Nos. 15-1457 & 16-1010

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PRICE-SIMMS, INC., D/B/A TOYOTA SUNNYVALE

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

RICHARD VOGEL

Intervenor

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the National Labor Relations Board ("the Board") certifies the following:

A. Parties and Amici

1. Price-Simms, Inc. d/b/a Toyota Sunnyvale Midwest Division—MMC, LLC, d/b/a Menorah Medical Center ("the Company") was the respondent before the Board (Board Case No. 32-CA-138015) and is the Petitioner and Cross-Respondent before the Court.

2. The Board is the Respondent and Cross-Petitioner before the Court; its General Counsel was a party before the Board.

3. Richard Vogel was the charging party before the Board and is the Intervenor before the Court.

4. The Chamber of Commerce of the United States filed an amicus brief in this proceeding on behalf of the Company.

B. Rulings Under Review

The case under review is a Decision and Order of the Board issued on November 30, 2015, reported at 363 NLRB No. 52.

C. Related Cases

This case has not previously been before the Court. The Board is not aware of any related cases either pending or about to be presented before this or any other court.

s/ Linda Dreeben
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Dated at Washington, DC
this 27th day of May, 2016

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GLOSSARY

"the Board"	National Labor Relations Board
"Br."	Company's opening brief
"C&A ¶".....	Corresponding paragraphs of the complaint filed by the General Counsel and answer filed by the Company in the proceeding before the Board
"the Company".....	Price-Simms, Inc. d/b/a Toyota Sunnyvale
"D&O"	*Price-Simms, Inc. d/b/a Toyota Sunnyvale*, 363 NLRB No. 52 (Nov. 30, 2015)
"Ex.".....	Exhibits attached to the complaint filed by the General Counsel in the proceeding before the Board
"the FAA"	Federal Arbitration Act, 9 U.S.C. § 1, et seq., as amended
"the NLRA"	National Labor Relations Act, 29 U.S.C. § 151, et seq., as amended

UNITED STATES COURT OF APPEALS
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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

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Price-Simms, Inc., d/b/a Toyota Sunnyvale ("the Company") for review, and the cross-application of the National Labor Relations Board for enforcement, of a Board Order issued against

the Company, reported at 363 NLRB No. 52, 2015 WL 7750756 (Nov. 30, 2015) ("D&O" 1-6).[1] Richard Vogel, who was the charging party before the Board, has intervened on the Board's behalf.

The Board had jurisdiction over this matter under Section 10(a) of the National Labor Relations Act ("the NLRA," 29 U.S.C. §§ 151, 160(a)). The Board's Decision and Order is final under Section 10(e) and (f) of the NLRA, which provides the basis for this Court's jurisdiction. 29 U.S.C. § 160(e) and (f). The petition and cross-application were timely; the NLRA imposes no time limit on such filings.

STATEMENT OF THE ISSUES

1. Did the Board reasonably find that the Company violated Section 8(a)(1) of the NLRA by maintaining an arbitration agreement waiving employees' right to maintain class or collective actions in any forum, arbitral or judicial?

2. Did the Board reasonably find that the Company violated Section 8(a)(1) of the NLRA by seeking to enforce the unlawful arbitration agreement?

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[1] "C&A ¶ _"refers to the relevant paragraph in the General Counsel's complaint, and the corresponding admission in the Company's Answer. "Ex." Refers to exhibits attached to the complaint. "Br." refers to the Company's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are contained in the Statutory Addendum to this brief.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The Company sells and services automobiles in Sunnyvale, California. (D&O 2; C&A ¶ 2(a).) Since at least April 2, 2014, the Company has required its employees, as a condition of employment, to sign a Binding Arbitration Agreement and a Handbook Employee Acknowledgement Agreement ("the Agreement"), both of which include the following provision:

> In order to provide for the efficient and timely adjudication of claims, the arbitrator is prohibited from consolidating the claims of others into one proceeding. This means that an arbitrator will hear only my 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 of employees in one proceeding, to the maximum extent permitted by law. Thus, the Company has the right to defeat any attempt by me to file or join other employees in a class, collective or joint action lawsuit or arbitration (collectively "class claims").

(D&O 2-3; C&A ¶ 4(a).)

Richard Vogel signed the Agreement on June 7, 2012. (D&O 2; C&A ¶ 4(a) Ex. A.) Vogel later filed a class-action wage-and-hour lawsuit against the Company in California Superior Court. (D&O 3; C&A ¶ 5(a).) On October 1, 2014, the Company sought to enforce the Agreement by filing with the court a

motion to compel individual arbitration and stay the judicial proceedings based on the Agreement. (D&O 3; C&A ¶ 5(a).) The court granted the motion on October 24, 2014. (D&O 3; C&A ¶ 5(b).)

II. PROCEDURAL HISTORY

Pursuant to charges filed by Vogel, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by promulgating, maintaining, and enforcing an arbitration agreement that prohibits employees from engaging in activity protected by Section 7 of the NLRA, 29 U.S.C. § 157. The Company, in its answer to the complaint, admitted all of the factual allegations. On the General Counsel's motion for summary judgment, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted.

III. THE BOARD'S CONCLUSIONS AND ORDER

On November 30, 2015, the Board (Chairman Pearce and Member McFerran; Member Miscimarra, dissenting), issued a Decision and Order granting the General Counsel's motion for summary judgment. The Board found that the Company violated Section 8(a)(1) by maintaining and enforcing the Agreement, which waives employees' right to maintain collective actions in all forums, arbitral

and judicial.[2] (D&O 3.) To remedy those violations, the Board ordered the Company to cease and desist from the unfair labor practices found and from any like or related interference with employees' Section 7 rights. (D&O 3.) Affirmatively, the Board ordered the Company to rescind or revise the Agreement to make clear that it does not constitute a waiver of employees' right to maintain employment-related joint, class, or collective actions in all forums; notify all current and former employees who signed the Agreement of the change; notify the Superior Court of the change, and inform the court that it no longer opposes Vogel's complaint on the basis of the Agreement; reimburse Vogel for any reasonable attorneys' fees and expenses that he incurred opposing the Company's motion to stay the lawsuit and compel individual arbitration; and post a remedial notice. (D&O 3-4.)

