 357 NLRB at 2278-80 & n.4. Under longstanding Board law, that collective right, like other NLRA collective rights, may not lawfully be waived prospectively by individual employees. *Murphy Oil*, 2014 WL 5465454, at *2, *6, *20 (citing cases); *Horton*, 357 NLRB at 2280-82 (citing cases). Such waivers—including prospective requirements that all work-related legal claims be pursued individually, whether in an arbitral or judicial forum—violate Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), which prohibits employer interference with the Section 7 rights of employees. *Murphy Oil*, 2014 WL 5465454, at *2, *6; *Horton*, 357 NLRB at 2277-78, 2280-82.

As the Board explained, invalidating arbitration agreements that compel employees to resolve all their employment disputes solely on an individual basis does not conflict with the FAA's mandate that arbitration agreements be enforced according to their terms. *Murphy Oil*, 2014 WL 5465454, at *6, *9-*13; *Horton*, 357 NLRB at 2283-88. The FAA's text and Supreme Court precedent establish

limits to that mandate. In particular, the FAA's saving clause exempts arbitration agreements from enforcement on the same grounds that justify the revocation of any contract. The Board's *Horton/Murphy Oil* rule, which targets interference with the right of employees to engage in collective legal action, not arbitration, applies such a defense. *Murphy Oil*, 2014 WL 5465454, at *7, *8 n.37, *11; *Horton*, 357 NLRB at 2284-85, 2287.

Finally, in *Murphy Oil*, the Board responded to federal court decisions that had questioned or rejected its *Horton* decision, many of which described their holdings as compelled by Supreme Court precedent. The Board pointed out, correctly, that "no decision of the Supreme Court speaks directly to the issue" the Board decisions address. *Murphy Oil*, 2014 WL 5465454, at *2.

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

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

Section 7 guarantees employees "the right to self-organization, to form, join, or assist labor organizations, … to engage in *other concerted activities* for the purpose of collective bargaining or *other mutual aid or protection*, and … to refrain from any or all of such activities." 29 U.S.C. § 157 (emphases added). Central to this case is the Board's holding that the right of employees to engage in

concerted activity for mutual aid or protection—the "basic premise" upon which our national labor policy has been built, *Murphy Oil*, 2014 WL 5465454, at *1—includes concerted *legal* activity. That construction falls squarely within the Board's expertise and its responsibility for delineating the NLRA generally, and Section 7 in particular. *See City Disposal*, 465 U.S. at 829 (noting that "the task of defining the scope of [Section] 7 'is for the Board to perform in the first instance as it considers the wide variety of cases that come before it'" (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978))); *accord El Gran Combo de Puerto Rico v. NLRB*, 853 F.2d 996, 1001 (1st Cir. 1988). The District Court thus plainly erred in failing to accord the Board's NLRA interpretation the requisite deference. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1868-71 (2013) (statutory interpretation within agency's expertise should be accepted unless "foreclose[d]" by the statutory text); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

The line of cases holding concerted legal activity to be protected dates back to just after the NLRA's enactment. *See Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-50 (1942) (three employees' joint Fair Labor Standards Act ("FLSA") lawsuit). It continues, unbroken and with this and other courts' approval, through modern NLRA jurisprudence. *See, e.g.*, *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 980 (9th Cir. 2016) ("[E]mployees have the right to pursue work-related legal

claims together.") (citations omitted), *cert. granted*, No. 16-300 (Jan. 13, 2017); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1152-53 (7th Cir. 2016) ("[F]iling a collective or class action suit constitutes 'concerted activit[y]' under Section 7."), *cert. granted*, No. 16-285 (Jan. 13, 2017); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) ("[T]he filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by [Section] 7…."). [3] And the Supreme Court confirmed the reasonableness of the Board's statutory interpretation in *Eastex*, which recognized—in direct contrast to the District Court's analysis here, 2016 WL 4203412, at *20—that Section 7's broad guarantee encompasses employees' efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship," including "through resort to administrative and judicial forums." *Id*. at 565-66 & n.15.

