No. 12-60031

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

D.R. HORTON, INCORPORATED

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STUART F. DELERY
Acting Assistant Attorney General

BETH S. BRINKMANN
Deputy Assistant Attorney General

SCOTT R. McINTOSH
SARANG V. DAMLE
MELISSA N. PATTERSON
BENJAMIN M. SCHULTZ
Attorneys, Appellate Staff

U.S. Department of Justice
Civil Division, Room 7259
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-4052

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

RUTH E. BURDICK
Supervisory Attorney

KIRA DELLINGER VOL
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2978
(202) 273-2941

STATEMENT REGARDING ORAL ARGUMENT

The Board believes that oral argument would assist the Court in evaluating the novel legal issues presented in this case.

TABLE OF CONTENTS

Headings **Page(s)**

Headings-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases-Cont'd **Page(s)**

Cases-Cont'd **Page(s)**

Cases-Cont'd **Page(s)**

Cases-Cont'd **Page(s)**

Cases-Cont'd **Page(s)**

Cases-Cont'd **Page(s)**

Cases-Cont'd **Page(s)**

Cases-Cont'd **Page(s)**

Statutes: **Page(s)**

Constitution:

Rules:

Other Authorities:

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12-60031

D.R. HORTON, INCORPORATED

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of D.R. Horton, Inc. for review, and the cross-application of the National Labor Relations Board for enforcement, of a Board Order issued against Horton. The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) (29 U.S.C. § 160(a)) of the National Labor Relations Act, as amended ("the NLRA," 29 U.S.C. §§ 151, et seq.). The Decision and Order, issued on January 3, 2012, and reported at 357

NLRB No. 184 (D&O 1-18),[1] is a final order under Section 10(e) and (f) of the NLRA (29 U.S.C. § 160(e) and (f)).

Horton petitioned for review on January 13, 2012; the Board cross-applied for enforcement on March 19. The Court has jurisdiction pursuant to Section 10(e) and (f) of the NLRA, because Horton is headquartered in Texas. The filings were timely; the NLRA imposes no time limit on the initiation of review or enforcement proceedings.

ISSUE STATEMENT

1. Whether the Board reasonably found that Horton violated Section 8(a)(1) of the NLRA by maintaining a mandatory arbitration agreement that waives employees' right to pursue employment-related claims in a joint, collective, class, or other concerted manner in any forum, arbitral or judicial.

2. Whether the Board reasonably found that Horton violated Section 8(a)(1) of the NLRA by maintaining a mandatory arbitration agreement that employees could reasonably interpret as restricting their right to file charges before the Board.

3. Whether the Board's Order was validly issued.

---

[1] "D&O" refers to the Board's Decision and Order; "Tr." to the transcript of the hearing before the administrative law judge; "GCX" (General Counsel's), "ERX" (Employer's), and "JX" (Joint) to exhibits introduced at that hearing. References preceding a semicolon are to Board findings; those following, to supporting evidence.

STATEMENT OF THE CASE

This case came before the Board on a consolidated complaint issued by the Board's General Counsel, after investigation of an amended charge filed by former company employee Michael Cuda. (D&O 14; GCX 1.) An administrative law judge issued a recommended decision finding that Horton had violated Section 8(a)(4) and (1) of the NLRA (29 U.S.C. § 158(a)(4) and (1)) by maintaining an arbitration agreement that employees could reasonably understand as restricting their right to file charges with the Board. The judge declined to find that the agreement also violated Section 8(a)(1) by restricting employees' concerted protected activities. (D&O 15-17.)

Horton and the Acting General Counsel excepted to the judge's decision before the Board. (D&O 1 n.1.) The Board considered their submissions, along with amici briefs, and issued a decision affirming (D&O 2) the judge's determination that Horton violated Section 8(a)(1) by maintaining the arbitration agreement because the agreement's language would lead employees reasonably to believe that they were barred from filing charges with the Board, but did not pass (D&O 2 n.2) on the related Section 8(a)(4) allegation, which would not affect the remedy. The Board further found (D&O 2, 13), contrary to the judge, that Horton independently violated Section 8(a)(1) by maintaining the agreement's bar on all types of concerted legal claims.

FACT STATEMENT

Horton builds and sells homes. (D&O 1, 15; Tr. 7, GCX 1(j) & (l).) Starting in January 2006, Horton required each of its employees to sign a Mutual Arbitration Agreement ("MAA") as a condition of employment. (D&O 1, 15; Tr. 12-13, 28-29, JX 1 ¶2, JX 2.) Charging party Michael Cuda signed one. (D&O 1; JX 2.)

The MAA provides that "all disputes and claims" between Horton and the signatory employee "will be determined exclusively by final and binding arbitration." The agreement clarifies that arbitrable claims include "those relating to Employee's employment with [Horton] and any separation therefrom" and specifies, among others, claims relating to "wages, benefits, or other compensation." It further provides that, except for certain enumerated claims not relevant here, "[Horton] and Employee voluntarily waive all rights to trial in court before a judge or jury on all claims between them." (D&O 1, 15; JX 2 ¶1 & 2.)

Other provisions of the MAA detail procedures for invoking arbitration and selecting the arbitrator, designate procedural rules and substantive law, allocate costs, and define the arbitrator's authority. (JX 2.) Paragraph 6 states that the parties intend for the MAA to expedite resolution of disputes between them and limits the arbitrator's authority as follows:

> [T]he arbitrator will not have the authority to consolidate the claims of other employees into a proceeding originally filed by either

> [Horton] or the Employee. The arbitrator may hear only Employee's individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.

(D&O 1, 15; JX 2 ¶ 6 ("the concerted-action waiver").) The MAA concludes with an acknowledgement that the signatory employee has "knowingly and voluntarily" waived both "the right to file a lawsuit or other civil proceeding relating to Employee's employment with [Horton]" and "the right to resolve employment-related disputes in a proceeding before a judge or jury." (D&O 1; JX 2.)

Around the time Horton instituted the MAA, it gave supervisors a handout entitled "Arbitration Agreement FAQ's," which listed anticipated questions and provided responses. (D&O 15; Tr. 39, ERX 1.) Horton did not provide the FAQs, or communicate the information they contained, directly to employees. (D&O 15; Tr. 29, 35-38.)

On February 13, 2008, attorney Richard Cellar wrote Horton a letter formally requesting arbitration under the MAA. The letter explained that Cellar represented Cuda, "and a class of similarly situated current and former 'Superintendents' employed by D.R. Horton on a national basis," asserting that Horton had misclassified them as exempt from the overtime protections of the Fair Labor Standards Act ("the FLSA," 29 U.S.C. § 201, et seq.). (D&O 1, 15; JX 1 ¶3, JX 4.) In two subsequent letters, Cellar notified Horton that he represented more former superintendents. (D&O 15; JX 1 ¶3, JX 5, JX 6.)

On March 14 and 20, company attorney Michael Tricarico responded to those notices. He cited the MAA's concerted-action waiver, and explained that Horton would "consider any notice purporting to initiate a class or collective action arbitration proceeding as ineffective notice under" the MAA. Tricarico invited Cellar to initiate individual arbitration on behalf of each claimant. (D&O 1, 15; JX 1 ¶3, JX 8, JX 10.)

THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Pearce and Member Becker; Member Hayes, recused) found (D&O 2, 13) that Horton violated Section 8(a)(1) of the NLRA (29 U.S.C. § 158(a)(1)) by maintaining a mandatory arbitration agreement: (1) that waived in all forums, arbitral or judicial, the employees' right, under Section 7 of the NLRA (29 U.S.C. § 157), to maintain joint, class, or collective actions concerning employment-related claims; and (2) that employees would reasonably interpret as barring or restricting their right to file charges with the Board.

The Board ordered Horton to cease and desist from the unfair labor practices found and from any like or related interference with employees' exercise of their Section 7 rights. Affirmatively, the Order mandates that Horton: rescind or revise the MAA to make clear that it does not constitute a waiver in all forums of employees' right to maintain employment-related joint, class, or collective actions, and does not restrict employees' right to file charges with the Board; notify its

employees of the rescinded or revised agreement; post a remedial notice at any facility where the MAA has been in effect; and distribute the notice electronically, if appropriate.

SUMMARY OF ARGUMENT

In enacting the NLRA, Congress guaranteed certain associational rights in Section 7, protecting not only union-related activities but also employees' fundamental right to act concertedly for mutual aid or protection in furthering their interests as employees. In interpreting that provision, the Board reasonably found that Section 7's mutual-protection right encompasses the right to pursue employment-related claims concertedly, an interpretation supported by federal labor policy, statutory language, and relevant precedent. Because the MAA's preclusion of any litigation in a judicial forum and its language strictly limiting any arbitration to individual proceedings combine to bar, expressly and categorically, any such concerted pursuit of claims, the agreement violates Section 8(a)(1) of the NLRA. Contrary to Horton and amici, the mandate of the Federal Arbitration Act ("FAA," 9 U.S.C. § 1, et seq.) that private arbitration agreements be enforced to the same extent as other private contracts does not conflict with that unfair-labor-practice finding because the FAA allows for the invalidation of agreements like the MAA that are illegal, impair substantive federal rights, or otherwise undermine established public policy.

In a distinct unfair labor practice, Horton's maintenance of the MAA violates Section 8(a)(1) because employees reasonably would construe the agreement to bar them from exercising their right to file charges before the Board. The MAA's language, covering "all disputes" between the parties and referencing agencies as well as courts, supports that violation, as does relevant caselaw.

Finally, Horton's argument that the Board lacked a properly constituted quorum when it issued the contested order on January 3, 2012, because Member Craig Becker's recess appointment commission had allegedly ended in December is meritless. The Legislative and Executive Branches agree that the Senate's Session ended at noon on January 3, 2012, after the Board's decision here issued, and Horton offers no sound basis for this Court to disregard the political branches' congruent views. Contrary to Horton's additional assertion, the decision issued by two of the three sitting Board members, with the third member recused, met the requirements of Section 3(b) of the Act.