SUMMARY OF ARGUMENT

This case arises at the intersection of two federal statutes: the NLRA and the Federal Arbitration Act ("the FAA," 9 U.S.C. § 1, et. seq.). To the extent possible, both must be given effect. Applying its decisions in *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th

[2] The Board (D&O 2) dismissed the allegation that the Company unlawfully promulgated the Agreement, finding that the Agreement was promulgated well outside the 6-month limitations period for filing Board charges. *See* 29 U.S.C. § 160(b).

Cir. 2013), *petition for reh'g en banc denied*, 5th Cir. No. 12-60031 (April 16, 2014), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), *enforcement denied in relevant part*, 808 F. 3d 1013 (5th Cir. 2015), *petition for reh'g en banc denied*, 5th Cir. No. 14-60800 (May 13, 2016), the Board reasonably held that the Company's Agreement violates the NLRA, and correctly found that its unfair-labor-practice finding does not offend the FAA's general mandate to enforce arbitration agreements according to their terms.

Longstanding Supreme Court and Board precedent establish that Section 7 of the NLRA protects employees' right to pursue work-related legal claims concertedly. It also makes clear that employers may not restrict Section 7 rights through work rules, or induce employees to waive those rights prospectively in individual agreements. Such restrictions or waivers violate Section 8(a)(1), which bars interference with Section 7 rights. Accordingly, the Company's maintenance of an agreement that requires its employees to arbitrate all employment-related disputes individually violates the NLRA.

The Board also correctly found that the FAA does not mandate enforcement of the Agreement. Because the Agreement violates the NLRA, it fits within the FAA's savings clause, which exempts from enforcement arbitration agreements subject to general contract defenses such as illegality. As the Board found, the Agreement violates the NLRA for reasons unrelated to arbitration, and which have

consistently been applied to various types of individual contracts. The Supreme Court's FAA jurisprudence does not compel a different result. The Court has enforced agreements requiring individual arbitration in other contexts, but has never held that the FAA mandates enforcement of an arbitration agreement that directly violates another federal statute. Such a result would run counter to the longstanding principle that when two coequal statutes can be harmonized, courts should give effect to both.

The Company also violated Section 8(a)(1) by taking steps to enforce the unlawful Agreement by filing a motion to compel individual arbitration in California Superior Court. Because the Company's enforcement efforts had an objective that is illegal under federal law, the Company's actions were not protected petitioning under the First Amendment. Moreover, under established Board law, the Board acted within its remedial discretion by ordering the Company to rescind or revise the Agreement, notify the Superior Court, and reimburse Vogel for expenses incurred in defending against the motion to compel.

STANDARD OF REVIEW

In enacting the NLRA, Congress established the Board and charged it with the primary authority to interpret and apply the statute. *See Garner v. Teamsters, Chauffeurs & Helpers Local 776*, 346 U.S. 485, 490 (1953). Accordingly, the

Board's reasonable interpretation of the NLRA is entitled to affirmance.[3] *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1868-71 (2013) (to reject agency interpretation of statute within its expertise requires showing that "the statutory text forecloses" agency's interpretation) (reaffirming *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996) (Board "need not show that its construction is the *best* way to read the statute"); *Cmty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1083 (D.C. Cir. 2003) (Court "review[s] with deference" Board decisions that implicate its expertise in labor relations). The Court does not defer to the Board's interpretation of statutes other than the NLRA. *See United Food & Commercial Workers Intl. Union Local 400 v. NLRB*, 222 F.3d 1030, 1035 (D.C. Cir. 2000).

[3] The Company wrongly claims that the Board is not entitled to deference "where the issues involved are purely legal or otherwise outside the Board's particular expertise." Br. 9-10 (citing *Local 777, Democratic Union Organizing Comm. v. NLRB*, 603 F.2d 862, 869 n.17 (D.C. Cir. 1978)). Although the Court articulated that standard in *Local 777*, it clarified, in a per curiam order appended to a decision denying rehearing, "that the Board's decision is not subject to de novo review merely because it was a determination of pure agency law involving no special administrative expertise that a court does not possess." *Id*. at 891, 893.

ARGUMENT

I. THE COMPANY VIOLATED SECTION 8(a)(1) OF THE NLRA BY MAINTAINING AN AGREEMENT THAT BARS EMPLOYEES FROM PURSUING WORK-RELATED CLAIMS CONCERTEDLY

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

Section 7 guarantees 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*, and . . . to refrain from any or all of such activities." 29 U.S.C. § 157 (emphasis added). As explained below, courts have long upheld the Board's construction of Section 7 as protecting concerted pursuit of work-related legal claims, consistent with the language and purposes of the NLRA. That construction falls squarely within the Board's expertise and its responsibility for delineating federal labor law generally, and Section 7 in particular. *See NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (noting that "the task of defining the scope of [Section] 7 'is for the Board to perform in the first instance as it considers the wide variety of cases that come before it'") (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978)); *accord Venetian Casino Resort, LLC v. NLRB*, 484 F.3d 601, 606 (D.C. Cir. 2007).

Central to this case is the Board's holding that the right of employees to engage in concerted activity for mutual aid or protection – the "basic premise"

upon which our national labor policy has been built, *Murphy Oil*, 2014 WL 5465454, at *1 – includes concerted *legal* activity. The reasonableness of the Board's view was confirmed by the Supreme Court in *Eastex*, 437 U.S. at 565-66 & n.15-16. In that case, the Court recognized that Section 7's broad guarantee reaches beyond immediate workplace disputes to encompass employees' efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship," including "through resort to administrative and judicial forums." *Id.* at 565-66.

