No. 15-2820

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONNIE PATTERSON
on behalf of herself and all others similarly situated, and
DAVID AMBROSE

Plaintiffs-Appellants

v.

RAYMOURS FURNITURE COMPANY, INC.

Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

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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 federal agency created by Congress to enforce and administer the National Labor Relations Act ("NLRA"). In *D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274 (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 ("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 (2014), *enforcement denied in relevant part*, __ F. 3d __, 2015 WL 6457613 (5th Cir. 2015).[1]

This case is on appeal from a decision of the District Court for the Southern District of New York that enforced an arbitration agreement that mandates individual arbitration of work-related disputes. *Patterson v. Raymours Furniture Co.* (March 27, 2015). In doing so, the District Court specifically rejected the argument that the agreement violates the NLRA. The Board submits this brief to

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

defend its decisions in *D.R. Horton* and *Murphy Oil*. The Board is authorized to file an amicus-curiae brief under FRAP 29(a). In filing this brief when there is a related case challenging the same Raymours agreement pending before the Board (Patterson Br. 9), the Board agrees to give preclusive effect to the final decision in this case in the pending unfair-labor-practice case.

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 employees cannot lawfully waive Section 7 rights prospectively. *Murphy Oil*, 2014 WL 5465454, at *2, 6; *D.R. Horton*, 2012 WL 36274, at *1, 5-6.[2]

In those same decisions, the Board 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 *6, 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 individual 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; *D.R. Horton*, 2012 WL 36274, at *11-15.

Finally, in *Murphy Oil*, the Board acknowledged a number of federal court decisions – including *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) – that had questioned or refused to follow its *D.R. Horton* decision, many of

[2] The Board explained that individual agreements that wholly foreclose one avenue of Section 7 activity violate Section 8(a)(1) regardless of whether employees can engage in other types of Section 7 activity. *D.R. Horton*, 2012 WL 36274, at *8; *see also Serendippity-Un-Ltd.*, 263 NLRB 768, 775 (1982) (employees have the right "to engage in concerted activity which they decide is appropriate," even if "alternative methods of solving the problems" are available (internal quotations omitted)).

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.

The arbitration agreement before the Court in this case requires that any claim that an employee has against Raymours "must be decided individually" in arbitration. The Board does not question Raymours' right to require arbitration of *individual* work-related claims, because an agreement so limited would not encroach on the employees' right to engage in concerted activity. *D.R. Horton*, 2012 WL 36274, at *12. Rather, the Board's position is that Raymours' agreement violates the NLRA insofar as it explicitly restricts employees from exercising their Section 7 right to join together in pressing their legal claims against their employer in any forum. As such, the agreement is illegal under long-established NLRA principles. Accordingly, as more fully explained below, the FAA does not mandate its enforcement against statutory employees entitled to the NLRA's protections.

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. 556, 566 (1978). And the Supreme Court has affirmed the Board's broad construction of protected concerted activity, recognizing that "[t]here 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).

Concerted legal activity to address workplace issues is 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 effectively 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).

Salt River Valley Water Users' Association v. NLRB, 206 F.2d 325 (9th Cir. 1953), aptly illustrates those principles. 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 ("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 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 back 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 employees to achieve more favorable terms or conditions of employment is 'concerted activity' under [Section] 7…."); *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1187-89 (D.C. Cir. 2000) (concerted petition for injunction against workplace harassment was Section 7 activity); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) ("[F]iling by employees of a labor related civil action is protected activity under [S]ection 7 … unless the employees acted in bad faith."); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (same).[3] Employees covered by the NLRA, recognizing the strength in numbers,

[3] *See also Le Madri Rest.*, 331 NLRB 269, 275 (2000) (concerted lawsuit alleging unlawful pay policies); *United Parcel Serv., Inc.*, 252 NLRB 1015, 1018, 1022 & n.26 (1980) (wage-related class action), *enforced*, 677 F.2d 421 (6th Cir. 1982);

thus have long 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.[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

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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).