STANDARD OF REVIEW

The Board's reasonable interpretation of the NLRA is entitled to affirmance.[2] This Court will reverse it only if "the plain meaning of the statute unambiguously contradicts the Board's interpretation," or if the interpretation "is

---

[2] *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996); *see also NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829-30 & n.7 (1978); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984).

inconsistent with prior Board holdings."[3] Of particular relevance here, the Supreme Court has "often reaffirmed that the task of defining the scope of § 7 'is for the Board to perform in the first instance as it considers the wide variety of cases that come before it.'"[4] This Court also recognizes "the Board's expertise in labor law" and will "defer to plausible inferences [the Board] draws from the evidence, even if [the Court] might reach a contrary result were [it] deciding the case de novo."[5] The Board's factual findings are conclusive "if supported by substantial evidence on the record considered as a whole."[6] The Court does not defer to the Board's interpretation of statutes other than the NLRA.[7]

---

[3] *Sanderson Farms, Inc. v. NLRB*, 335 F.3d 445, 448 (5th Cir. 2003) (applying *Holly Farms*).

[4] *NLRB v. City Disposal*, 465 U.S. at 829 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978)). *See also Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945) (citation omitted).

[5] *NLRB v. Thermon Heat Tracing Servs., Inc.*, 143 F.3d 181, 185 (5th Cir. 1998) (quotations omitted).

[6] *Mobil Exploration & Producing U.S. Inc. v. NLRB*, 200 F.3d 230, 237 (5th Cir. 1999) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951)).

[7] *See Roundy's Inc. v. NLRB*, 674 F.3d 638, 646 (7th Cir. 2012).

ARGUMENT

I. THE MAA'S PROHIBITION OF EVERY FORM OF CONCERTED PURSUIT OF EMPLOYMENT-RELATED CLAIMS, IN BOTH JUDICIAL AND ARBITRAL FORUMS, VIOLATES SECTION 8(a)(1) OF THE NLRA

Section 7 of the NLRA broadly protects employees' ability to band together and take concerted action for their mutual aid or protection, even in the absence of union representation or collective bargaining. "[C]ollective efforts to redress workplace wrongs or improve workplace conditions are at the core of what Congress intended to protect by adopting the broad language of Section 7." (D&O 3.) The MAA strips employees of fundamental Section 7 rights by precluding them from prosecuting their employment-related legal claims collectively in any forum, arbitral or judicial. The Board's expert judgment that the MAA violates Section 8(a)(1) of the NLRA is supported by the language of the statute, the policies underlying it, and the caselaw interpreting it, and the FAA's protection of arbitration agreements does not require a contrary result.

A. Section 7 Protects Concerted Employee Efforts – Including the Pursuit of Legal Claims – To Improve Conditions, Redress Grievances, and for Other Mutual Aid or Protection

The fundamental right of employees to advance their workplace interests concertedly lies at the heart of the NLRA. Section 7 confers on 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," as well as "the right to refrain from any or all of such activities. . . ."[8] That language explicitly shields employees' distinct right to engage in "concerted activities for . . . mutual aid or protection" that are unrelated to union activity and collective bargaining, or take place in a non-union workplace.[9]

Activity falls within the scope of Section 7 when it is both concerted and protected. It is clearly "concerted" when two or more employees act together, but Section 7's protection is not limited to such situations. A lone employee's conduct may be concerted under a variety of circumstances, including when the employee attempts to incite or induce concerted action, whether or not the attempt is successful.[10] "Mutual aid or protection" refers to employee efforts to improve their

---

[8] Section 2(3) of the NLRA (29 U.S.C. § 152(3)) defines "employee" for purposes of the Act, and excludes managerial employes, supervisors, and several other categories of employees. *See infra*, page 43.

[9] *See NLRB v. McEver Eng'g, Inc.*, 784 F.2d 634, 639 (5th Cir. 1986) ("The guarantees and protection of section 7 are afforded equally to nonunion employees and union employees. . . ."); *NLRB v. Schwartz*, 146 F.2d 773, 774 (5th Cir. 1945) ("[T]he [NLRA] was passed for the primary benefit of the employees as distinguished from the primary benefit to labor unions. . . . Consequently, the right of employees lawfully to engage in concerted activities for the purpose of mutual aid, outside of a union, is specified by the Act.").

[10] *See Meyers Indus.*, 281 NLRB 882, 887 (1986) (concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action. . . ."), *enforced*, 835 F.2d 1481 (D.C. Cir. 1987); *see also Morton Int'l, Inc.*, 315 NLRB 564, 566 (1994) (posting memo in workplace, annotated with critical comments, concerted because done to induce

terms and conditions of employment or lot as employees.[11] As the Supreme Court held in *Eastex, Inc. v. NLRB*, it includes conduct undertaken outside the immediate employee-employer relationship, or intended to influence issues beyond employees' own workplaces, but affecting their "interests as employees."[12]

In *Eastex*, the Supreme Court identified mutual aid or protection as the "broader" category of Section 7-protected conduct, specifically citing the example of employees "seek[ing] to improve working conditions through resort to administrative and judicial forums."[13] In doing so, it approved Board law recognizing that protection.[14] For decades, the Board, with court approval, has held that Section 7 protects employees who collectively prepare, join, or pursue all types of employment-related complaints – including wage claims under the FLSA

---

others to join critique). *Accord City Disposal*, 465 U.S. at 831; *Mobil Exploration & Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 238 (5th Cir. 1999).

[11] *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-65 (1978); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). *Accord McEver*, 784 F.2d at 639 ("Employees' activities are protected by [S]ection 7 if they might reasonably be expected to affect terms or conditions of employment.").

[12] 437 U.S. at 567. *Accord Mobil*, 200 F.3d at 238.

[13] 437 U.S. at 565-66 & n.15.

[14] *Id. Accord Mobil*, *supra*. *See also Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-49 (1942).

– in a variety of forums, from informal grievances and contractual arbitration,[15] to administrative agencies,[16] to courts.[17]

As the Board explained (D&O 2-3 & nn.3 & 5), such concerted legal action may "aid or protect" employees in various ways, including financial support, group power in negotiations, shared information, the impression of safety in numbers,

---

[15] *See, e.g., NLRB v. Southwestern Bell Tel. Co.*, 694 F.2d 974, 978 (5th Cir. 1982) ("Section 7 rights are not now and never have been confined to negotiations conducted only during formal grievance, arbitration, or labor contract bargaining sessions."); *UForma/Shelby Business Forms*, 320 NLRB 71, 77 (1995) (contractual arbitration), *enforcement denied on other grounds*, 111 F.3d 1284 (6th Cir. 1997); *El Dorado Club*, 220 NLRB 886, 887-88 (1975) (contractual arbitration), *enforced sub nom. NLRB v. Anthony Co.*, 557 F.2d 692 (9th Cir. 1977).

[16] *See, e.g., Garage Mgmt. Corp.*, 334 NLRB 940, 951 (2001) (OSHA); *Franklin Iron & Metal Corp.*, 315 NLRB 819, 822 (1994) (Ohio Civil Rights Commision), *enforced*, 83 F.3d 156 (6th Cir. 1996); *Salisbury Hotel*, 283 NLRB 685, 686-87 (1987) (DOL); *Gibbs Die Casting Aluminum Corp.*, 174 NLRB 75, 79 & n.12 (1969) (county health department); *Moss Planing Mill Co.*, 103 NLRB 414, 418-19, 426 (1953) (wage-and-hour office), *enforced*, 206 F.2d 557 (4th Cir. 1953).

[17] *See, e.g., Mohave Elec. Co-op, Inc. v. NLRB*, 206 F.3d 1183, 1188 (D.C. Cir. 2000) (concerted petitions for injunctions against harassment at work); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) (participation in union lawsuit; "Generally, 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."); *Le Madri Restaurant*, 331 NLRB 269, 275 (2000) (concerted lawsuit alleging unlawful pay policies); *Host Int'l, Inc.*, 290 NLRB 442, 442-43, 445 (1988) (concerted lawsuit alleging employer physically assaulted and interrogated employees); *United Parcel Serv., Inc.*, 252 NLRB 1015, 1018, 1022 n.26 (1980) (class-action lawsuit challengine employer's break policy), *enforced*, 677 F.2d 421 (6th Cir. 1982); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975) (concerted lawsuit for breach of contract, unpaid wages), *enforced mem.*, 567 F.2d 391 (7th Cir. 1977); *Spandsco*, 42 NLRB at 948-49 (concerted FLSA lawsuit).

and – sometimes – anonymity. The Ninth Circuit expressly approved that rationale in *Salt River Valley Water Users' Association v. NLRB.*[18] *Salt River* identified, as a particular advantage, the ability to exert "group pressure upon [the employer] in regard to possible negotiation and settlement of the [employees' FLSA] claims."[19] It also explained that, in the event of a lawsuit, employees' "solidarity might enable more effective financing of the expenses involved."[20] The court expressly rejected, moreover, the employer's argument that employees could not engage in mutual aid or protection with respect to individual statutory rights. In doing so, it affirmed that concerted activity "is often an effective weapon for obtaining that to which the [employees], as individuals, are already 'legally' entitled."[21]

In sum, the Board's determination that Section 7 protects employees' concerted pursuit of employment-related legal claims is consistent with the

---

[18] 206 F.2d 325 (9th Cir. 1953).

[19] *Id.* at 328.

[20] *Id.* Horton's (Br. 52) and its amici's suggestion that some class plaintiffs may invoke the class-action procedure in order to "force" employers to settle, if true, illustrates the greater power wielded by a group of employees compared to a lone employee proceeding independently, consistent with the federal labor policy of equalizing bargaining power between employees and employers. *See NLRB v. City Disposal Sys., Inc.*, 465 U.S. at 835 (Congress' "evident" purpose, in enacting Section 7, was "to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment.").