Indeed, as *Eastex* notes, for decades the Board has held concerted legal activity to be protected. *Id*. at 565-66 & n.15. That line of cases dates back to *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-50 (1942), in which the Board found protected three employees' joint lawsuit filed under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq. It continues, unbroken and with court approval, through modern NLRA jurisprudence. *See, e.g.*, *Lewis v. Epic Sys. Corp.*, No. 15-2997, slip op. at 4 (7th Cir. May 26, 2016) (see addendum) ("[F]iling a collective or class action suit constitutes 'concerted activit[y]' under Section 7."); *Brady v. Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under

[Section] 7 . . . ."); *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188-89 (D.C. Cir. 2000) (concerted petitions for injunctions against workplace harassment).[4]

The Board's holding that Section 7 protects concerted legal activity furthers the policy objectives that guided Congress in passing the NLRA. The NLRA protects collective rights "not for their own sake but as an instrument of the national labor policy of minimizing industrial strife." *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975). Protecting employees' ability to

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[4] *Accord Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) ("Generally, filing by employees of a labor related civil action is protected activity under section 7 of the NLRA unless the employees acted in bad faith."); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (same); *Harco Trucking, LLC*, 344 NLRB 478, 478-79 (2005) (wage-related class action); *Le Madri Rest.*, 331 NLRB 269, 275 (2000) (concerted lawsuit alleging unlawful pay policies); *United Parcel Serv., Inc.*, 252 NLRB 1015, 1018, 1026 & n.26 (1980) (wage-related class action), *enforced*, 677 F.2d 421 (6th Cir. 1982); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975) (concerted lawsuit for contract violation and unpaid wages), *enforced mem.*, 567 F.2d 391 (7th Cir. 1977).

The Company erroneously claims (Br. 10-11, 14) that the cases cited by the Board in *D.R. Horton* as establishing Section 7 protection of legal activity are inapposite because they involved *retaliation*. That argument conflates Section 7, which defines the scope of the NLRA's protection, and Section 8, which protects employees against different kinds of interference with Section 7 rights. Thus, whether an employer violates Section 8 by retaliating against employees for engaging in Section 7 activity or by prospectively prohibiting such activity (which implicitly threatens retaliatory consequences for disregard of the ban) does not affect Section 7's coverage. Indeed, the employer in *Eastex*, like the Company, violated Section 8(a)(1) by prospectively barring Section 7 activity. 437 U.S. at 559-62 (unlawfully banning distribution of protected literature).

resolve workplace disputes collectively in an adjudicatory forum effectively serves that purpose because collective lawsuits are an alternative to strikes and other disruptive protests. *D.R. Horton*, 357 NLRB at 2279-80. Conversely, denying employees access to concerted litigation "would only tend to frustrate the policy of the [NLRA] to protect the right of workers to act together to better their working conditions." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

Salt River Valley Water Users' Association v. NLRB aptly illustrates how concerted legal activity functions as a safety valve when a labor dispute arises. 206 F.2d 325 (9th Cir. 1953). In that case, unrest over the employer's wage policies prompted an employee to circulate a petition among co-workers designating him as their agent to seek back wages under the FLSA. Recognizing that concerted activity "is often an effective weapon for obtaining [benefits] to which [employees] . . . are already 'legally' entitled," *id*. at 328, the court upheld the Board's holding that Section 7 protected the employees' effort to exert group pressure on the employer to redress their work-related claims through resort to legal processes.

Protecting employees' concerted pursuit of legal claims also advances the congressional objective of "restoring equality of bargaining power between employers and employees." 29 U.S.C. § 151; *accord Murphy Oil*, 2014 WL 5465454, at *1. Recognizing the strength in numbers, statutory employees have

long exercised their Section 7 right to band together to take advantage of the evolving body of laws and procedures that legislatures have provided to redress their grievances. *See, e.g.*, *Eastex*, 437 U.S. at 565-66 & n.15; *Moss Planing Mill Co.*, 103 NLRB 414, 418 (1953) (concerted wage claim before administrative agency), *enforced*, 206 F.2d 557 (4th Cir. 1953). Such collective legal action seeks to unite workers generally and to lay a foundation for more effective collective bargaining. *See Eastex*, 437 U.S. at 569-70. That result, in turn, furthers the NLRA's objective of enabling employees, through collective action, to increase their economic well-being. *See Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 753-54 (1985) (noting Congress's intention to remedy "the widening gap between wages and profits") (quoting 79 Cong. Rec. 2371 (1935)).

In sum, the Board has reasonably construed Section 7 as guaranteeing employees the option of resorting to concerted pursuit of legal claims to advance work-related concerns. That construction is supported by longstanding Board and court precedent. It also reflects the Board's sound judgment that concerted legal activity is a particularly effective means to advance Congress's goal of avoiding labor strife and economic disruptions. And that judgment falls squarely within the Board's area of expertise and responsibility. *See City Disposal*, 465 U.S. at 829.

Because, as just demonstrated, Section 7 is the source of employees' right to pursue work-related legal claims concertedly, it is immaterial that Rule 23 does not

"establish an entitlement to class proceedings for the vindication of statutory rights." Br. 11 (quoting *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013)). Rule 23 is just one mechanism employees can use for exercising Section 7 rights. The Board's determination that the NLRA protects employees' use of such mechanisms in the course of protected activity does not imbue the procedures themselves with independent substantive weight, or shift the source of those rights away from the NLRA.

Nor does it matter, contrary to the Company's assertion (Br. 12-13), that neither Rule 23 nor the FLSA's collective-action provision, another outlet for Section 7-protected legal activity, postdated the 1935 enactment of the NLRA. The Company's narrow focus on those two procedures should not create the impression that concerted legal action is a recent development anachronistically imported into labor law. Joint and collective claims of various forms long predate Rule 23, *Lewis*, slip op. at 7-9, as do the Board's earliest decisions finding that Section 7 protects the collective legal pursuit of work-related claims. *See* p. 9-10. In any event, the NLRA was drafted to allow the Board to respond to new developments in interpreting the rights it creates and conduct it proscribes. *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (recognizing Board's "responsibility to adapt the [NLRA] to changing patterns of industrial life"). The relevant point is that when class procedures became generally available, the NLRA

barred employers from interfering with employees' Section 7 right to use concerted avenues of litigation, including those new procedures, for mutual aid or protection.