[4] As the Board has emphasized, what Section 7 protects in this context is the employees' right to act in concert "to *pursue* joint, class, or collective claims *if and as available*, without the interference of an employer-imposed restraint." *Murphy Oil*, 2014 WL 5465454, at *2 (second emphasis added). Accordingly, the Board's position is not impaired by recognizing that Federal Rule of Civil Procedure 23, which governs class actions, 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).

Nor, contrary to the Fifth Circuit's assumption in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013), does it matter that modern class-action procedures were not available to employees in 1935 when the NLRA was enacted. The NLRA was drafted to allow the Board to respond to new developments. *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (recognizing Board's "responsibility to adapt the [NLRA] to changing patterns of industrial life"). The relevant point is that when class-action procedures became available, the NLRA barred employers from interfering with their employees' Section 7 right to use those new procedures for their mutual aid or protection. In any event, Raymours' arbitration agreement would preclude its employees from using the procedural device of joinder, which existed in 1935.

with particular effectiveness. That judgment falls squarely within the Board's area of expertise and responsibility. *See City Disposal*, 465 U.S. at 829 ("[T]he 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*, 437 U.S. at 568)).

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

Longstanding Board and court precedent establishes 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]" were unenforceable, and were "a continuing means of thwarting the policy of the [NLRA]." 309 U.S. 350, 360-61 (1940). As the Court explained, "employers cannot set at naught the [NLRA] by inducing their workmen to agree not to demand performance of the duties which [the statute] imposes." *Id*. at 364. Similarly, the Seventh Circuit 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"); *accord On Assignment Staffing Servs., Inc.*, 362 NLRB No. 189, 2015 WL 5113231, at *7-11 (2015), *petition for review filed*, 5th Cir. No. 15-60642.

Applying that same principle, the Board has found concerted-legal-action waivers unlawful, regardless of whether they require arbitration. *Convergys Corp.*, 363 NLRB No. 51, 2015 WL 7750753, at *1 & n.3 (2015), *petition for review filed*, 5th Cir. No. 15-60860. It has also regularly set aside settlement agreements that require employees, as a condition of reinstatement, prospectively to 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 protest, on agreement not to engage in further similar protests); *Bethany Med. Ctr.*, 328 NLRB 1094, 1105-06 (1999) (same); *cf. Ishikawa Gasket America, Inc.*, 337 NLRB 175, 175-76 (2001) (employer unlawfully conditioned employee's severance payments on agreement not to help other employees in workplace disputes or act "contrary to

the [employer's] interests in remaining union-free"), *enforced*, 354 F.3d 534 (6th Cir. 2004).

The uniform rejection of prospective individual waivers of Section 7 rights "no matter what the circumstances that justify their execution or what their terms," *J.I. Case*, 321 U.S. at 337, follows directly from core tenets of labor law. The collective nature of the right to engage in concerted activity for mutual aid or protection, Section 7's express protection of employees' freedom of choice, and the NLRA's goal of minimizing economic disruptions and strife all lead to that result.

The NLRA is "unique among workplace statutes," *Murphy Oil*, 2014 WL 5465454, at *1, in that it provides a *collective* right to band together for mutual protection in efforts to improve working conditions. Collective action does not occur in a vacuum, but results from employee interaction in response to workplace problems. *See, e.g.*, *Washington Aluminum Co.*, 370 U.S. at 14-15 (concerted activity spurred by extreme cold in the plant); *Salt River Valley*, 206 F.2d at 328 (concerted activity prompted by violations of minimum-wage laws). When such actual workplace issues arise, the NLRA "allows employees 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). The decision whether collectively to walk out of a cold plant (as in *Washington*

Aluminum) or to join with other employees in a particular lawsuit over wages and hours (as in *Salt River Valley*) is materially different from an individual employee's decision – made in advance of any concrete grievance – to agree to refrain from future concerted activity regardless of the circumstances. Like the contract struck down in *National Licorice*, 309 U.S. at 361, such prospective individual waivers impair the full freedom of the signatory employees to decide for themselves whether to join or refrain from participating in a particular concerted activity.