The Board's interpretation furthers the policy objectives that guided Congress in enacting the NLRA. The NLRA protects collective rights "not for their own sake but as an instrument of the national labor policy of minimizing industrial strife." *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975). Protecting employees' ability to resolve workplace disputes

[3] *Accord Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188-89 (D.C. Cir. 2000) (concerted petitions for injunctions against workplace harassment); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) (concerted labor-related lawsuit).

collectively in an adjudicatory forum serves that purpose because collective lawsuits are an alternative to strikes and other disruptive protests. *Horton*, 357 NLRB at 2279-80; *see Salt River Valley Water Users' Ass'n v. NLRB*, 206 F.2d 325, 328 (9th Cir. 1953) (in response to dissatisfaction with wages, employee collected signatures to represent coworkers in negotiations or FLSA litigation).

Protecting employees' concerted legal claims also advances the congressional objective of "restoring equality of bargaining power between employers and employees." 29 U.S.C. § 151; *accord Murphy Oil*, 2014 WL 5465454, at *1. Indeed, recognizing that concerted activity "is often an effective weapon for obtaining [benefits] to which [employees] … are already 'legally' entitled," the Ninth Circuit in *Salt River* upheld the Board's holding that Section 7 protected employees' efforts to exert group pressure on their employer to redress work-related claims through resort to legal processes. 206 F.2d at 328. Similarly, the Supreme Court has acknowledged a long history of employees banding together under Section 7 to take advantage of the evolving body of laws and procedures that legislatures have provided for their protection. *See Eastex*, 437 U.S. at 565-66 & n.15.

In sum, contrary to the District Court's finding, *Bekele*, 2016 WL 4203412, at *18-*21, the Board has reasonably construed Section 7 as guaranteeing employees the option of pursuing work-related legal claims collectively. That

construction is supported by longstanding precedent—including decisions of this Court and the Supreme Court—none of which the District Court addressed. It also effectively advances Congress's goals of avoiding labor strife and restoring employees' bargaining power.[4]

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

An employer violates Section 8(a)(1) by "intefer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of" Section 7 rights. 29 U.S.C. § 158(a)(1). Accordingly, as the Board reiterated in *Murphy Oil*, 2014 WL 5465454, at *11,

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[4] Contrary to the misapprehensions of the District Court, 2016 WL 4203412, at *20, the Board's position is not impaired by recognizing that Federal Rule of Civil Procedure 23 is a procedural device that does not "establish an entitlement to class proceedings for the vindication of statutory rights." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013). The Board could not have been clearer that the substantive right of employees to act in concert to vindicate employment rights is subject to the procedural requirements of the forum. *See Murphy Oil*, 2014 WL 546454, at *18 (what NLRA prohibits is action by an employer "that purports to completely deny employees access to class, collective or group procedures *that are otherwise available to them under statute or rule*") (emphasis added); *id*. at *2 (employees' NLRA right is to act together "to *pursue* joint, class, or collective claims *if and as available*, without the interference of an employer-imposed restraint") (second emphasis added).

Nor does it matter that modern class-action procedures were not available when the NLRA was enacted. Joinder and various other collective procedural devices existed at that time, *see Lewis*, 823 F.3d at 1154, and the Lyft agreement bars employees from using them if they are available. In any event, as the Supreme Court has explained, Sections 7 and 8(a)(1) of the NLRA were drafted broadly to enable the Board to respond to new developments affecting employees. *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945).

individual agreements between employers and employees that prospectively waive Section 7 rights are unlawful.

Longstanding Board and court precedent establish that principle. In *National Licorice Co. v. NLRB*, the Supreme Court held that individual contracts in which employees prospectively relinquish their right to present grievances "in any way except personally," or otherwise "stipulate[] for the renunciation … of rights guaranteed by the [NLRA]," are unenforceable and "a continuing means of thwarting the policy of the [NLRA]." 309 U.S. 350, 360-61, 364 (1940); *accord Morris*, 834 F.3d at 983, 987; *Lewis*, 823 F.3d at 1152, 1157, 1161. It thus made clear that employers cannot use such contracts to "set at naught the [NLRA]." *Nat'l Licorice*, 309 U.S. at 364; *see also J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) (individual contracts conflicting with Board's function of preventing NLRA violations "obviously must yield or the [NLRA] would be reduced to a futility"). Similarly, in *NLRB v. Stone*, the Seventh Circuit held that individual contracts requiring employees to adjust their work-related grievances individually "constitute[] a violation of the [NLRA] per se," even when "entered into without coercion." 125 F.2d 752, 756 (7th Cir. 1942). The Board has long held—in a variety of contexts unrelated to arbitration—that Section 8(a)(1) bars individual contracts that prospectively waive Section 7 rights. *See, e.g.*, *First Legal Support Servs., LLC*, 342 NLRB 350, 362-63 (2004) (unlawful to have employees sign

contracts stripping them of right to organize); *McKesson Drug Co.*, 337 NLRB 935, 938 (2002) (unlawful to insist that employee sign, as condition of avoiding discharge, broad waiver of right to file any lawsuit, unfair-labor-practice charge, or other legal action).[5]