[21] *Id.*

language of that provision and follows naturally from decades of Board and court precedent. More fundamentally, it effectuates the principal goal of the NLRA: it protects employees' core right to work in concert, with or without a union, to advance their workplace concerns, as a counterbalance to their employers' greater clout.

Horton and its amici fail to demonstrate that the Board's interpretation of Section 7 is unreasonable, much less inconsistent with the language of that provision or relevant caselaw, as required for this Court to reject it.[22] Their policy arguments (Br. 50-52) – reflecting their assessment of the relative benefits of arbitration and court litigation, of individual and concerted pursuit of legal rights, and of the significance of the availability of public agencies to prosecute the employees' legal claims – are all beside the point. What is at stake here is employees' Section 7 right to decide for themselves among the options that the law affords them to address their employment-related concerns. Section 7 does not impose collective activity on any employee. Instead, the NLRA protects each employee's "freedom of association" – or ability to *choose* concerted action – if, in the employee's judgment, that course appears warranted.

That right to chose concerted activity extends through adjudication of an employee's claims and cannot be limited to preparation for litigation or arbitration,

---

[22] *See supra*, notes 2 & 3.

or mere assertion of a legal claim, as Horton argues (Br. 36-38). Section 7 has long been understood to protect not only the filing of lawsuits, grievances, or administrative charges, but also participation in the adjudication of the same, from attending hearings, to providing affidavits, to testifying.[23] Moreover, common sense dictates that the right to initiate adjudication of a legal claim would be hollow without the corresponding right to pursue the case to its conclusion: artificially truncating Section 7's protection at the courthouse (or arbitral) steps would, as the Board held (D&O 3), frustrate the policies of the NLRA.[24]

Consistent with those principles, the Board reasonably held (D&O 10 & n.24) that Section 7 vests employees with the right to invoke – without employer coercion, restraint, or interference – procedures generally available under state or federal law for concertedly pursuing employment-related legal claims. The fact that certain collective procedures were not available when the NLRA was enacted does not affect that holding, for the Board has the responsibility to adapt its

---

[23] *See, e.g.*, *Altex*, 542 F.2d at 296-97 (executing affidavits supporting lawsuit); *Dick Gidron Cadillac*, 287 NLRB 1107, 1110 (1988) (testifying at arbitration hearing); *Supreme Optical Co.*, 235 NLRB 1432, 1432-33 (1978) (testifying at discharged employee's unemployment hearing), *enforced*, 628 F.2d 1262 (6th Cir. 1980); *El Dorado*, 220 NLRB at 887-88 (attending arbitration hearing, participating in arbitration).

[24] *See generally Eastex*, 437 U.S. at 557 (failing to protect concerted activity outside of workplace would frustrate NLRA's policy of protecting employees' right "to act together to better their working conditions") (quoting *Washington Aluminum*, 370 U.S. at 14).

interpretation of the NLRA to changing circumstances, such as the creation of new avenues for concerted pursuit of legal claims.[25]

Finally, Horton (Br. 7, 42-43, 45-46) and its amici cite various authorities for the proposition that the right to proceed as a class under Federal Rule of Civil Procedure 23 ("Rule 23"), or collectively under the FLSA (29 U.S.C. § 216(b)), is procedural rather than substantive, and assert that the Rules Enabling Act does not create substantive rights. But such claims do not undermine the Board's finding of a right to pursue concerted legal action because that right stems not from Rule 23 or any other collective-action mechanism, but from the substantive provisions of the NLRA.[26] As the Board acknowledged, Section 7 does not guarantee class

---

[25] *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975) (recognizing Board's "responsibility to adapt the [NLRA] to the changing patterns of industrial life" and emphasizing deference due the Board's interpretation of the statute, in approving Board determination that Section 7 protected right to union representation at certain investigatory interviews). *See generally* cases cited in note 4 regarding Board's responsibility for defining contours of Section 7.

[26] A putative-class complaint or arbitration demand is concerted under *Meyers*, *supra* note 10, because it invites similarly situated employees to join cause with the named plaintiff against the employer. Horton's cases (Br. 54) are not to the contrary. *See Holling Press, Inc.*, 343 NLRB 301, 301-03 (2004) (employee's filing individual sexual-harassment complaint with state agency and asking coworker for assistance *was* concerted but was unprotected because not undertaken to address group concerns, but only to advance employee's personal interest); *K-Mart Corp.*, 341 NLRB 702, 702-03 (2004) (employee's profane objection in response to supervisor's direction that he follow established rule not concerted in absence of evidence he was acting on authority of, with, or seeking to induce participation of, coworkers). *See also Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 306, 308, 310 (4th Cir. 1980) (trying to incite coworker participation

certification or create any such procedural advantage. Rather, Section 7, in combination with Section 8(a)(1), *see* Part II, *infra*, shields employees' concerted efforts to use existing, generally available procedures from employer-created *dis*advantage.

In conclusion, employees who concertedly bring employment-related claims – whether jointly, collectively, or on a class basis, and either in court or before an arbitrator – are exercising a core Section 7 right. As demonstrated below, the MAA explicitly requires employees to pursue all work-related claims individually, effectively barring exercise of concerted protected activity in that context. Consequently, the agreement violates Section 8(a)(1) of the NLRA.

B. The MAA's Concerted-Action Waiver Explicitly Restricts Section 7 Rights, in Violation of Section 8(a)(1)

Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7. To determine whether an employer's conduct violates Section 8(a)(1), the Board examines whether that conduct "reasonably tends to interfere" with employee rights.[27] In the case of workplace rules like the MAA, which

---

is "concerted" but not where no evidence employee "intended or contemplated any group activity" in filing individual claim).

[27] *Golub Corp.*, 338 NLRB 515, 516 (2002). *Accord NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338, 1340-41 (5th Cir. 1980).

employers impose unilaterally as a condition of employment, the Board will find a violation either where the rule explicitly restricts concerted protected activity or where "employees would reasonably construe" it as doing so.[28] Mere maintenance of such a rule is an unfair labor practice; application or enforcement of the rule is unnecessary to the violation.[29] As the Board found (D&O 4), the MAA *expressly* restricts Section 7 activity in violation of Section 8(a)(1).

The MAA prohibits all forms of collective legal action to pursue employment-related claims by prospectively barring all such claims in the judicial forum while strictly limiting arbitration to individual proceedings. Section 7, as just demonstrated, protects concerted employee pursuit of work-related claims, and the MAA's constraints preclude signatory employees from undertaking any such collaboration, from joint arbitration demands, to formal class actions, and

---

[28] *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004). *Accord NLRB v. Northeastern Land Servs., Ltd.*, 645 F.3d 475, 478, 481-83 (1st Cir. 2011) (applying *Lutheran Heritage* to provision of employment contract); *Cintas Corp. v. NLRB*, 482 F.3d 463 (D.C. Cir. 2007) (same; employee-handbook rule); *U-Haul Co.*, 347 NLRB 375, 377-78 (2006) (same; arbitration agreement), *enforced*, 255 F. App'x 527 (D.C. Cir. 2007).

[29] *See Northeastern*, 645 F.3d at 481; *Cintas*, 482 F.3d at 467-68; *Beverly Health & Rehab. Servs., Inc. v. NLRB*, 97 F.3d 468, 478 (6th Cir. 2002).

everything in between. That categorical bar on concerted claims restrains employees' Section 7 rights in violation of Section 8(a)(1).[30]

The categorical nature of that ban is worth emphasizing. While the MAA certainly curtails Section 7 rights to the extent it prevents employees from meaningfully seeking class certification or statutory collective action in court, those are but a few aspects of its broad restriction. The MAA also blocks concerted action as basic as two coworkers jointly seeking redress, in arbitration, of an injury stemming from an incident involving both of them. Horton's and the amici's near-exclusive focus on a few formal methods of concerted action affected by the MAA cannot obscure its broad ban on *every* form of collective legal claim, which cannot be reconciled with Congress' explicit protection of concerted employee action for mutual aid or protection, and the Board's and federal courts' understanding of that protection as encompassing resort to arbitral, administrative, and judicial forums.

---

[30] *See, e.g.*, *Western Cartridge Co.*, 44 NLRB 1, 6-8 & n.5, 19 (1942) (invalidating individual employment contracts that purportedly gave employer right to fire any employee who "participated in a strike or any other concerted activity regarded as interfering with his 'faithfully' fulfilling 'all his obligations,'" because effectively restricted employees' right to engage in concerted activity), *enforced*, 134 F.2d 240 (7th Cir. 1943); *J.H. Stone & Sons*, 33 NLRB 1014, 1023 (1941) (invalidating contracts, imposed as condition of employment, barring employees from bringing grievances to employer through representative until after attempting to settle issue directly, thus requiring each employee "to pit his individual bargaining strength against the superior bargaining power of the employer"), *enforced in relevant part*, 125 F.2d 752 (7th Cir. 1942).

The fact that the MAA does not, as Horton (Br. 49-50) and its amici note, bar "pre-litigation" concerted activities does not render the agreement lawful. Employees' freedom to collaborate before filing legal claims does not obviate the MAA's explicit infringement of their Section 7 right to pursue those claims concertedly. As described above, the MAA's ban is comprehensive, covering every conceivable concerted approach to litigation or arbitration. Conversely, the Board's Order does not require (D&O 13) that Horton make every avenue of collective litigation available to its employees, only that it not block every one. Horton's reliance (Br. 49-50) on the principle that an employer may bar one means of union communication to employees when others are available, or need not affirmatively facilitate such communication, is thus inapposite.