As the Board has emphasized, what Section 7 protects in this context is statutory employees' right to act in concert "to *pursue* joint, class, or collective claims *if and as available*, without the interference of an employer-imposed restraint." *Murphy Oil*, 2014 WL 5465454, at *2 (second emphasis added). Accordingly, the Board's policy does not, as the Company contends (Br. 11), "reach into the judicial system to regulate the procedural manner" in which cases are litigated. It merely prevents employers from truncating statutory employees' exercise of Section 7 rights. [5]

B. The Agreement's Waiver of Employees' Right To Engage in Concerted Action Violates Section 8(a)(1) of the NLRA

An employer violates Section 8(a)(1) of the NLRA by "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1). A workplace rule or policy that either explicitly restricts Section 7 activity, or that employees would "reasonably construe" as

[5] The Company contends that the Supreme Court has rejected the idea that all litigants have a generalized "nonwaivable opportunity" to use class mechanisms. (Br. 11 (quoting *Italian Colors*, 133 S. Ct. at 2310)). But the quoted language is not inconsistent with the Supreme Court's recognition in *Eastex* that *some* litigants – those covered by the NLRA – have a Section 7 right to engage in concerted litigation activity. *Italian Colors* thus does not undermine the Board's interpretation of the NLRA as providing a right to access collective procedures without employer interference.

doing so, is unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004); *accord Hyundai Am. Shipping Agency, Inc. v. NLRB*, 805 F.3d 309, 313 (D.C. Cir. 2015). It does not matter whether the employer has applied or enforced the policy – mere maintenance constitutes an unfair labor practice. *Cintas Corp. v. NLRB*, 482 F.3d 463, 467-68 (D.C. Cir. 2007). Here, because the Company imposed the Agreement on all employees as a condition of employment, which carries an "implicit threat" that failure to comply will result in loss of employment, the Board appropriately utilized the work-rule standard. *D.R. Horton*, 357 NLRB at 2283; *see also NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 481-83 (1st Cir. 2011) (applying to employment contract); *U-Haul Co.*, 347 NLRB 375, 377-78 (2006) (same), *enforced*, 255 F. App'x 527 (D.C. Cir. 2007). Applying that standard, the Board reasonably found (D&O 2) that the Company's maintenance of the Agreement violates Section 8(a)(1).

1. The Agreement unlawfully restricts Section 7 activity

The Agreement facially and indisputably restricts employees' Section 7 rights because it prohibits employees from pursuing *any* concerted legal claims, without exception. Specifically, it provides that "all disputes which may arise out of the employment context" must be submitted to arbitration. (D&O 1; C&A ¶ 4(a) Ex. A.) Moreover, it only confers on arbitrators the authority to hear individual claims, and expressly prohibits arbitrators from consolidating claims or

otherwise "fashion[ing] a proceeding as a class or collective action or to award relief to a group of employees in one proceeding . . . ." (D&O 1; C&A ¶ 4(a) Ex. A.) By explicitly requiring that employees individually arbitrate all work-related claims, the Agreement violates Section 8(a)(1) by restraining employees from exercising in any forum their long recognized right concertedly to enforce employment laws.

2. Individual agreements that prospectively waive employees' Section 7 rights violate Section 8(a)(1)

As the Board explained in *D.R. Horton*, 357 NLRB at 2280-81, and *Murphy Oil*, 2014 WL 5465454, at *1, 6, restrictions on Section 7 rights are unlawful even if, like here, they take the form of agreements between employers and employees. In *National Licorice Co. v. NLRB*, the Supreme Court held that individual contracts in which employees prospectively relinquish their right to present grievances "in any way except personally," or otherwise "stipulate[] for the renunciation … of rights guaranteed by the [NLRA]," are unenforceable and "a continuing means of thwarting the policy of the [NLRA]." 309 U.S. 350, 360-61 (1940). As the Court explained, "employers cannot set at naught the [NLRA] by inducing their workmen to agree not to demand performance of the duties which [the statute] imposes." *Id*. at 364. Similarly, in *NLRB v. Stone*, the Seventh Circuit held that individual contracts requiring employees to adjust their grievances with their employer individually violate the NLRA, even when "entered into without

coercion." 125 F.2d 752, 756 (7th Cir. 1942); *accord Lewis*, slip op. at 10; *see also J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) (individual contracts conflicting with Board's function of preventing NLRA violations "obviously must yield or the [NLRA] would be reduced to a futility").

Applying that principle, the Board has found unlawful a variety of individual agreements under which employees or job applicants forfeit their Section 7 rights. *See, e.g.*, *First Legal Support Servs., LLC*, 342 NLRB 350, 362-63 (2004) (unlawful to have employees sign contracts stripping them of right to organize); *Eddyleon Chocolate Co.*, 301 NLRB 887, 887 (1991) (unlawful to ask job applicant to agree not to join union). It has also regularly set aside settlement agreements that require such waivers as conditions of reinstatement. *See, e.g.*, *Bon Harbor Nursing & Rehab. Ctr.*, 348 NLRB 1062, 1073, 1078 (2006) (employer unlawfully conditioned employees' reinstatement, after dismissal for non-union concerted protest, on agreement not to engage in further similar protests); *Bethany Med. Ctr.*, 328 NLRB 1094, 1105-06 (1999) (same); *cf. Ishikawa Gasket Am., Inc.*, 337 NLRB 175, 175-76 (2001) (employer unlawfully conditioned employee's severance payments on agreement not to help other employees in workplace disputes or act "contrary to the [employer's] interests in remaining union-free"), *enforced*, 354 F.3d 534 (6th Cir. 2004). And it has found unlawful agreements in which employees have prospectively waived their Section 7 right to access the

Board's processes. *See, e.g.*, *McKesson Drug Co.*, 337 NLRB 935, 938 (2002) (finding employer violated Section 8(a)(1) by conditioning return to work from suspension on broad waiver of rights, both present and future, to invoke Board's processes for alleged unfair labor practices); *Reichhold Chems.*, 288 NLRB 69, 71 (1988) (explaining "in futuro waiver" of right to access Board's processes is contrary to NLRA). In sum, all individual contracts that prospectively waive Section 7 rights violate Section 8(a)(1) "no matter what the circumstances that justify their execution or what their terms." *J.I. Case*, 321 U.S. at 337. [6]

The proposition that an employer may not lawfully induce an employee prospectively to waive her Section 7 rights flows from the unique characteristics of those rights and the practical circumstances of their exercise. Collective action does not occur in a vacuum, but results from employee interaction with others. *See NLRB v. Babcock & Wilcox Co.*, 351 U. S. 105, 113 (1956) ("The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others"); *Harlan Fuel Co.*, 8 NLRB 25, 32

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[6] Collective waivers negotiated on behalf of employees by their exclusive bargaining representative, by contrast, are permissible. For example, a union may waive the employees' right to engage in an economic strike, for the term of a collective-bargaining agreement, provided that the waiver is clear and unmistakable. *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 705-06 (1983); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280-83 (1956). Such waivers are themselves the product of concerted activity – the choice of employees to exercise their Section 7 right "to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157; *D.R. Horton*, 357 NLRB at 2286.