The principle that an employer may not lawfully induce an employee prospectively to waive her Section 7 rights flows from the unique characteristics of those rights and the practical circumstances of their exercise. Concerted activity—of unorganized workers, in particular—often arises spontaneously when employees are presented with actual problems and have to decide among themselves how to respond. *See, e.g.*, *NLRB v. Wash. Aluminum*, 370 U.S. 9, 14-15 (1962) (concerted activity spurred by extreme cold in plant); *Salt River*, 206 F.2d at 328 (concerted activity prompted by violations of minimum-wage laws). The decision whether to collectively walk out of a cold plant or to join in a collective wage-and-hour lawsuit is materially different from the decision—made in advance of any concrete grievance—to refrain from *any* future concerted activity, regardless of the circumstances. *See Nijjar Realty, Inc.*, 363 NLRB No. 38, 2015 WL 7444737, at

[5] Collective waivers negotiated by unions on behalf of member employees, by contrast, are permissible. For example, a union may waive the employees' right to engage in an economic strike, for the term of a collective-bargaining agreement. *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 705-06 (1983). Such waivers are the product of concerted activity—employees' exercise of their Section 7 right "to bargain collectively through representatives of their own choosing." *See Horton*, 357 NLRB at 2286.

*5 (Nov. 20, 2015) (such waivers are made "at a time when the employees are unlikely to have an awareness of employment issues that may now, or in the future, be best addressed by collective or class action"), *petition for review filed*, 9th Cir. No. 15-73921.

In other words, as the Supreme Court has recognized, "the vitality of [Section] 7 requires that the [employee] be free to refrain in November from the actions he endorsed in May." *NLRB v. Granite State Joint Bd., Textile Workers Local 1029*, 409 U.S. 213, 214-18 (1972) (Section 7 protects right of employees who resign from union not to take part in strike they once supported). By the same token, employees must be able to decide whether "to engage in … concerted activity which they decide is appropriate," *Plastilite Corp.*, 153 NLRB 180, 183 (1965), *enforced in relevant part*, 375 F.2d 343 (8th Cir. 1967); *see also Serendippity-Un-Ltd.*, 263 NLRB 768, 775 (1982) (same), when the opportunity for such activity arises, even after previously deciding not to do so when circumstances were different. *See Pattern Makers' League of N. Am. v. NLRB*, 473 U.S. 95, 101-07 (1985) (union cannot maintain rule prospectively restricting employee resignations); *Mission Valley Ford Truck Sales*, 295 NLRB 889, 892 (1989) (employer cannot hold employee to "earlier unconditional promises to refrain from organizational activity"). In that context, prospective individual waivers, like the contract struck down in *National Licorice*, impair the "full

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

The fact that Section 7 also protects employees' "right to refrain" from concerted activity does not undermine the Board's rationale. Like the choice to engage in concerted activity, the right to refrain belongs to each employee to exercise in the context of a concrete workplace dispute, free from employer interference. Under the Board's rule, employees remain free to refrain from concerted legal action, either by choosing not to participate in a particular action, or by pursuing a grievance individually. *See Murphy Oil*, 2014 WL 5465454, at *24.

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

concerted action also may depend on hearing such appeals. *See Harlan Fuel Co.*, 8 NLRB 25, 32 (1938) (Section 7 guarantees employees "full freedom to receive aid, advice and information from others concerning [their self-organization] rights"). But such real-time appeals would be futile if employees are picked off one-by-one through individual waivers. While an employee not bound by a waiver may choose in a particular instance not to assist her coworkers, an employee who has waived her Section 7 rights prospectively can never choose to assist them regardless of the force of their appeals. Such prospective, individual restrictions thus diminish each employee's right to mutual aid and all employees' collective ability to advance their interests in the workplace.