Horton (Br. 41, 44-45) and its amici argue unpersuasively that the MAA's ban on all but purely individual claims is analogous to an employer's invocation, in a given case, of generally available procedural devices or defenses – such as a motion to dismiss for failure to state a claim or an argument that employees do not meet the typicality requirement for class certification.[31] Unlike those defenses, the MAA removes *any* opportunity for concerted pursuit of legal claims before the

[31] Horton's citation (Br. 43-44) to rules for negotiating procedures to apply in particular pending cases is similarly inapposite to evaluation of the MAA's *prospective* ban on certain procedures for pursuing all potential claims.

claims accrue and in all situations, even those where concerted litigation would otherwise be wholly appropriate under prevailing rules and procedures.

Nor, as the Board explained (D&O 4-5), does employees' consent to the MAA render its explicit restriction of Section 7 rights lawful. The Board has long held, with court approval, that employers cannot avoid NLRA obligations, or obviate employees' rights, through agreements with individual employees. As the Supreme Court explained in *National Licorice Co. v. NLRB*, shortly after the statute's enactment, "employers cannot set at naught the [NLRA] by inducing their workmen to agree not to demand performance of the duties which [the statute] imposes."[32]

Consistent with that principle, the Seventh Circuit recognized long ago that individual agreements requiring employees to adjust their grievances with their employer individually, rather than concertedly, "constitute[] a violation of the [NLRA] per se," even when they were "entered into without coercion."[33] And, pursuant to that same principle, the Board has regularly set aside settlement agreements that require employees, as a condition of reinstatement, prospectively

---

[32] 309 U.S. 350, 364 (1940). *Accord J.I. Case Co. v. NLRB*, 321 U.S. 332, 337, 339 (1944).

[33] *NLRB v. Stone*, 125 F.2d 753, 756 (7th Cir. 1942).

to waive their right to act in concert with coworkers in disputes with their employer.[34]

Contrary to Horton (Br. 27) and its amici, the many cases invalidating restraints on employees' ability to organize, join, or support a union[35] rest on the same principles at issue here. As discussed above, Section 7 equally protects union activity and concerted activity for mutual protection. Individual agreements requiring employees to forego collective action as a condition of employment thus violate Section 8(a)(1).

---

[34] *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 Amer., Inc.*, 337 NLRB 175, 175-76 (2001) (employer unlawfully conditioned discharged 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)

[35] *See, e.g.*, *Nat'l Licorice*, 309 U.S. at 360 (unlawful contract restricted employees' rights to strike and to demand closed shop or collective-bargaining agreement with any union); *Eddyleon Chocolate Co.*, 301 NLRB 887, 887 (1991) (unlawful to ask applicant to sign agreement not to join or be affiliated with union, implying it was condition of employment); *Adel Clay Prods. Co.*, 44 NLRB 386, 396-97 (1942) (unlawful to use individual contracts as means of avoiding organization and collective bargaining), *enforced*, 134 F.2d 342 (8th Cir. 1942); *Jahn & Ollier Engraving Co.*, 24 NLRB 893, 909-10 (1940) (same), *enforced*, 123 F.2d 589 (7th Cir. 1941); *Carlisle Lumber Co.*, 2 NLRB 248, 266 (1936) (unlawful to require agreement, as part of job application, to "renounce all affiliations with labor organizations"), *enforced as modified*, 94 F.2d 138 (9th Cir. 1937).

At the same time, the Board and the courts have long held that a union may waive certain rights – including Section 7 rights like the ability to strike – on behalf of the employees it represents, precisely because the process of negotiating and agreeing to those waivers is itself concerted protected activity.[36] The distinction between a union-negotiated agreement and an individual employee's contract with his employer reinforces the Board's decision because it rests on the same principle, one of safeguarding Section 7 rights.

Horton's (Br. 50) and the amici's citation of the Supreme Court's statement, in *14 Penn Plaza LLC v. Pyett*, that there is no "distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative," is not to the contrary.[37] First, as the Board noted (D&O 10-11), that statement was a response to the argument that a union does not have

---

[36] *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009) (enforcing collective-bargaining agreement's clear and unmistakable waiver of judicial forum in favor of arbitration for statutory claims); *Mastro Plastics Corp. v. NLRB*, 350 NLRB 270, 280 (1956) (unions may waive right to strike in collective-bargaining agreement); *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 74, 76, 79-80 (1953) (upholding discharge for refusal to cross picket line where governing collective-bargaining agreement barred work stoppages); *Vincennes Steel Corp.*, 17 NLRB 825, 832 (1939) (limitation on concerted activity that would be unlawful in individual employee's contract "may be unobjectionable when reached as a result of collective bargaining with the [union]," because "the conclusion of the agreement is itself an exercise of the right of engaging in collective activities"), *enforced*, 117 F.2d 169 (7th Cir. 1941).

[37] 556 U.S. at 258.

authority to waive employees' individual statutory rights under federal anti-discrimination statutes, and the Court found that the arbitration agreement at issue did not waive any substantive anti-discrimination rights.[38] Unlike the Board in this case, the Court in *Pyett* did not consider the employees' Section 7 right to pursue work-related claims collectively.

Second, the Court's equation of union and individual agreements to arbitrate in *Pyett* depended on its determination that a union's agreement is the result of a "bargained-for exchange" consummated pursuant to the NLRA's statutory scheme.[39] That scheme confers on the union certified as the employees' representative both the right to bargain over and agree to terms and conditions of employment on behalf of the employee and the responsibility to represent the employee fairly, and imposes on the employer a concomitant statutory duty to bargain in good faith.[40] In other words, as the Board explained (D&O 10), any waiver negotiated by a union during collective bargaining "stems from an *exercise* of Section 7 rights: the collective-bargaining process." The Seventh Circuit noted the importance of that principle decades ago in *NLRB v. Stone*, in rejecting an

---

[38] *Id.* at 256 n.5, 259.

[39] *Id.* at 257.

[40] *Id.* at 255-56, 270-71.

employer's attempt to analogize individual arbitration agreements waiving Section 7 rights to collectively bargained arbitration agreements doing the same.[41]

While in some individual-agreement cases discussed above, the Board, as Horton asserts (Br. 28-30), found that employers intended, or used, the contracts to avoid unionization, anti-union motivations were not necessary to all of the violations found even in those cases,[42] nor is such animus required to establish a violation of Section 8(a)(1).[43] Moreover, as the Board explained (D&O 7), Section 8(a)(1) does not require express coercion in the form of discipline, discharge, or other retaliation. Indeed, it does not even require enforcement of the unlawful rule, only that the employer maintain it.[44] A reasonable tendency to interfere with, restrain or coerce Section 7 rights – or, in the case of work rules like the MAA, a

---

[41] 125 F.2d 752, 756 (7th Cir. 1942) (noting, in response to argument that collective-bargaining agreements often contain mandatory arbitration provisions, that such provisions "must be distinguished from the instant case where the [mandatory arbitration clause in employment agreement] was agreed to as a result of individual action and thereafter imposed a restraint upon collective action").

[42] *See, e.g., id.*; *J.H. Stone*, 33 NLRB at 1021-22, 1023 (contracts' substantive limitation of Section 7 rights independently unlawful).

[43] *See Mobil Exploration & Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 239 (5th Cir. 1999) (good faith not defense to Section 8(a)(1) violation if conduct tends to interfere with Section 7 rights); *Reef Indus., Inc. v. NLRB*, 952 F.2d 830, 836 (5th Cir. 1991) (union animus unnecessary for Section 8(a)(1) violation where adverse action motivated by concerted protected activity).

[44] *See supra*, note 29. Horton's point (Br. 30-31) that some cases supporting the Board's decision involve retaliation is thus inapposite.

reasonable employee perception of such restriction – suffices to establish the violation. Either way, Horton's presentation of the MAA to its employees comprised an implicit threat that any employee who refused to sign it could not retain, or obtain, employment with Horton.

Finally, as the Board described (D&O 5-6), the history of federal labor policy before the NLRA lends further support to the Board's longstanding interpretation of the statute as prohibiting employers from using private contracts to avoid their obligation not to interfere with employees' Section 7 rights. Congress recognized the federal interest in equalizing bargaining power through concerted action in the 1932 Norris-LaGuardia Act ("NLGA," 29 U.S.C. § 101, et seq.), which declared employees' associational rights – including the freedom from interference with concerted activity for mutual aid or protection – necessary to federal labor policy.[45] It then invalidated employer-employee agreements purporting to restrict employees' freedom to associate and engage in mutual

[45] 29 U.S.C. § 102 (finding "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment," and declaring necessary non-interference with "full freedom of association, self-organization, and designation of representatives," and with such freedoms and with "other concerted activities for the purpose of collective bargaining or other mutual aid or protection").

protection,[46] and barred judicial restraint of concerted litigation "involving or growing out of any labor dispute" based on employer-employee agreements.[47]

Even before enacting the NLRA, therefore, Congress had acted to shield employees' concerted pursuit of employment-related claims from restraints imposed by employer-employee agreements. That history reinforces the reasonableness of the Board's interpretation of the NLRA, which was enacted after the NLGA and adopted its mutual-protection language, as restricting employers' ability to contract with individual employees to restrict their Section 7 rights. As the Board held, therefore, the MAA not only violates Section 8(a)(1) of the NLRA but also implicates federal labor policies predating the NLRA.

C. The Board's Invalidation of the MAA's Concerted-Action Waiver Does Not Conflict with the FAA

The Board, cognizant of its obligation to take into account potential conflicts between its interpretation of the NLRA and the strictures of other federal statutes,[48]

---

[46] 29 U.S.C. § 103.

[47] 29 U.S.C. § 104.