(1938) (the rights guaranteed to employees by Section 7 include "full freedom to receive aid, advice and information from others concerning [their self-organization] rights"). The concerted activity of unorganized workers in particular often arises spontaneously when employees are presented with actual workplace problems and have to decide among themselves how to respond. *See, e.g.*, *Washington Aluminum Co.*, 370 U.S. at 14-15 (concerted activity spurred by extreme cold in plant); *Salt River Valley*, 206 F.2d at 328 (concerted activity prompted by violations of minimum-wage laws).

As the Board has recognized, an individual employee's decision whether collectively to walk out of a cold plant or to join with other employees in a lawsuit over wages and hours is materially different from the decision of an individual employee – made in advance of any concrete grievance – to agree to refrain from *any* future concerted activity, regardless of the circumstances. *See Nijjar Realty, Inc.*, 363 NLRB No. 38, 2015 WL 7444737, at *5 (Nov. 20, 2015) (noting that such waivers are made "at a time when the employees are unlikely to have an awareness of employment issues that may now, or in the future, be best addressed by collective or class action"), *petition for review filed*, 9th Cir. No. 15-73921. When actual workplace issues arise, the NLRA "allows employees to engage in … concerted activity which they decide is appropriate." *Plastilite Corp.*, 153 NLRB 180, 183 (1965), *enforced in relevant part*, 375 F.2d 343 (8th Cir. 1967); *see also*

Serendippity-Un-Ltd., 263 NLRB 768, 775 (1982) (same). In this context, prospective individual waivers, like the contract struck down in *National Licorice*, 309 U.S. at 361, impair the "full freedom" of the signatory employees to decide for themselves whether to participate in a particular concerted activity.[7]

The fact that Section 7 also protects employees' "right to refrain" from concerted activity does not change that calculus. Similar to the choice to engage in concerted activity, the right to refrain belongs to the employee to exercise, free from employer interference, in the context of a specific workplace dispute. As the Board has explained, employees remain free to refrain by choosing not to participate in a specific concerted legal action. *See Murphy Oil*, 2014 WL 5465454, at *24 ("In prohibiting *employers* from requiring employees to pursue

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[7] For similar reasons, the Board and the courts have held that Section 7 precludes enforcement of individual waivers of an employee's right to refrain from supporting a strike for its duration. *See NLRB v. Granite State Joint Board, Textile Workers Local 1029*, 409 U.S. 213, 217 (1972) (protecting the right of the employee to "change his mind" regarding whether to participate in concerted activity based on "[e]vents occurring after" an initial decision whether to do so). In *Granite State*, the Court upheld the Board's position that Section 7 preserves the option of an employee who has resigned from a union to decide not to honor a strike he once promised to support, and that a rule preventing him from doing so was unlawful. *Id.* at 214-17. Just as "the vitality of § 7 requires that the [employee] be free to refrain in November from the actions he endorsed in May," *id.* at 217-18, an employee must be able to decide whether to engage in concerted activity when the opportunity for such activity arises, even after previously deciding not to do so when circumstances were different. *See also Mission Valley Ford Truck Sales*, 295 NLRB 889, 892 (1989) (employer could not hold employee to "earlier unconditional promises to refrain from organizational activity").

their workplace claims individually, *D. R. Horton* does not compel *employees* to pursue their claims concertedly.").

Prospective waivers of Section 7 rights are unlawful not only because they impair the rights of the employees who are party to them, but also because they preemptively deprive non-signatory employees of the signatory employees' mutual aid and support at the time that an actual dispute arises. That impairment occurs because, as discussed above, collective action depends on employees having the right to communicate with and appeal to fellow employees to join in such action. *See, e.g.*, *Signature Flight Support*, 333 NLRB 1250, 1260 (2001) (finding employee efforts "to persuade other employees to engage in concerted activities" protected), *enforced mem.*, 31 F. App'x 931 (11th Cir. 2002); *Am. Fed'n of Gov't Emps.*, 278 NLRB 378, 382 (1986) (describing as "indisputable" that one employee "had a Section 7 right to appeal to [another employee] to join" in protected activity). That right includes appeals to employees of other employers as well as to co-workers. *See Eastex*, 437 U.S. at 564-65. Prospective waivers of the right to engage in concerted activity deprive non-signatory employees of any meaningful opportunity to enlist signatory employees in their cause.

Finally, where, as here, the prospective waiver of Section 7 rights operates to bar only concerted *legal* activity, the result is to limit the employees' options to comparatively more disruptive forms of concerted activity at a time when

workplace tensions are high and employees are deciding which, if any, concerted response to pursue. As the Board has explained, *D.R. Horton*, 357 NLRB at 2279-80, the peaceful resolution of labor disputes is a core objective of the NLRA, and that objective is ill-served by individual arbitration agreements that prospectively waive the right of employees to consider the option of concerted legal action along with other collective means of advancing their interests as employees.

In sum, the Agreement's express bar on a key form of concerted activity violates Section 8(a)(1) of the NLRA. And it is no less unlawful for being styled an agreement, in light of the longstanding prohibition on individual contracts that prospectively waive Section 7 rights. That the Company used the particular vehicle of an arbitration agreement subject to the FAA to impose that prospective bar likewise does not excuse its restriction of Section 7 rights; the Company cannot "attempt 'to achieve through arbitration what Congress has expressly forbidden'" under the NLRA. *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 676 (4th Cir. 2016) (quoting *Graham Oil v. ARCO Prods. Co.*, 43 F.3d 1244, 1249 (9th Cir. 1994)). As explained more fully below, such agreements thus are not entitled to enforcement under the FAA.