In sum, employers may not require individual employees to waive prospectively the right to act concertedly for mutual protection, even in a contract. And where, as here, the prospective waiver bars concerted *legal* activity, it is particularly inimical to the policies of the NLRA. The result is to limit employees' options to more disruptive forms of concert at times when workplace tensions are high. Such agreements' express bar on a key form of protected concerted activity thus violates Section 8(a)(1) of the NLRA.

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

Section 2 of the FAA establishes that arbitration agreements "shall be valid, irrevocable, and enforceable, *save* upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). That provision "reflect[s] both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal quotations omitted). "[C]ourts must [therefore] place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *Id*. (internal quotations omitted); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (FAA's purpose is "to make arbitration agreements as enforceable as other contracts, but not more so"); *accord Marks 3-Zet-Ernst Marks GMBH v. Presstek, Inc.*, 455 F.3d 7, 17 (1st Cir. 2006). The limitation embodied in the FAA's saving clause thus demands contractual validity as a prerequisite to the statute's enforcement mandate.

Specifically, as the Supreme Court has explained, the saving clause ensures that general defenses that would serve to nullify any contract also bar enforcement of arbitration agreements. *Concepcion*, 563 U.S. at 339. Thus, it admonished courts to "remain attuned," in FAA cases, to contract defenses that "would provide

grounds 'for the revocation of any contract.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (quoting 9 U.S.C. § 2); *accord Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991); *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 483-84 (1989); *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Conversely, contract defenses that affect only arbitration agreements do not prevent enforcement under the saving clause. *Concepcion*, 563 U.S. at 339. The same is true of defenses that, while ostensibly neutral, "derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.*

As demonstrated below, agreements that violate the NLRA by barring concerted legal claims in all forums are unenforceable pursuant to the FAA's saving clause. The Board's holding to that effect in *Horton* and *Murphy Oil* fully implements both the NLRA and the FAA and is consistent with Supreme Court precedent interpreting both statutes. The Board's position thus adheres to the settled principle that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see also POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236-39 (2014).[6]

[6] In the absence of a valid, enforceable contract to arbitrate, moreover, the Court need not reach the question of whether either of the two judicially created exceptions to the FAA's enforcement mandate applies. The "contrary

### 1. Because arbitration agreements that violate the NLRA are not valid contracts, they are exempted from enforcement by the FAA's saving clause

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

Under the NLRA, a prospective individual waiver of Section 7 rights is illegal and such illegality serves to invalidate a variety of contracts, not just arbitration agreements. The Board has, for example, rejected settlement agreements prospectively barring employees from engaging in concerted protests, *Bon Harbor Nursing & Rehab. Ctr.*, 348 NLRB 1062, 1078 (2006); *Bethany Med. Ctr.*, 328 NLRB 1094, 1105-06 (1999), and a separation agreement conditioned on

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congressional command" exception asks whether Congress has precluded arbitration of a particular federal statutory claim in the statute creating that claim. *McMahon*, 482 U.S. at 226-27. The "effective vindication" exception considers whether, in a given case, enforcement of an arbitration agreement would "operat[e] ... as a prospective waiver of a party's *right to pursue* statutory remedies." *Italian Colors*, 133 S. Ct. at 2310-11 (alteration in original) (internal quotations omitted).

the departing employee's agreement not to help other employees in workplace disputes. *Ishikawa Gasket Am., Inc.*, 337 NLRB 175, 175-76 (2001), *enforced*, 354 F.3d 534 (6th Cir. 2004). It has also found waivers of employees' right to pursue concerted legal claims unlawful even when unconnected to agreements to arbitrate. *See LogistiCare Solutions., Inc.*, 363 NLRB No. 85, 2015 WL 9460027, at *1 (Dec. 24, 2015), *petition for review filed*, 5th Cir. No. 16-60029; *Convergys Corp.*, 363 NLRB No. 51, 2015 WL 7750753, at *1 & n.3 (Nov. 30, 2015), *petition for review filed*, 5th Cir. No. 15-60860.

That unbroken line of precedent dates from shortly after the NLRA's enactment, *see* pp. 9, demonstrating that the rule against such waivers does not affect only arbitration agreements or "derive [its] meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339. Indeed, the rule developed well before the advent of agreements mandating individual arbitration of employment disputes.[7] As the Ninth Circuit found in *Morris*, the illegality of an individual, prospective, concerted-action waiver under the NLRA thus "has nothing to do with arbitration as a forum." 834 F.3d at 985.