[48] *See, e.g.*, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147-50 (2002) (reiterating Board's obligation to consider other federal statutes and policies and invalidating backpay and reinstatement remedies for undocumented workers as incompatible with immigration law making it "impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies"); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 521-24, 531-34 (1984) (holding collective-bargaining agreements subject to rejection under Bankruptcy Code but, because of their special role in labor

reviewed (D&O 8-9) the FAA's language and underlying policies to ensure that they did not conflict with its finding that an agreement within the FAA's general purview was unlawful. The Board correctly determined (D&O 9-12) that its decision conforms to the FAA's mandate – clarified in a long line of Supreme Court precedent – of enforcing arbitration agreements to the same extent as other private contracts.

i. The FAA provides for the invalidation of arbitration agreements pursuant to generally applicable contract defenses

As the Board acknowledged (D&O 8-9), Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration," and create a "liberal federal policy favoring arbitration."[49] The statute's "overarching purpose . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."[50] And, in formulating arbitration contracts,

---

relations, subject to stricter standard than other contracts; also holding Board could not prevent rejection by finding it to be unfair labor practice).

[49] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011). *Accord Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24-25 (1991); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 297 (5th Cir. 2004).

[50] *Concepcion*, 131 S. Ct. at 1748; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010).

parties have the freedom to set specific procedures to govern arbitration, designate which claims will be arbitrable, and limit the participating parties.[51]

The FAA effectuates those goals by placing arbitration agreements "on an equal footing with other contracts."[52] Specifically, Section 2 of the FAA (9 U.S.C. § 2) mandates 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." Under that "savings clause," therefore, invalidation of an arbitration agreement does not conflict with either the language or policies of the FAA if the basis for rejecting the agreement would serve to nullify any other contract under the same circumstances. Conversely, defenses to enforcement applicable only to arbitration agreements do conflict with the FAA, as do ostensibly general defenses "that derive their meaning from the fact that an agreement to arbitrate is at issue."[53]

---

[51] *See Concepcion*, 131 S. Ct. at 1748-49; *Stolt-Nielsen*, 130 S. Ct. at 1774.

[52] *Concepcion*, 131 S. Ct. at 1745. *Accord Gilmer*, 500 U.S. at 24; *Carter*, 362 F.3d at 297.

[53] *Concepcion*, 131 S. Ct. at 1746-47.

ii. Invalidation of the MAA because it restricts substantive rights under the NLRA does not conflict with the FAA

The Board's invalidation of the MAA falls comfortably within the FAA's savings clause. It is premised on the MAA's prohibition of employees' collective pursuit of employment-related legal claims in any forum, arbitral or judicial, an express restriction of their Section concerted-activity rights. Individual contracts requiring such a waiver of Section 7 rights have long been held to violate the NLRA. Accordingly, as the Board explained (D&O 9), "[t]o find that an arbitration agreement must yield to the NLRA is to treat it no worse than any other private contract that conflicts with Federal labor law."

Nor does the Board's invalidation of the MAA emanate from any sort of hostility towards arbitration. Unlike the courts, whose historic opposition to arbitration was the genesis of the FAA,[54] the Board harbors no prejudice against arbitration. Rather, "arbitration has become a central pillar of Federal labor relations policy" (D&O 13), and the Board often defers its own processes in favor of arbitration or arbitral awards.[55] In finding a violation here, the Board expressly

---

[54] *See Gilmer*, 500 U.S. at 24.

[55] *See generally Collyer Insulated Wire*, 192 NLRB 837, 839-43 (1971) (setting standard for deferral to arbitration); *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955) (explaining standard for deferral to arbitration awards); *Olin Corp.*, 268 NLRB 573, 573-74 (1984) (adopting and modifying *Spielberg* standard). *See also Mobil*, 200 F.3d at 237 ("NLRB deference to an arbitration award is an integral part of the administration of federal labor law. . . .").

held (D&O 13) that an employer may, consistent with the NLRA, require arbitration of all individual employment-related claims, so long as it does not preclude employees from collective litigation in a judicial forum. The invalidity of the MAA thus turns not on any Board preference for court litigation, but on a determination that an employer may not leave its employees with no avenue concertedly to seek redress for legal wrongs.

The Board's favorable attitude towards arbitration – and its consistent and longstanding application of Section 8(a)(1) to bar restrictions of Section 7 rights imposed on employees through contracts, work rules, and conduct other than arbitration agreements – distinguishes its unfair-labor-practice finding from state-court unconscionability findings in cases like *AT&T Mobility v. Concepcion*.[56] Unlike defenses courts have rejected as truly deriving their meaning from the fact that an agreement to arbitrate was at issue, the NLRA violation here depends entirely on the MAA's restriction of employees' federal statutory right to act

[56] 131 S. Ct. 1740, 1747 (2011) (noting "judicial hostility towards arbitration that prompted the FAA had manifested itself in a great variety of devices and formulas declaring arbitration against public policy," and "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts") (quotations omitted). *Cf. Gilmer*, 500 U.S. at 30 (rejecting arguments as "generalized attacks on arbitration" based on "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants") (citation omitted).

concertedly and not on any judgment regarding particular arbitral procedures available under the MAA, or likelihood of success in arbitration.[57]

The Board's determination that the concerted-action waiver constrains a federal right, moreover, provides an independent basis for denying the FAA's protection to the MAA. It is well established that the FAA's reach extends not only to arbitration agreements covering contractual disputes, but also to agreements to arbitrate federal statutory claims under laws as diverse as the Securities Exchange Act of 1934 and the Age Discrimination in Employment Act ("ADEA").[58] Without question, private parties may agree to arbitrate employment-related claims, including those arising under the FLSA.[59] But nothing in the FAA's language suggests, nor do the decades of Supreme Court and Circuit Court cases interpreting it hold, that such agreements – any more than other contracts – may nullify substantive federal protections like those in Section 7, which are otherwise insulated from contractual restriction. To the contrary, in

---

[57] *See Concepcion*, 131 S. Ct. at 1745 (rejecting invalidation of agreement with class waiver as unconscionable under California law because company "had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions"); *Gilmer*, 500 U.S. at 30-31 (rejecting arguments that agreement was inconsistent with ADEA because arbitration panels potentially biased and discovery more limited than in judicial forum).

[58] *See Gilmer*, 500 U.S. at 26-27 and cases cited therein. *See also CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012).

[59] *See Carter*, 362 F.3d at 297-98 (FLSA claims arbitrable under *Gilmer*).

enforcing agreements to arbitrate federal statutory claims over litigants' objections, courts have repeatedly affirmed that enforcement does not implicate waiver of substantive rights because "a party does not forgo [his] substantive rights afforded by the statute" by agreeing to pursue his claims "in an arbitral, rather than a judicial, forum."[60]

Horton (Br. 17-18, 22) and its amici point to several cases holding that arbitration agreements with various types of class- or concerted-action waivers are enforceable and do not restrict litigants' federal statutory rights, which can be vindicated through arbitration. But those cases do not hold that arbitration never impairs federal statutory rights, only that the particular agreements in those cases were enforceable, in part because they did not prevent the complaining parties from vindicating the individual rights they asserted. More specifically, the courts held that the statutes in question did not create substantive rights to a judicial (as opposed to arbitral) forum, to proceed using particular collective procedures, or to other tangential aspects of their enforcement schemes.[61]

---

[60] *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S 614, 628 (1985)).

[61] *See, e.g.*, *CompuCredit*, 132 S. Ct. at 669-71 (consumer-credit statute's disclosure provision did not create substantive right to judicial forum, only to notice; "contractually required arbitration of claims satisfies the statutory prescription of civil liability in court") (citing *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1989), *Mitsubishi*, and *Gilmer*); *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 677-78 (5th Cir. 2006) (arbitration not precluded by

In none of Horton's cases did the parties challenging the arbitration agreements' class-action waivers raise – or the courts consider – employees' Section 7 right to pursue legal claims concertedly. In *Gilmer v. Interstate/Johnson Lane Corp.*, for example, the Supreme Court upheld application of an arbitration agreement to individual ADEA claims, rejecting Gilmer's assertions that he had a substantive right *under the ADEA* to either a judicial forum or to a particular type of collective action provided for in that statute.[62] As an initial matter, the Court's discussion of whether the agreement could have barred collective arbitration was *dicta* because Gilmer's underlying claim was individual, not concerted, and his agreement – unlike the MAA – provided for arbitration pursuant to rules that allowed collective proceedings and did not restrict the type of relief the arbitrator could award.[63] More fundamentally, the Court's analysis was based on its determination that the agreement would not prevent Gilmer from vindicating, in arbitration, his right to be free from age-based discrimination.[64] The facts of the case did not present, Gilmer did not argue, and thus the Court did not consider,

---

availability of judicial forum in service-member-protection statute when could still vindicate rights in arbitration); *Carter*, 362 F.3d at 298-300 (employees not prevented from vindicating substantive FLSA rights by agreement's bar on collective proceedings, limits on discovery, and forum-selection provision).

[62] 500 U.S. at 29, 32; *Carter*, 362 F.3d at 298 (adopting *Gilmer*'s rationale).

[63] *See Gilmer*, 500 U.S. at 23-24, 32.

[64] *See id.* at 28-32 (quoting *Mitsubishi*, 473 U.S. at 637).

whether an employer could prevent employees qualifying for Section 7 protection from pursuing their employment-related claims in a concerted manner in any forum, arbitral or judicial.[65] Nor had the Board, which has the primary responsibility for defining Section 7 rights, spoken on that question before the instant decision.

The *Gilmer*-based argument of Horton (Br. 17-23) and its amici rests entirely on the mistaken assumption that because an employee's individual waiver of collective action does not violate employment statutes such as the ADEA or the FLSA,[66] that same contractual waiver cannot violate the NLRA. However, there is nothing anomalous about the same agreement violating one statute but not

---

[65] The Court noted that Gilmer worked as a "Manager of Financial Services," *id.* at 23, which suggests that he may not have qualified as an "employee" entitled to Section 7 protections.