Such prospective waivers, moreover, impair the Section 7 rights not only of employees who are party to them but also of non-signatory employees who are preemptively deprived of the signatory employees' mutual aid and support at the time that an actual dispute arises. The right to engage in concerted activity includes the right to communicate with and appeal to fellow employees to join in concerted action. *See, e.g.*, *American Fed'n of Gov't Emps.*, 278 NLRB 378, 382 (1986) (describing as "indisputable" that one employee "had a Section 7 right to appeal to [another employee] to join" in protected activity); *Harlan Fuel Co.*, 8 NLRB 25, 32 (1938) (discussing employees' Section 7 right "to receive aid, advice, and information from others"). That right includes appeals to employees of other employers as well as to co-workers. *See Eastex*, 437 U.S. at 564-65. Prospective waivers of the right to engage in concerted activity deprive non-

signatory employees of any meaningful opportunity to enlist signatory employees in their cause when a concrete dispute arises.

Finally, where, as here, the prospective waiver of Section 7 rights operates to bar only concerted legal activity, the result is to limit the employees' options to comparatively more disruptive concerted activity at a time when workplace tensions are high and employees are deciding which, if any, concerted response to pursue. The peaceful resolution of labor disputes is a core objective of the NLRA, and that objective is ill-served by individual arbitration agreements that prospectively waive the right of employees to consider the option of concerted legal action along with other collective means of advancing their interests as employees.[5]

In sum, the longstanding prohibition on individual contracts that prospectively waive Section 7 rights encompasses contracts – including arbitration agreements – that require employees to pursue all work-related disputes individually. As explained more fully below, such agreements are not entitled to enforcement under the FAA.

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[5] By contrast, a union may prospectively waive some of a represented employee's Section 7 rights in a collective-bargaining agreement, *see Metro. Edison Co. v. NLRB*, 460 U.S. 693, 705-06 (1983), because negotiating such a waiver "is itself an exercise of the right of engaging in collective activities." *Vincennes Steel Corp.*, 17 NLRB 825, 832 (1939), *enforced*, 117 F.2d 169 (7th Cir. 1941); *see also Stone*, 125 F.2d at 756. That collective waiver of collective rights is distinct from a prospective individual waiver of the NLRA right to engage in concerted activity.

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 the FAA reflects "a liberal federal policy favoring arbitration," and that "courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." 563 U.S. 333, 339 (2011) (internal quotations omitted). But the 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 rights 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 prospectively waive core NLRA rights. For that reason, an agreement that effects such a waiver also 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. And such an agreement 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 an arbitration agreement effecting "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 enforcing "an arbitration agreement forbidding the assertion of certain statutory rights." 133 S. Ct. at 2310; *see also Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483, 488 (2d Cir. 2013) (distinguishing procedural mechanisms from "non-waivable, substantive right[s]" in FAA analysis).

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 ("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." *Id*. at 27. And in rejecting the challenge to arbitration based on the statute's judicial-forum provision, the Court emphasized that Congress did not "'intend[] the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum.'" *Id*. at 29 (quoting *Mitsubishi*, 473 U.S. at 628).

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.[6] But the Supreme Court has never enforced an arbitration agreement that extinguishes a right core to the statute creating that right. As discussed below,

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[6] *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) (arbitration agreement waiving judicial forum "does not carry with it the waiver of any substantive duties or liabilities" created by ERISA); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (FLSA judicial-forum, collective-action, and attorneys-fee provisions not substantive according to reasoning in *Gilmer*).

under the mode of analysis used by the Court in its FAA cases, the Section 7 right 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 turns on two questions: (1) whether such concerted legal activity is a Section 7 right; and (2) whether Section 7 is the "critical" or "principal" right 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 detailed above, Section 7's protection encompasses concerted legal activity to redress work-related grievances. In addition, 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 entitled to considerable deference.[7]

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[7] *See City Disposal*, 465 U.S. at 829 (Board has prerogative to define Section 7); *Garner v. Teamsters, Chauffeurs & Helpers Local 776*, 346 U.S. 485, 490 (1953) (Board has primary authority to interpret and apply NLRA); *see also City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 (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);

As the Board explained in *Murphy Oil*, "[t]he core objective of the [NLRA] is the protection of workers' ability to act in concert, in support of one another." 2014 WL 5465454, at *1. The Supreme Court has characterized that Section 7 right as "fundamental." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937). That 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), (b)(1). Section 9 establishes procedures, such as elections and exclusive representation, to implement representational Section 7 rights. 29 U.S.C. § 159. And Section 10 empowers the Board to prevent violations of Section 8. 29 U.S.C. § 160. Thus, the NLRA's various provisions all lead back to Section 7's guarantee of employees' right to join together "to improve terms and conditions of employment or otherwise improve their lot as employees." *Eastex*, 437 U.S. at 565.