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

The Company's principal defense is that the FAA precludes enforcement of the Board's Order barring the prospective waiver of employees' Section 7 right to seek to improve working conditions through collective litigation. But that position contravenes the settled principle that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1972); *see also POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014). As demonstrated below, agreements that are unlawful under the NLRA are exempted from enforcement by the FAA's savings clause. There is thus no difficulty in fully enforcing each statute according to its terms.

Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, *save* upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). That enforcement mandate, with its savings-clause exception, "reflect[s] both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). "[C]ourts must [therefore] place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *Id*.

(internal quotations omitted); *accord Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (FAA's purpose is "to make arbitration agreements as enforceable as other contracts, but not more so").

Pursuant to those core FAA principles, arbitration agreements that violate the NLRA by prospectively barring protected, concerted litigation fit within the savings-clause exception to enforcement. The Board's holding to that effect in *D.R. Horton* and *Murphy Oil*, applied here, implements both the NLRA and the FAA and is consistent with Supreme Court precedent interpreting both statutes.

1. Because an employee cannot prospectively waive Section 7 rights in any contract, the Agreement fits within the FAA's savings-clause exception to enforcement

The FAA's savings clause is an express limitation on the FAA's mandate to enforce arbitration agreements as written and, consequently, on the broad federal policy favoring arbitration. Under the savings clause, general defenses that would serve to nullify any contract also bar enforcement of arbitration agreements. Conversely, defenses that affect only arbitration agreements conflict with the FAA, as do ostensibly general defenses "that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. 339.

One well-established general contract defense is illegality. As the Supreme Court explained in *Kaiser Steel Corp. v. Mullins*, "a federal court has a duty to determine whether a contract violates federal law before enforcing it." 455 U.S.

72, 83-84 (1982). Giving effect to that principle, the Court held that if a contract required an employer to cease doing business with another company in violation of the NLRA, it would be unenforceable. *Id*. at 84-86; *see also Courier-Citizen Co. v. Boston Electrotypers Union No. 11*, 702 F.2d 273, 276 n.6 (1st Cir. 1983) (explaining that "the federal courts may not enforce a contractual provision that violates section 8 of the [NLRA]").

As described above (p. 17-19), the Board, with court approval, has consistently rejected, as unlawful under the NLRA, a variety of individual contracts that are unrelated to arbitration because they prospectively restrict Section 7 rights. *Nat'l Licorice,* 309 U.S. at 360-61, 364. It has set aside settlement agreements that require employees to agree not to engage in concerted protests, *Bon Harbor Nursing & Rehab. Ctr.*, 348 NLRB at 1078; *Bethany Med. Ctr.*, 328 NLRB at 1105-06, and has found unlawful a separation agreement that was conditioned on the departing employee's agreement not to help other employees in workplace disputes, *Ishikawa Gasket Am.*, 337 NLRB at 175-76. The Board has also found waivers of an employee's right to engage in concerted-legal action are unlawful in contracts that do not provide for arbitration. *See Convergys Corp.*, 363 NLRB No. 51, 2015 WL 7750753, at *1 & n.3 (Nov. 30, 2015) (application for employment), *petition for review filed*, 5th Cir. No. 15-60860; *cf. Logisticare Solutions, Inc.*, 383 NLRB No. 85, 2015 WL 9460027, at *1

(Dec. 24, 2015) (employee handbook), *petition for review filed*, 5th Cir. No. 15-60029. That unbroken line of precedent, dating from shortly after the NLRA's enactment, demonstrates that illegality under the NLRA has consistently served to invalidate a variety of contracts, not just arbitration agreements, and does not derive its meaning from arbitration.

Moreover, unlike the courts, whose hostility to arbitration prompted enactment of the FAA, *see Concepcion*, 563 U.S. at 339, the Board harbors no prejudice against arbitration, *see Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 271 (1964) (discussing the Board's policies favoring arbitration as means of peacefully resolving workplace disputes). Nothing in the Board's *D.R. Horton* decision prohibits an employer from requiring arbitration of all *individual* work-related claims; as the Board explained, "[e]mployers remain free to insist that *arbitral* proceedings be conducted on an individual basis." *D.R. Horton*, 357 NLRB at 2288. What violates the NLRA is an agreement that prospectively forecloses the concerted pursuit of work-related claims in any forum, arbitral or judicial. Such an agreement unlawfully restricts employees' Section 7 right to decide for themselves, at the time an actual workplace dispute arises, whether or not to join with others in seeking to enforce their employment rights. *Id.* at 2278-80.

Indeed, consistent with the Board's analysis in *D.R. Horton* and *Murphy Oil*, the Seventh Circuit recently held that arbitration agreements similar to the Company's "meet[] the criteria of the FAA's savings clause for nonenforcement" because they waive employees' Section 7-protected right to engage in concerted action in violation of Section 8(a)(1). *Lewis*, slip op. at 14. In coming to that conclusion, the court agreed with the Board that contracts restricting Section 7 activity are illegal. *Id.* at 10, 14. It also noted that, rather than embodying hostility, the NLRA "does not disfavor arbitration" as a mechanism of dispute resolution. *Id*. at 15-16.

In sum, because the defense that a contract is illegal under the NLRA is unrelated to the fact that an agreement to arbitrate is at issue, that defense falls comfortably within the FAA's savings-clause exception. In other words, the Board's finding that the Company violated the NLRA by maintaining agreements that require arbitration of all work-related claims on an individual basis adheres to the FAA policy of enforcing arbitration agreements on the same terms as other contracts.[8] There is no conflict between either the express statutory requirements,

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[8] Because Section 7 is only implicated when the agreement applies to work-related claims of statutory employees, it poses no impediment to enforcement of arbitration agreements that apply to consumer, commercial, or other non-employment-related claims, or that involve employees exempt from NLRA coverage, such as statutory supervisors or managers. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (age-discrimination claim by manager); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 673 (2012)

or animating policy considerations, of the FAA and NLRA with respect to that unfair-labor-practice.[9]

(consumer claims under Credit Repair Organization Act); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483 (1989) (investor claims under Securities Act).