[66] *See* 500 U.S. at 26 (party held to arbitration agreement "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue," with party opposing arbitration bearing burden to show such intent through statutory language, legislative history, or "an 'inherent conflict' between arbitration and the [statute's] underlying purposes") (citations omitted). *See also CompuCredit*, 132 S. Ct. at 669-71 (requiring enforcement of arbitration agreements absent "contrary congressional command" and reiterating past holdings that "arbitration of claims satisfies the statutory prescription of civil liability in court") (quoting *McMahon*, 482 U.S. at 226, and describing *McMahon*, *Gilmer*, and *Mitsubishi*); *Carter*, 362 F.3d at 298 (adopting, in FLSA case, *Gilmer*'s holding validating class waiver in arbitration agreement because ADEA collective-action provision was identical to, and adopted from, FLSA). *See* 29 U.S.C. § 626(b) (adopting procedures in 29 U.S.C. § 216(b)).

another if the statutes perform different functions.[67] That is the relevant context for understanding the Board's decision here.

The critical legal distinction that Horton's arguments obscure is the difference between the statutory rights at issue in the employment law cases and those at issue here. The substantive right protected by the ADEA is the right to be free from age-based discrimination.[68] The substantive right protected by the FLSA is the right to statutory wages and working hours.[69] The remedial purposes of both statutes may be served if the substantive rights of individual employees can be adequately vindicated in individual arbitration with the employer. Protecting collective action against individual employee waiver is not an objective of either statute.

---

[67] *New York Shipping Ass'n v. Fed. Maritime 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.").

[68] *See Gilmer*, 500 U.S. at 27 ("Congress enacted the ADEA in 1967 'to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age and employment.'") (quoting 29 U.S.C. § 621(b)).

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

But, as previously demonstrated, the substantive right protected by Section 7's "mutual aid or protection" clause includes the right to take collective action in order to ensure that employment statutes are widely enforced among employees generally.[70] For the purposes of the NLRA, it is not dispositive that an employee may be able to vindicate his own defined rights through individual action, whether in arbitration or litigation. To the contrary, what Congress protected in enacting the NLRA is the employee's right to choose concerted action *either* because he believes it will enable him more effectively to vindicate his own rights *or* because he has decided to subordinate personal advantage (such as expeditious resolution of his own claim) to achieve benefits for a greater number of employees.[71] That Section 7 right to mutual aid or protection is what the MAA strips away by depriving Horton's employees of any opportunity to prosecute their statutory employment rights in concert with others. And, as the Board stated here (D&O 5), protecting employees against individual agreements requiring that they waive their

---

[70] *See supra*, note 17.

[71] Employees often exercise their Section 7 rights to benefit coworkers rather than advance their own, immediate interests. *See, e.g., United Servs. Auto. Ass'n*, 340 NLRB 784, 792 (2003) (employee opposed employer policy "solely for the benefit of her fellow employees," having been assured by management that she would not personally be affected), *enforced*, 387 F.3d 908 (D.C. Cir. 2004); *Caval Tool Div.*, 331 NLRB 858, 862-63 (2000) ("The Board has consistently held that an employee who espouses the cause of another employee is engaged in concerted activity, protected by Section 7…."; employee protested unfair policy that did not apply to workers in her position), *enforced*, 262 F.3d 184 (2d Cir. 2001).

right to engage in concerted activity for mutual aid or protection "lies at the core" of the NLRA's objectives.

Accordingly, contrary to Horton's claim (Br. 18-19), the Board reasonably concluded (D&O 10) that "the question presented in this case is not whether employees can effectively vindicate their rights under the FLSA in arbitration despite a prohibition against class or collective proceedings, but whether employees can be required, as a condition of employment, to enter into an agreement waiving their rights under the NLRA." Because the MAA prospectively removes the signatory employee's choice to assist his fellow employees, or receive their assistance, in pursuing work-related legal claims, Horton's mere maintenance of the agreement violates the NLRA, even in the absence of any move to enforce it.[72] That violation does not depend on curtailment of FLSA rights, or any other non-NLRA cause of action.

The inherent conflict between the MAA and the NLRA also distinguishes the Supreme Court's state-law preemption analysis in *Concepcion*. In that decision, the Court rejected the argument that the FAA's savings clause preserved generally applicable California unconscionability and exculpatory contract defenses as applied to invalidate a class-action waiver in an arbitration agreement. In doing so, it emphasized that a federal statute cannot reasonably be construed to

---

[72] *See supra*, note 29.

"destroy itself" by ceding to common-law rights or defenses "that stand as an obstacle to the accomplishment of the [statute's] objectives."[73] By contrast, the Board held the MAA unenforceable under the FAA's savings clause because it curtails substantive rights created *by another federal statute*. That holding is reasonable and accommodates both statutes involved to the greatest extent possible.

The Board also viewed the MAA's curtailment of Section 7 rights through the lens of the common-law doctrine invalidating as against public policy contracts that violate federal statutes.[74] As the Board explained (D&O 11) and as described above, the MAA waiver's absolute preclusion of concerted claims in any forum, arbitral or judicial, contravenes the "strong federal policy protecting employees' right to engage in protected concerted action, including collective pursuit of litigation or arbitration." That policy is well defined and the MAA violates it,

---

[73] *Concepcion*, 131 S. Ct. at 1748.

[74] *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77-86 (1982) (courts must consider defense that contract was unenforceable because it violated NLRA); *Fid. & Deposit Co. of Md. v. Conner*, 973 F.2d 1236, 1241-42 (5th Cir. 1992). *Cf. W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 766 (1983) (public policy invalidating contract must be ascertained by reference to laws and legal precedents, not from general considerations of supposed public interests) (quotation omitted).

unlike the policies and contracts in Horton's cases (Br. 24-26) rejecting asserted public-policy defenses.[75]

The policy invoked by the Board is manifest in the right to concerted mutual protection guaranteed by Section 7, and in Section 8(a)(1)'s ban on restrictions of that right, as well as decades of caselaw discussed above. And, as the Board explained (D&O 11), the key Section 7 rights and Section 8(a)(1) protections implicated here built upon policies Congress had recognized in enacting the NLGA, *see supra* page 27-28. Those policies are, moreover, no less "defined" because Congress left to the Board the duty of interpreting the fine contours of concerted mutual protection. In that respect the MAA's violation of public policy is analogous, contrary to Horton's argument (Br. 25), to the defense the Supreme

---

[75] *See, e.g.*, *Eastern Associated Coal Corp. v. Mine Workers Dist. 17*, 531 U.S. 57, 62-67 (2000) (contractual arbitration award reinstating driver after positive drug tests, but with sanctions and conditions, did not contravene federal policy against drug use by transportation workers when statute provided for sanctions and rehabilitation and when viewed in light of labor policy favoring collective-bargaining and contractual arbitration); *W.R. Grace*, 461 U.S. at 770-72 (general policy favoring voluntary compliance with Title VII did not support allowing employer to reject provisions of collective-bargaining agreement conflicting with court-enforced voluntary conciliation agreement where union not included in conciliation process); *Weber Aircraft Inc. v. Warehousemen*, 253 F.3d 821, 823-26 (5th Cir. 2001) (rejecting argument that arbitrator's conversion of employee's discharge for sexual harassment to lesser discipline violated general public policy against workplace sexual harasment); *Conner*, 973 F.2d at 1242-44 (rejecting public policy argument where statute purportedly supporting it expressly exempted type of contractual provision at issue, and legislative history showed Congress specifically rejected arguments to provide agency with powers sought in appeal).

Court allowed to proceed in *Kaiser Steel Corp. v. Mullins*,[76] which also depended on an interpretation of statutory language rather than rote application of a formulaic rule. There, the company argued that a contract requiring it to pay a penalty if it bought coal from non-unionized providers *effectively* (though indirectly) violated the NLRA's prohibition on contracts requiring one company to cease doing business with another.[77] Refusing to enforce the concerted-action waiver thus undeniably furthers core federal labor policies.

Horton (Br. 11, 15-16) and its amici counter that the Supreme Court has declared the FAA embodies a strong public policy in favor of enforcing arbitration agreements according to their terms in order to facilitate arbitration, and that compelling class arbitration undermines the principal advantages of arbitration. As the Board made clear (D&O 12), however, its decision does not require class arbitration. It simply bars Horton from maintaining an agreement precluding employees from pursuing concerted legal claims in any forum. More fundamentally, the Board's decision is in accord with the public policies of the FAA because, as described, *supra* page 30, the FAA contains a savings clause recognizing the need to accommodate its overarching goal of facilitating the efficient, arbitral resolution of cases to the operation of standard contract defenses,

---

[76] 455 U.S. 72.

[77] *Id.* at 78.

including the invalidation of contracts that violate other federal statutes or impair other substantive federal rights.

Finally, as the Board also explained (D&O 11-13), its holding is limited. It only reaches arbitration agreements covering employment-related claims of workers who qualify as statutory employees within the meaning of NLRA Section 2(3) (29 U.S.C. § 152(3)) and work for employers meeting the definition of Section 2(2) (29 U.S.C. § 152(2)). That excludes several categories of workers, including supervisors, independent contractors, agricultural workers, and government employees. Commercial or consumer agreements, like those at issue in *Concepcion* and many other FAA cases,[78] remain unaffected by the Board's decision.

In conclusion, the MAA violates the NLRA because it requires employees "to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial." (D&O 13.) For that reason, the FAA issue presented here does not, contrary to Horton (Br. 18), turn on the *Gilmer* inquiry of

---

[78] *See, e.g.*, *CompuCredit*, 132 S. Ct. at 668 (consumer action against credit-card company); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1764-65 (2010) (antitrust case between commercial shipping companies and customers); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 82-83 (2000) (consumer lawsuit); *Volt Info. Scis., Inc. v. Bd. of Tr. of the Leland Stanford Junior University*, 489 U.S. 468, 470-71 (1989) (fraud and breach of contract suit based on construction contract); *Mitsubishi*, 473 U.S at 616-17 (anti-trust dispute between car manufacturer and distributor).

whether Congress intended to preclude waiver of a judicial forum for FLSA claims. The vice of the MAA is combining a waiver of the judicial forum with a waiver of collective action to deny Cuda and his fellow employees *any* forum in which they can pursue their FLSA claims concertedly. A violation predicated on interference with NLRA concerted-activity rights is consistent with the FAA because it fits neatly within that statute's savings clause. Any other contract that violated the NLRA, restricted a substantive federal statutory right, or conflicted with the public policy embodied in a federal statute would also be invalid. The MAA, which is invalid for all three of those reasons, is thus, as the Board held (D&O 11) in "inherent conflict" with the NLRA, and unenforceable.