Finally, the right to engage in collective action for mutual protection is not only critical to the NLRA, but also a "basic premise" of national labor policy.

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see generally Note, *Deference and the Federal Arbitration Act: The NLRB's Determination of Substantive Statutory Rights*, 128 HARV.L.REV. 907, 919 (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).

Murphy Oil, 2014 WL 5465454, at *1. For example, in the Norris-LaGuardia Act, enacted three years before the NLRA, Congress declared unenforceable "[a]ny undertaking or promise" in conflict with the federal policy of protecting employees' freedom to act concertedly for mutual aid or protection. 29 U.S.C. § 102, 103. Congress also barred judicial restraint of concerted litigation "involving or growing out of any labor dispute" based on employer-employee agreements. 29 U.S.C. § 104. In short, once the appropriate deference is given to the Board's determination that Section 7 is critical to the NLRA and to federal labor policy – and thus substantive for FAA purposes – it is self-evident that an agreement requiring employees to arbitrate work-related disputes individually, 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 affect only arbitration agreements conflict with the FAA, as do ostensibly

general defenses "that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339.

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 the Board and the courts have repeatedly rejected, as contrary to the NLRA, a variety of individual contracts that seek to restrict Section 7 rights prospectively. *See, e.g.*, *Nat'l Licorice*, 309 U.S. at 361; *Stone*, 125 F.2d at 756; *Convergys Corp.*, 2015 WL 7750753, at *1; *Ishikawa Gasket*, 337 NLRB at 175-76. 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,'" and Congress gave no indication that the FAA must trump other statutes, including the NLRA, under those circumstances. *Murphy Oil*, 2014 WL 5465454, at *12 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)); *see also Morton*, 417 U.S. at 551 ("[C]ourts 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 of 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." *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. The Board has justifiably found both an express textual command and an equally prohibitive implicit conflict in the NLRA.

Section 8(a)(1) of the NLRA expressly commands employers not to interfere with their employees' right to engage in concerted activity for mutual aid or

protection. To the extent an arbitration agreement bars concerted pursuit of claims in any forum, whether arbitral or judicial, it infringes that right. 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. *Murphy Oil*, 2014 WL 5465454, at *12. 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, 109 (2001) (finding exclusion of certain employment contracts from the FAA's coverage referred only to contracts covering transportation workers).[8]

Moreover, as the Board found, an interpretation of the FAA that permits prospective individual waivers of Section 7 rights would present an inherent conflict with the NLRA, given the central role of Section 7 in the NLRA's statutory scheme. *Murphy Oil*, 2014 WL 5465454, at *13; *D.R. Horton*, 2012 WL 36274, at *13. As shown, such waivers effect a deprivation of collective rights for all employees in the workplace, not just the individual party to the agreement. The

[8] There is no merit to the suggestion in *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053 (8th Cir. 2013), that the recodification of the FAA after the NLRA's enactment was significant. As the Board explained in *Murphy Oil*, "'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)); *see also id*. at *15 (noting absence of any evidence Congress intended to restrict the then "relatively new and undeniably prominent" NLRA and Norris-LaGuardia Act).

FAA cannot be used to shield employer efforts to abrogate the NLRA's protection of concerted activity for mutual aid or protection.

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, Inc. 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).[9] The reality, however, is that the Supreme Court has never considered the effect of an arbitration agreement's concerted-action waiver on the NLRA rights of statutory employees to pursue work-related claims concertedly. The conclusion of the Fifth and Eighth Circuits therefore overreads

[9] *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*"); *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"), *amending and superseding* 734 F.3d 871 (9th Cir. 2013).