[9] For that reason, it is unnecessary to reach the question (Br. 17-19) of whether the NLRA clearly contains a "contrary congressional command" overruling the FAA. That inquiry is designed to determine which statutory command controls when another federal statute conflicts with the FAA and the two cannot be reconciled. Here, there is no conflict between the statutes; both can – and should – be given effect. *Morton*, 417 U.S. at 551; *accord Lewis*, slip op. at 13-14 (finding "no conflict between the NLRA and the FAA, let alone an irreconcilable one"). Nevertheless, it is evident that Section 8(a)(1) of the NLRA expressly commands employers not to interfere with their employees' Section 7 right to engage in concerted activity for mutual aid or protection. To the extent an arbitration agreement bars concerted pursuit of claims in any forum, whether arbitral or judicial, its enforcement under the FAA would "inherent[ly] conflict" with those NLRA provisions. *Gilmer*, 500 U.S. at 26.

Likewise, no fair analogy can be drawn to *Hoffman Plastic Compounds, Inc. v. NLRB* and *Sure-Tan, Inc. v. NLRB*, on which the Company relies (Br. 20). Those decisions sought, like the congressional-command cases, to accommodate conflicting federal statutes when both could not be fully effectuated. *See Hoffman Plastic*, 535 U.S. 137, 151 (2002) (reinstating undocumented individuals "would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations"); *Sure-Tan*, 467 U.S. 883, 902-04 (1984) (deeming employees who are unable to gain legal reentry to country "unavailable" for work, tolling backpay). Moreover, the Court in *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, did not accommodate the NLRA to federal antitrust law. It found that the two could be fully effectuated without conflict (as the NLRA and FAA can here). Specifically, the Court held that because an employer-union agreement was not protected by the NLRA, labor law posed no impediment to finding that the agreement violated federal antitrust law. 421 U.S. 616, 633-35 (1975).

2. The Board's *D.R. Horton* and *Murphy Oil* Decisions Are Consistent with the Supreme Court's FAA Jurisprudence

The Company is mistaken in its contention (Br. 8,11) that the Board's position is foreclosed by Supreme Court precedent enforcing agreements that require individual arbitration in other contexts. The Supreme Court has never considered whether agreements requiring individual arbitration must be enforced under the FAA despite the NLRA's protection of the right of statutory employees to pursue work-related claims concertedly. Nor has the Court found enforceable an arbitration agreement that violates a federal statute – as the Agreement violates Section 8(a)(1). For a court to find that a contract that violates the NLRA does not fit within the FAA's savings clause would be to fail to give effect to the settled principle that courts should regard two co-equal statutes as effective. *Morton*, 417 U.S. at 551.

None of the Supreme Court FAA cases that the Company cites (Br. 11, 16, 26-27) involve arbitration agreements that impair core provisions of another federal statute, much less directly violate such a statute. Instead, the Court has enforced arbitration agreements over challenges based on statutory provisions only where the agreements were consistent with the animating purposes of those particular statutes. For example, in *Gilmer v. Interstate/Johnson Lane Corp.*, which involved a challenge to arbitration of claims under the Age Discrimination in Employment Act ("ADEA"), the Court determined that Congress' purpose in

enacting the ADEA was "to prohibit arbitrary age discrimination in employment." 500 U.S. 20, 27 (1991). Because the substantive rights of individual employees to be free of age-based discrimination could be adequately vindicated in individual arbitration, the Court held that an arbitration agreement could be enforced. The Court rejected arguments that ADEA provisions affording a judicial forum and an optional collective-action procedure precluded enforcement of an arbitration agreement, explaining that Congress did not "'intend[] the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum.'" *Id.* at 29 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).[10]

Unlike the statutory provisions at issue in the Supreme Court's FAA cases – where protecting collective action against individual employee waiver is not an objective of the statutes – the NLRA provisions protecting collective action are foundational, underlying the entire architecture of federal labor law and policy. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (characterizing

[10] The Supreme Court has consistently maintained that same analytical focus on statutory purpose when assessing challenges to the enforcement of arbitration agreements based on provisions in other federal statutes. *See, e.g.*, *CompuCredit*, 132 S. Ct. at 671 (judicial-forum provision not "principal substantive provision[]" of Credit Repair Organizations Act); *Rodriguez de Quijas*, 490 U.S. at 481 (judicial-forum and venue provisions in Securities Act not "so critical that they cannot be waived"); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 235-36 (1987) (Exchange Act provision not intended to bar regulation when "chief aim" was to preserve exchanges' power to self-regulate).

the rights protected by Section 7 as "fundamental"). Under the mode of statutory analysis used in cases like *Gilmer*, that is a crucial distinction. As the Board explained in *Murphy Oil*, "[t]he core objective of the [NLRA] is the protection of workers' ability to act in concert, in support of one another." 2014 WL 5465454, at *1; *see also Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (describing NLRA as "designed to … encourag[e] employees to promote their interests *collectively*").

Consistent with the fundamental status of Section 7 – and of particular relevance to the savings-clause inquiry – Section 8 expressly prohibits restriction of Section 7 rights. And other NLRA provisions further demonstrate the central role Section 7 rights play in federal labor policy and the importance of Section 8's proscription of interference with those rights. Section 9 establishes procedures, such as elections and exclusive representation, to implement representational Section 7 rights. 29 U.S.C. § 159. And Section 10 empowers the Board to prevent violations of Section 8. 29 U.S.C. § 160. Thus, the NLRA's various provisions all lead back to Section 7's guarantee of employees' right to join together "to improve terms and conditions of employment or otherwise improve their lot as employees." *Eastex*, 437 U.S. at 565.[11]

[11] The Board's determination that Section 7 is critical to the NLRA is entitled to considerable deference. *See NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (Board has prerogative to define Section 7); *Garner*, 346 U.S. at 490

Indeed, the right to engage in collective action for mutual protection is not only critical to the NLRA, but also a "basic premise" of national labor policy generally. *Murphy Oil*, 2014 WL 5465454, at *1. For example, in the Norris-LaGuardia Act, enacted three years before the NLRA, Congress declared unenforceable "[a]ny undertaking or promise" in conflict with the federal policy of protecting employees' freedom to act concertedly for mutual aid or protection. 29 U.S.C. § 102, 103. Congress also barred judicial restraint of concerted litigation "involving or growing out of any labor dispute" based on employer-employee agreements. 29 U.S.C. § 104.