Moreover, unlike the courts, whose hostility to arbitration prompted Congress to enact the FAA, *see Concepcion*, 563 U.S. at 339, the Board has long

[7] The Supreme Court first definitively ruled that the FAA applied to employment contracts in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

recognized that statutory rights may be effectively vindicated in arbitration. *See Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 271 (1964) (discussing Board policies favoring arbitration); *Horton*, 357 NLRB at 2289 (explaining that Board embraces arbitration as "central pillar of Federal labor relations policy" and often defers to arbitration (citing cases)). Nothing in the Board's *Horton* decision prohibits an employer from requiring arbitration of all *individual* work-related claims. 357 NLRB at 2288. And to the extent an employer agrees to arbitrate collective claims, it may bar its employees from bringing such claims in court. *SolarCity Corp.*, 363 NLRB No. 83, 2015 WL 9315535, at *5 n.15 (Dec. 22, 2015), *petition for review filed*, 5th Cir. No. 16-60001. In other words, the focus of the *Horton/Murphy Oil* rule is protecting concerted activity; it is neutral with respect to the adjudicatory forum, arbitral or judicial. As described, it bars enforcement of arbitration agreements that violate a coequal federal statute in a manner that would invalidate any contract.

The Board's rule is thus consistent with the Supreme Court's saving-clause analysis in *Concepcion*. In *Concepcion*, the Court declined to read the saving clause to preserve a state-law rule that it found disfavored arbitration in practice. 563 U.S. at 341-46; *see Lewis*, 823 F.3d at 1158 ("the law [in *Concepcion*] was directed toward arbitration, and it was hostile to the process"). Specifically, the case involved a judicial interpretation of California's state unconscionability

principles that barred class-action waivers in most arbitration agreements and permitted a party to a consumer contract to demand class arbitration. 563 U.S. at 340, 346. The Board's rule does not similarly disfavor arbitration or permit employees to demand concerted arbitration. *Horton*, 357 NLRB at 2288 (acknowledging employer's right "to insist that *arbitral* proceedings be conducted on an individual basis").

Moreover, the rule that the Court rejected in *Concepcion* was a non-statutory state policy intended to facilitate low-value claims. 563 U.S. at 340. Later, in *Italian Colors*, the Court applied *Concepcion* to strike down a similar, federal-court-imposed policy intended to ensure an "affordable procedural path" to vindicate claims when individual arbitration would be prohibitively expensive. 133 S. Ct. at 2304. By contrast, the Board's rule effectuates the NLRA's express statutory protection of concerted activity and specific proscription of interference with such activity. Neither *Concepcion* nor *Italian Colors* suggest that the FAA mandates enforcement of a contract that directly violates another federal statute like the NLRA, an issue that entails "reconciling two federal statutes, which must be treated on equal footing." *Lewis*, 823 F.3d at 1158; *see also Morris*, 834 F.3d at 988 (contrasting *Concepcion* and *Italian Colors*, which "held that arguments about the adequacy of arbitration necessarily yield to the policy of the FAA," with the

Board's rule, which "has nothing to do with the adequacy of arbitration proceedings").

In contrast to the California rule underlying the saving-clause argument rejected in *Concepcion*, the Board's rule is a straightforward application of a longstanding NLRA interpretation, endorsed by the Supreme Court, pursuant to which *all* individual contracts that prospectively waive Section 7 rights violate Section 8(a)(1). Accordingly, it "meets the criteria of the FAA's saving clause for nonenforcement." *Lewis*, 823 F.3d at 1157; *see also Morris*, 834 F.3d at 984-86. The Board's position that arbitration agreements requiring concerted-action waivers are unenforceable thus both effectuates the NLRA and adheres to the FAA's mandate that arbitration agreements be enforced on the same terms as other contracts. It creates no conflict between either the express statutory requirements, or animating policy considerations, of the two statutes. *See Morris*, 834 F.3d at 987 n.13 ("[W]e see no inherent conflict between the FAA and the NLRA[.]"); *accord Lewis*, 823 F.3d at 1156-57.[8]

[8] Judge Ikuta, dissenting in *Morris*, opined that the saving clause is reserved exclusively for defenses based on state law, citing Supreme Court cases analyzing federal statutory challenges to arbitration under non-contractual, judicially created exceptions to the FAA. 834 F.3d at 992, 997. But the plain language of the saving clause embraces general contract defenses without any such qualification. And none of the cases she cites presented a saving-clause challenge to the validity of the contract to arbitrate, much less an argument that the agreement was contractually infirm because it directly violated a federal statute.