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 Alexander v. Sandoval*, 532 U.S. 275, 282-84 (2001).

This Court's statement in *Sutherland* that it would "decline to follow the decision in *D.R. Horton*" suffers from the same flaw, as it simply cited *Owen* and provided no independent analysis. 726 F.3d at 297 n.8. Because *Sutherland* involved the distinct issue of whether the FLSA prohibits individual-arbitration agreements, it did not address either the Board's determination that Section 7 was a substantive right or the caselaw finding prospective individual waivers of that right unlawful.[10] To the extent the panel in this case considers itself bound by the language in *Sutherland*, the Board requests that it suggest en banc review to reconsider circuit law. *See* 2d Cir. IOP 35.1.

Critical in deciding this case is recognizing that the Supreme Court has addressed whether arbitration agreements requiring individual arbitration are enforceable only in the context of other statutes (or judge-made rules). The NLRA is a distinctive statute and the rights Section 7 creates are materially different from those in other laws. That is evident when, pursuant to the approach dictated by

[10] This Court's decision also was influenced by uncertainty as to whether the Board had a quorum when it issued *D.R. Horton* because of the recess appointment of Member Becker. 726 F.3d at 297 n.8. The validity of his appointment was subsequently upheld. *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2566-67, 2573 (2014); *Mathew Enter., Inc. v. NLRB*, 771 F.3d 812, 813-14 (D.C. Cir. 2014).

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 leads to a different result with respect to the FAA's enforcement mandate.

In *Gilmer*, for example, the Supreme Court held that individual arbitration was not "inconsistent with the statutory framework and purposes of the ADEA" – another federal statute providing workplace protections, and which contains a provision allowing for collective action. 500 U.S. at 27. That holding flows from the ancillary nature of the ADEA's collective-action provision, which is only a procedural means to effectuate Congress' ultimate substantive goal of protecting individuals from age-based discrimination in employment. *Id*. at 27-29, 32.[11] 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. *Id*. 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.

[11] Similarly, "[t]he principal congressional purpose in enacting the [FLSA] was to protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981).

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. 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 forum is akin to a contract providing that employees 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 *Concepcion*, another FAA case often cited as determinative of the issue presented here, *see, e.g.*, *D.R. Horton*, 737 F.3d at 359-60; *Owen*, 702 F.3d at 1054, 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. 563 U.S. at 346-52. 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*. at 340; *see also Italian Colors*, 133 S. Ct. at 2312 & n.5. In contrast to that "manufactured" rule, 563 U.S. at 348, the Board's decisions protect a specific right embodied in, and central to the principal objective of, a federal statute.[12] Under the

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

NLRA, concerted legal action is not an incentive to pursue other claims but a key substantive right.

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*, 420 U.S. at 71-72; *see also New York Shipping Ass'n, Inc. v. Fed. Mar. Comm'n*, 854 F.2d 1338, 1367 (D.C. Cir. 1988) ("[T]here is no anomaly if conduct privileged under one statute is nonetheless condemned by another; we expect persons in a complex regulatory state to conform their behavior to the dictates of many laws, each serving its own special purpose.").

The 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

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

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

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December 2015

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONNIE PATTERSON	)	
on behalf of herself	)	
and all others similarly situated	)	
	)	
and	)	
	)	**No. 15-2820**
DAVID AMBROSE	)	
	)	
Plaintiffs-Appellants	)	
	)	
v.	)	
	)	
RAYMOURS FURNITURE COMPANY, INC.	)	
	)	
Defendant-Appellee	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 6,999 words of proportionally spaced, 14-point type, and the word-processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 23rd day of December, 2015

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONNIE PATTERSON	)	
on behalf of herself	)	
and all others similarly situated	)	
	)	
and	)	
	)	**No. 15-2820**
DAVID AMBROSE	)	
	)	
Plaintiffs-Appellants	)	
	)	
v.	)	
	)	
RAYMOURS FURNITURE COMPANY, INC.	)	
	)	
Defendant-Appellee	)	

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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this 23rd day of December, 2015