II. THE MAA VIOLATES SECTION 8(a)(1) BECAUSE EMPLOYEES WOULD REASONABLY CONSTRUE IT TO BAR NLRB CHARGES

Employees have an unquestionable Section 7 right to file and pursue charges before the Board.[79] Pursuant to the Board's established, court-approved test for evaluating work rules imposed as a condition of employment, the Board will invalidate a rule when "employees would reasonably construe the language to prohibit Section 7 activity."[80] And, as explained, the mere maintenance of such a

---

[79] *See Utility Vault Co.*, 345 NLRB 79, 82 (2005); *McKesson Drug Co.*, 337 NLRB 935, 938 (2002).

[80] *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004); *see also Bill's Elec., Inc.*, 350 NLRB 292, 296 (2007) (arbitration policy that would reasonably be read by affected applicants and employees as barring their access to

rule suffices to violate Section 8(a)(1).[81] The Board reasonably found (D&O 2 & n.2, 16) that employees "would reasonably construe" the MAA's language as barring access to the Board. For that reason, Horton's maintenance of the MAA is unlawful, independent of the concerted-waiver violation discussed above.

As the Board described (D&O 2 n.2), the language of the MAA is all-encompassing. The first paragraph covers "all disputes and claims" between Horton and the signatory employee. (JX 2.) The second paragraph lists four specific categories of claims excepted from that coverage, none of which even arguably includes unfair-labor-practice charges. Therefore, a reasonable employee reading the plain language of the MAA would interpret the agreement as prohibiting the filing of Board charges.

Horton does not contest the applicable law but asserts (Br. 57) that the plain language of the MAA does not cover administrative claims, pointing to the agreement's use of the terms "court actions," "trial in court," and "judge or jury." But, as the Board noted (D&O 2 n.2), the final paragraph of the MAA acknowledges that an employee, by signing the agreement, is "waiving the right to file a lawsuit *or other civil proceeding*. . . ." (emphasis added). Moreover, the

---

Board processes violated Section 8(a)(1)); *U-Haul Co.*, 347 NLRB 375, 377-78 (2006) (same), *enforced*, 255 F. App'x 527 (D.C. Cir. 2007).

[81] *See supra* note 29.

MAA's references to judge or jury trial are more ambiguous than Horton allows: they appear to supplement the general waiver of judicial forum rather than limiting the legal claims to which it applies. That interpretation is consistent with paragraphs 5 and 7 of the MAA, which make clear that the agreement is intended to apply to administrative proceedings. Those paragraphs establish the arbitrator's authority and fees by reference to the comparable authority or fees of "a court or agency," using such alternative phrasing five times. The MAA's language, in other words, does not purport to constrain its coverage to "court" actions or "lawsuits" before a "judge" or "jury," but instead encompasses "all disputes," including "civil proceedings" other than lawsuits, and claims that might normally proceed before agencies as well as those that courts typically adjudicate.

Finally, the Board has determined that employees may reasonably understand references to court actions as encompassing administrative claims, regardless of the technical meaning a lawyer might attribute to them. Even if the MAA's coverage language had referred only to "court" actions, that terminology would not preclude an unfair-labor-practice finding under Board precedent, which recognizes that a reasonable employee does not necessarily understand legal terms of art. In *U-Haul Co.*, for example, the Board found a violation where the arbitration agreement covered "all disputes" related to employment, despite clarification in a side memo that the agreement applied only "to disputes, claims or

controversies *that a court of law would be authorized to entertain*."[82] Similarly, in *Utility Vault Co.*, the unlawful agreement covered "legal claims," with exceptions not specifically excluding Board charges, and the parties agreed that "such claims shall not be filed or pursued in court, and that [the employee was] forever giving up the right to have those claims decided by a jury."[83] In any event, as the Board explained in *U-Haul*, Board charges may – as in the present appeal –end up in court.[84]

In sum, the Board's determination that employees would reasonably read the MAA as restricting their right to file Board charges is supported by the language of the agreement and relevant caselaw. Horton has not demonstrated to the contrary. The Board is thus entitled to enforcement of this unfair-labor-practice finding.

---

[82] 347 NLRB at 377 (emphasis added). *Cf. CompuCredit*, 132 S. Ct. at 670-71 (explaining "[i]t is utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action . . . in the context of a court suit," holding such terms insufficient to create non-waivable right to judicial forum, and finding "most consumers would understand" terms as conveying existence of legal right enforceable in court rather than right to judicial, as opposed to arbitral, forum in first instance).

[83] 345 NLRB at 81.

[84] 347 NLRB at 377 (Board decisions may be challenged in court). *See* Section 10(e) and (f), 29 U.S.C. § 160(e) and (f) (creating circuit-court jurisdiction to hear petitions for review, and applications for enforcement, of Board orders).

III. THE BOARD'S ORDER WAS VALIDLY ISSUED

A. The Board Had a Quorum When It Issued the Decision on Review Because Member Craig Becker's Term Did Not End Until Noon on January 3, 2012, at the End of the 1st Session of the 112th Congress

Horton cursorily asserts in the last two pages of its brief (Br. 59-60) that the Board lacked a properly constituted quorum when it issued the January 3, 2012 Order because Board Member Craig Becker's recess appointment commission had expired on either December 17 or 30, 2011.[85] That claim is baseless. Under the terms of the Recess Appointment Clause, Becker's "Commission[] * * * expire[d] at the End of their [*i.e.*, the Senate's] next Session." U.S. Const. art II, § 2, cl. 3.

---

[85] At the time the Board issued the decision here on January 3, it comprised only three members: Mark Pearce, Brian Hayes, and Craig Becker. Under the Supreme Court's decision in *New Process Steel v. NLRB*, 130 S. Ct. 2635, 2640 (2010), the Board cannot exercise its full authority when its membership falls below three. As amicus, the Coalition for a Democratic Workplace suggests that the Board's Order may not have been "final" before Member Becker's term expired at noon on January 3, 2012, because the Order may not have been available online at that time. C.D.W. Amicus Br. at 3 n.1. Horton did not raise this issue before the Board and does not raise it on appeal; this Court should therefore decline to consider it. *See, e.g., Texas Democratic Party v. Benkiser*, 459 F.3d 582, 595 (5th Cir. 2006). In any event, the Board considers an order final when all participating members have voted on a final draft, even if post-decision ministerial actions have not yet been completed. *See* Order Denying Motion for Reconsideration at 2, *New Vista Nursing & Rehab., LLC*, NLRB Case No. 22-CA-29988 (Dec. 30, 2011) (order denying reconsideration), *application for enforcement of* 357 NLRB No. 69 (Aug. 26, 2011) *and petitions for review pending*, 3d Cir. Nos. 11-3440, 12-1027, 12-1936; *see also Braniff Airways, Inc. v. C.A.B.*, 379 F.2d 453, 459 (D.C. Cir. 1967) ("[I]t is plain that once all members have voted for an award and caused it to be issued the order is not nullified because of incapacity, intervening before the ministerial act of service, of a member needed for a quorum.").

Because Member Becker was appointed during the Senate's 2d Session of the 111th Congress (in March 2010), *see* National Labor Relations Board, *Members of the NLRB since 1935, available at* http://www.nlrb.gov/member-nlrb-1935, his term expired at the end of the Senate's next Session, its first of the 112th Congress.

The Legislative and Executive Branches have uniformly expressed the understanding that that Session ended at noon on January 3, 2012. *See* Senate of the United States, Executive Calendar (Jan 3, 2012), *available at* http://www.senate.gov/legislative/LIS/executive_calendar/2012/01_03_2012.pdf (indicating that the First Session "adjourned January 3, 2012"); *Entergy Mississippi Inc.*, 358 NLRB No. 99, slip op. at 1 (Aug. 14, 2012) (explaining that Becker continued to exercise his authority as a Member of the NLRB until noon on January 3, 2012), *petition for review pending*, 5th Cir. No. 12-60644.

Horton appears to suggest (Br. 59-60) that each time the Senate adjourns, its Session terminates, but that is contradicted not only by this shared understanding of the political branches, but also by decades of unbroken congressional practice. *See Mistretta v. United States*, 488 U.S. 361, 401 (1989) ("traditional ways of conducting business give meaning to the Constitution") (internal quotation marks omitted). As explained by the House Parliamentarian, a specific type of adjournment, "[a]djournments *sine die* (literally, without day)[,] are used to terminate the sessions of Congress." Wm. Holmes Brown, et al., *House Practice:*

A Guide to the Rules, Precedents, and Procedures of the House, § 13, at 11 (2011) (hereinafter "*House Practice*"), *available at* http://www.gpo.gov/fdsys/pkg/GPO-HPRACTICE-112/pdf/GPO-HPRACTICE-112.pdf; *see also R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1064 n.2 (9th Cir. 1997) ("Adjournment *sine die* means final adjournment for the session." (citing Black's Law Dictionary 1385 (6th ed.1990)).[86] Absent adjournment *sine die* on an earlier date, a session of Congress, and thus the Sessions of the Senate and the House, ends automatically with the commencement of the next session, which the Twentieth Amendment sets for noon on January 3 unless Congress passes a law specifying a different date.