For that reason, it is unnecessary to address other defenses to the FAA's enforcement mandate, including whether the NLRA contains a "contrary congressional command" overriding the FAA. The congressional-command exception presupposes a valid contract to arbitrate. *See, e.g.*, *Gilmer*, 500 U.S. at 33 (recognizing need to consider contract defenses under saving clause if asserted) (quoting *Mitsubishi*, 473 U.S. at 627); *Rodriguez de Quijas*, 490 U.S. at 483-84 (same). It is designed to determine which statutory command controls when another federal statute conflicts with the FAA and the two cannot be reconciled. Specifically, it asks whether Congress has expressed its intent to override the FAA's enforcement mandate with respect to the particular federal statutory claims at issue, precluding the waiver of a judicial forum for adjudication of those claims. *See, e.g.*, *Rodriguez de Quijas*, 490 U.S. at 483-84 (party may successfully oppose FAA arbitration by "showing that Congress intended in a separate statute to preclude a waiver of judicial remedies, or that such a waiver … inherently conflicts with the underlying purposes of that other statute"); *McMahon*, 482 U.S. at 226-27

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While this Court stated in *Vimar* that the saving clause is limited to state-law defenses, it did so without explanation, based on inapposite authority. *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 29 F.3d 727, 731 (1st Cir. 1994) (citing *Southland Corp. v. Keating*, 465 U.S. 1 (1984), and *McAllister Bros. v. A & S Transp. Co.*, 621 F.2d 519 (2d Cir. 1980)), *aff'd on other grounds*, 515 U.S. 528 (1995). As *Vimar*'s parenthetical description implicitly acknowledges, *Southland* supports only the undisputed proposition that, under the saving clause, "[a] party may assert general contract defenses, such as fraud and duress…." *Vimar*, 29 F.3d at 731. *McAllister* does not mention the saving clause.

(explaining that FAA's enforcement mandate "may be overridden by a contrary congressional command"). Here, there is no valid agreement to arbitrate, so there is no conflict between the statutes; both can—and should—be given effect. *Morton*, 417 U.S. at 551; *see also Lewis*, 823 F.3d at 1157; *accord Morris*, 834 F.3d at 987.

### 2. The Board's *Horton/Murphy Oil* rule is consistent with the Supreme Court's overall FAA jurisprudence

The Supreme Court has enforced contractually valid arbitration agreements over statutory challenges only when it found the agreements consistent with protection of the substantive rights afforded by those statutes. For example, in *Gilmer*, the Court determined that Congress enacted the Age Discrimination in Employment Act ("ADEA") "to prohibit arbitrary age discrimination in employment." 500 U.S. at 27 (citation omitted). Because the substantive rights of individual employees to be free of age-based discrimination could be adequately vindicated in individual arbitration, the Court held that an agreement requiring arbitration of ADEA claims could be enforced. It rejected arguments that ADEA procedural provisions affording a judicial forum and an optional collective-action procedure precluded enforcement of the agreement, explaining that Congress did not "intend[] the substantive protection afforded [by the ADEA] to include

protection against waiver of the right to a judicial forum." *Id.* at 29, 32 (second alteration in original) (quoting *Mitsubishi*, 473 U.S. at 628).[9]

By contrast, Congress plainly intended the substantive protection afforded by the NLRA to include protection against waiver of the right to engage in collective action. *Morris*, 834 F.3d at 980, 982-83, 985-86; *Lewis*, 823 F.3d at 1154, 1160. Unlike the waivable collective-action procedure in the ADEA at issue in *Gilmer*, 29 U.S.C. § 626(b)—and the identical procedure in the FLSA, 29 U.S.C. § 216(b), upon which the ADEA procedure is based—the Section 7 right of employees to engage in concerted activity is enforceable against employers. Section 8 expressly prohibits employer interference with Section 7 rights, 29 U.S.C. § 158(a)(1), and Section 10 provides for cease-and-desist orders enjoining such interference, 29 U.S.C. § 160(c). For that reason, under the NLRA, unlike the ADEA or the FLSA, substantive law protects employees from agreements prospectively waiving their right to engage in concerted activity for mutual aid and protection.