---

[86] The opinion of the Office of Legal Counsel that Horton cites does not "asser[t] [that] the Senate's session ended on December 17, 2011." Br. 60. The opinion does acknowledge that the Senate adjourned on that date, *see Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 2012 WL 168645, at *1 (Jan. 6, 2012), but a simple adjournment does not end a Session. *See, e.g.*, Floyd M. Riddick & Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, S. Doc. No. 101-28, at 1 ("An adjournment of the Senate concludes 1 legislative day . . . ."). Further, the opinion expressly states that "the Senate in fact adjourned pursuant to an order that . . . there . . . be 'no business conducted' *for the final seventeen days of the first session*." 2012 WL 168645, at *13 (emphasis added).

Nor does the adjournment of the Senate to a series of *pro forma* sessions affect congressional practice of ending a Session only through adjournment *sine die* or through the commencement of the subsequent Session. At the end of 2007, the Senate held *pro forma* sessions at the end of the 2d Session of the110th Congress, and when it adjourned the *pro forma* session on December 31, it expressly did so *sine die*, pursuant to a concurrent resolution. See 153 Cong. Rec. 36,508 (Dec. 31, 2007) ("Under the provisions of S. Con. Res. 61, as amended, the Senate stands adjourned sine die until Thursday, January 3, 2008.").

See U.S. Const., amend. XX, § 2; *House Practice*, § 13, at 11 ("A session terminates automatically at the end of the constitutional term."); Deschler's Precedents of the House of Representatives, H. Doc. 94-661, vol. I, § 2, at 8 ("[T]he 76th Congress, 3d session, terminated and the 77th Congress, 1st session, began at noon on Jan. 3, 1941, pursuant to the twentieth amendment; neither a concurrent resolution providing for adjournment *sine die* nor a law changing the convening date of the 77th Congress had been passed.").[87] Indeed, the Senate itself (via the presiding officer) has relatively recently acknowledged that, when there is no adjournment *sine die*, one session of the Senate transitions into the next at noon on January 3 by operation of the Twentieth Amendment. *See* 142 Cong. Rec. 1 (Jan. 3, 1996) ("The PRESIDENT pro tempore. The hour of 12 noon on January 3 having arrived, pursuant to the Constitution of the United States, the 1st session of the Senate in the 104th Congress has come to an end and the 2d session commences."). In this case, Congress did not pass a concurrent resolution authorizing adjournment *sine die* of the 1st Session of the 112th Congress, and at

[87] S*ee also* Henry B. Hogue, Congressional Research Service, *Recess Appointments: Frequently Asked Questions* 2 n.5 (Jan. 9, 2012) ("In the absence of a concurrent resolution, adjournment sine die is determined by the arrival of the constitutionally mandated convening of a new session on January 3."); General Accounting Office, *Matter of Commodity Futures Trading Commission*, B-288581, at 2-3 (Nov. 19, 2001) ("It is well established that a session of Congress is brought to a close through either (1) a concurrent resolution of both houses adjourning the session sine die or (2) operation of law, immediately prior to the beginning of the next session of Congress.").

no point did the Senate even purport to say it was adjourning *sine die* prior to January 3. Accordingly, the Session and Becker's term ended at noon on January 3, and the Board had a quorum when it issued its decision in this case.

B. The Two Participating Members Satisfied the NLRA's Quorum Requirement

Horton incorrectly contends (Br. 60) that the decision by Chairman Pearce and Member Becker, with Member Hayes recused, lacked a quorum, because "there is no record the Board delegated authority to a three-member panel."[88] Section 3(b) of the NLRA (29 U.S.C. § 153(b)) sets forth the Board's quorum requirements. Specifically, the Board "is authorized to delegate to any group of three or more members any or all of [its] powers. . . ."[89] While "three members of the Board shall, at all times, constitute a quorum of the Board," "two members shall constitute a quorum of any group designated" pursuant to the delegation clause.[90]

The novel issue Horton raises is informed by *New Process Steel, L.P. v. NLRB*.[91] There, the Court held that when the Board delegates its powers to a three-member group, two members of the group cannot exercise that delegated authority

---

[88] *See also* Brief of Council on Labor Law Equality, pp.5-14.

[89] 29 U.S.C. § 153(b).

[90] *Id.*

[91] 130 S. Ct. 2635 (2010).

"once the group's (and the Board's) membership falls to two" with the departure of a member from the Board.[92] The Court, however, approvingly recognized the Board's practice of issuing decisions with a two-member quorum of a three-member delegee group when the third member was recused.[93]

As the Board stated in *Plaza Healthcare and Rehabilitation LLC*, under *New Process*—which "left undisturbed the Board's practice of deciding cases with a two-member quorum of a panel when one of the panel members has recused himself"—the "'group quorum provision [of Section 3(b)] still operates to allow any panel to issue a decision by only two members if one member is disqualified.'"[94] The Board further concluded, "the same is true . . . where one of the three members of the full Board deciding the case is recused."[95] In other words, where, as here, the Board has only three members to whom the case can be

---

[92] *Id*. at 2638.

[93] *Id.* at 2641-42, 2644.

[94] *Plaza*, 2011 WL 6950504, at *1 n.1 (2011) (quoting *New Process*, 130 S. Ct. at 2644). *Chamber of Commerce v. NLRB*, 2012 WL 1664028 (D.D.C. May 14, 2012), *notice of review filed*, D.C. Circuit No. 12-5250 (Aug. 13, 2012), upon which the Company relies (Br. 60), is inapposite. That case did not involve the Board's delegation or recusal practices, but rather the different issues of whether the third member was abstaining from voting or instead entirely absent.

[95] 2011 WL 6950504, at *1 n.1

assigned, Section 3(b) permits two panel members to issue the decision where the third member is recused.[96]

Also of no consequence is Horton's reference (Br. 60) to the Board's usual practice of deciding novel cases with three affirmative votes. That Board tradition is entirely a matter of Board discretion and is subject to exception.[97]

---

[96] *See, e.g., Wisconsin Bell, Inc.*, 346 NLRB 62 (2005); *Iron Workers Local 1*, 338 NLRB 43 (2002); *Carpenters Local 210*, 323 NLRB 521 (1997). For periods when the Board had three sitting members, see *Board Members Since 1935*, National Labor Relations Board, at http://www.nlrb.gov/who-we-are/board/board-members-1935.

[97] *See Mathews Readymix, Inc.*, 324 NLRB 1005, 1008 n.14 (1997), *enforced*, 165 F.3d 74 (D.C. Cir. 1999) (two-member majority overrules precedent); *Service Employees Local 87 (Cresleigh Mgmt.)*, 324 NLRB 774, 775 n.3 (1997) (same).

CONCLUSION

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

STUART F. DELERY
Acting Assistant Attorney General

BETH S. BRINKMANN
Deputy Assistant Attorney General

SCOTT R. McINTOSH
SARANG V. DAMLE
MELISSA N. PATTERSON
BENJAMIN M. SHULTZ
Attorneys, Appellate Staff

U.S. Department of Justice
Civil Division, Room 7259
950 Pennsylvania Avenue N.W.
Washington, D.C. 20530
(202) 514-4052

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

/s/Ruth E. Burdick
RUTH E. BURDICK
Supervisory Attorney

/s/Kira Dellinger Vol
KIRA DELLINGER VOL
Attorney

National Labor Relations Board
1099 14th Street N.W.
Washington, D.C. 20570
(202) 273-2978
(202) 273-2941

AUGUST 2012

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

D.R. HORTON, INCORPORATED	*	
	*	
Petitioner/Cross-Respondent	*	No. 12-60031
	*	
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	12-CA-25764
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,506 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 4th day of September, 2012

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

D.R. HORTON, INCORPORATED	*	
	*	
Petitioner/Cross-Respondent	*	No. 12-60031
	*	
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	12-CA-25764
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify 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:

Ronald Wayne Chapman, Jr.
Ogletree Deakins, P.C.
Suite 700
8117 Preston Road
Preston Commons West
Dallas, TX 75225-0000

Bernard Phillip Jeweler
Ogletree Deakins, P.C.
Suite 1000
1909 K Street, N.W.
Washington, DC 20006

Christopher Charles Murray, Esq.
Ogletree Deakins, P.C.
Suite 4600
111 Monument Circle
Indianapolis, IN 46204

Michael M. Shetterly
Mark M. Stubley
Ogletree Deakins, P.C.
300 N. Main Street, Suite 500
Ogletree Building
Greenville, SC 29601-0000

William J. Emanuel, Attorney
Vartan Serge Madoyan, Esq.
Littler Mendelson, P.C.
Suite 500
2049 Century Park, E.
Los Angeles, CA 90067

Henry David Lederman
Alexa L. Woerner, Esq., Attorney
Littler Mendelson, P.C
Suite 600
1255 Treat Boulevard
Treat Towers
Walnut Creek, CA 94597-0000

Catherine M. Masters
Schiff Hardin, L.L.P.
Suite 6600
233 S. Wacker Drive
Sears Tower
Chicago, IL 60606-0000

Paul William Cane, Jr.
Paul Hastings, L.L.P.
24th Floor
55 2nd Street
San Francisco, CA 94105-0000

Rae Thiesfield Vann, General Counsel
Norris, Tysse, Lampley & Lakis, L.L.P.
Suite 400
1501 M Street, N.W.
Washington, DC 20005

Howard Marc Radzely, Esq.
Morgan, Lewis & Bockius, L.L.P.
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004

Matthew Walter Ray, Esq.
Jones Day
2727 N. Harwood Street
Dallas, TX 75201-1515

Charles C. High, Jr., Esq.
Clara Beth Burns
Kemp Smith, L.L.P.
Suite 1700
221 N. Kansas Street
El Paso, TX 79901-0000

Jose Abelardo Howard-Gonzalez, Esq.
Kemp Smith, L.L.P.
Suite 1700
221 N. Kansas Street
El Paso, TX 79901-0000

Marshall Bruce Babson, Attorney
Seyfarth Shaw, L.L.P.
33rd Floor
620 8th Avenue
New York, NY 10018-1405

Deborah J. La Fetra
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814-0000

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 4th day of September, 2012