That different result reflects the difference between individual-rights statutes such as the ADEA or the FLSA and a statute like the NLRA with its distinctive

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[9] *See also, e.g.*, *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 670-71 (2012) (judicial-forum provision is not "principal substantive provision[]" of Credit Repair Organizations Act); *McMahon*, 482 U.S. at 235-36 (Exchange Act provision not intended to bar arbitration when "chief aim" was to preserve exchanges' self-regulating power).

focus on collective rights. 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. NLRA Section 7 rights are foundational, underlying the entire architecture of federal labor law and policy. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (characterizing Section 7 rights as "fundamental"). "Every other provision of the statute serves to enforce the rights Section 7 protects." *Lewis*, 823 F.3d at 1160.[10]

For the foregoing reasons, an arbitration agreement that precludes employees covered by the NLRA from engaging in concerted legal action is not a valid procedural waiver like the waiver of the judicial-forum provision in *Gilmer*. Rather, it is analogous to a contract providing that employees can be fired on the basis of age contrary to the ADEA or may be paid less than the minimum wage established in the FLSA. The Supreme Court has never held that arbitration agreements can be a means for employees to prospectively waive such core, enforceable rights. To the contrary, the Court has repeatedly emphasized that it will not sanction the enforcement of arbitration agreements that prospectively

[10] Employees' right to engage in collective action for mutual aid or protection is not only critical to the NLRA, but also a "basic premise" of national labor policy generally. *Murphy Oil*, 2014 WL 5465454, at *1. For example, the Norris-LaGuardia Act bars certain contractual and judicial restraints of such employee activity. *See* 29 U.S.C. §§ 102, 103, 104.

waive "substantive" federal rights. *See Italian Colors*, 133 S. Ct. at 2310; *Mitsubishi*, 473 U.S. at 637 n.19; *accord Morris*, 834 F.3d at 986.[11]

In sum, prospective waivers of the right to pursue concerted legal action are unlawful under the NLRA even if they do not offend other statutes, like the ADEA or the FLSA, which do not have fostering collective action among their objectives and only grant waivable procedural rights to engage in collective action. 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, 72 (1975); *see also N.Y. Shipping Ass'n, Inc. v. Fed. Mar. Comm'n*, 854 F.2d 1338, 1367 (D.C. Cir. 1988) ("[T]here is no anomaly if conduct privileged under one statute is nonetheless condemned by another; we expect persons in a complex regulatory state to conform their behavior to the dictates of many laws, each serving its own

[11] The Fifth Circuit thus erred in rejecting the Board's substantive-rights rationale in *Horton* based on cases holding that "there is no substantive right to class procedures under the [ADEA]" or "to proceed collectively under the FLSA," *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 357 (2013) (citing *Gilmer*, 500 U.S. at 32; *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004)), and that a judge-made state rule did not fit within the saving clause, *id.* at 358-60 (citing *Concepcion*, 563 U.S. 333). While other circuit courts have rejected the Board's *Horton* position, they too have misread Supreme Court precedent and evince a misunderstanding of the Board's position. *See, e.g., Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053-55 (8th Cir. 2013) (finding FLSA did not contain congressional command barring enforcement of arbitration agreement); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013) (per curiam) (rejecting citation to Board's *Horton* decision based on *Owen*, without analysis).

special purpose."). Even when claims are 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. The NLRA's protection of, and prohibition on interference with, concerted activity is what distinguishes it from other employment statutes and what renders agreements that require *individual* arbitration unlawful under the NLRA and unenforceable under the FAA.

## CONCLUSION

The Board's construction of the NLRA—that Section 8 precludes individual prospective waivers of employees' Section 7 right to pursue concerted, work-related legal claims—is entitled to considerable deference. The Supreme Court has never held that the FAA shields efforts to abrogate core rights in violation of a coequal federal statute. To the contrary, the FAA's saving clause dictates that such illegal waivers are unenforceable under the terms of that statute.

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January 2017

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

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| v. | ) | No. 16-2109 |
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| LYFT, INC. | ) | |
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| Defendant-Appellee | ) | |

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 6,488 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 26th day of January, 2017

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| Defendant-Appellee | ) | |

**CERTIFICATE OF SERVICE**

I hereby certify that on January 26, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

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

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