In sum, unlike in *Gilmer* and similar cases cited by the Company, concerted activity under the NLRA is not merely a procedural means of vindicating a statutory right; it is itself a core, substantive statutory right. And Congress expressly protected that right from employer interference in Section 8(a)(1). Therefore, an arbitration agreement that precludes employees covered by the NLRA from engaging in concerted legal action in any forum is not like a waiver of

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(Board has primary authority to interpret and apply NLRA); *see also City of Arlington*, 133 S. Ct. at 1871 (statutory interpretation within agency's expertise should be accepted unless "foreclose[d]" by the statutory text); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see generally* Note, *Deference and the Federal Arbitration Act: The NLRB's Determination of Substantive Statutory Rights*, 128 HARV. L .REV. 907, 919 (2015) (explaining that "[t]h[e] [FAA] context does not alter the conclusion that … the NLRB's determination is an interpretation of the statute the agency administers and is thus within *Chevron*'s scope").

the optional collective-action mechanisms in statutes like the ADEA or FLSA. Rather, it is akin to a contract providing that employees can be fired on the basis of age contrary to the ADEA, or will not be paid the minimum wage dictated by the FLSA. The Supreme Court has never held that an arbitration agreement may waive such rights or violate the statutes that create and protect them.

The Company's reliance on *Concepcion* (Br. 16-17) is flawed for similar reasons. Unlike the Company's Agreement, the arbitration agreement in that case did not directly violate a co-equal federal law. The rule asserted in *Concepcion* as precluding enforcement of the agreement under the FAA's savings clause was a judicial interpretation of state unconscionability principles. It was intended to ensure prosecution of low-value claims arising under other statutes by enabling consumers to bring them collectively. 563 U.S. at 340.[12] That interpretation barred class-action waivers in most arbitration agreements in consumer contracts of adhesion. Employing a preemption analysis, the Court found that the rule "interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA." *Id.* at 344, 346-52. It found, moreover, that the

[12] Similarly, in *Am. Express Co. v. Italian Colors Restaurant*, the Supreme Court applied *Concepcion* to strike down a federal-court-imposed requirement that collective litigation must be available when individual arbitration would be prohibitively expensive, ensuring an "affordable procedural path" to vindicate claims. 133 S. Ct. 2304, 2308-09 (2013).

unconscionability law was "applied in a fashion that disfavors arbitration." *Id*. at 341.

By contrast, the Board's rule fits within the savings clause because it bars enforcement of arbitration agreements that violate Section 8(a)(1) of the NLRA, a specific federal statutory proscription. The Board's rule is intended to effectuate the NLRA, not to implement non-statutory policies such as the judicially-created policy of facilitating particular claims, low-value or otherwise, brought under other laws. *Cf. Concepcion*, 563 U.S. at 340; *Italian Colors*, 133 S. Ct. at 2312 & n.5. That the Supreme Court declined to read the savings clause as protecting such judicially created defenses, which "stand as an obstacle to the accomplishment of the FAA's objectives," *Concepcion*, 563 U.S. at 343, does not suggest that the savings clause does not encompass a defense of contract illegality based on the NLRA, a co-equal federal law.

Nor has the Board taken aim at arbitration. Rather, it has applied a longstanding NLRA interpretation, endorsed by the Supreme Court, to find unlawful *all* individual contracts, including arbitration agreements, that prospectively waive Section 7 rights in violation of Section 8(a)(1). That illegality defense developed outside of the arbitration context and was recognized by the Board and courts well before the advent of agreements mandating individual

arbitration of employment disputes.[13] Moreover, the Board has not applied the statutory ban on restrictions of Section 7 rights in a manner disproportionately impacting arbitration agreements. *Cf. Concepcion*, 563 U.S. at 342; *see also id*. at 343 ("it is worth noting that California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts"). Indeed, unlike California courts, the Board has never required that an employer allow employees the opportunity to arbitrate as a class. Rather, as noted above, the Board acknowledges an employer's right "to insist that *arbitral* proceedings be conducted on an individual basis," so long as employees remain free to bring concerted actions in another forum.[14] *D.R. Horton*, 357 NLRB at 2288. And, rather than

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[13] It was not until 2001 that the Supreme Court definitively ruled that the FAA applied to employment contracts. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

[14] There is, accordingly, no basis for amicus Chamber of Commerce's claim (Chamber Br. 27) that "faced with the prospect of class arbitration," employers "would simply abandon arbitration altogether – to the detriment of employees, businesses, and the economy as a whole."

To the extent the Chamber maintains (*id*. at 27-30) that arbitration is a better means of resolving workplace disputes for employees, as well as employers, its assumption of the role of "workers' champion" may fairly be viewed with "suspicion." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996). In any event, nothing in the Board's rule precludes employees from making that decision for themselves at the time a claim or grievance arises and collective litigation is a real option. In that context, Section 7 gives employees the right to decide whether to pursue individual arbitration or to forego that advantage in order to benefit other employees or to strengthen the cause of employees generally. *See, e.g., United Servs. Auto Ass'n*, 340 NLRB 784, 792 (2003) (employee opposed employer

being hostile to arbitration as a means of enforcing statutory rights of employees, the Board embraces arbitration as "a central pillar of Federal labor relations policy, and in many different contexts … defers to the arbitration process." *Id*. at 2289 (citing *United Steelworkers of Am. v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 578 (1960)).

The Company thus overreads the Supreme Court's FAA cases as dispositive of the issue here, and as standing for the broad proposition that the FAA demands enforcement of arbitration agreements that violate a co-equal federal statute. *See Alexander v. Sandoval*, 532 U.S. 275, 282-84 (2001) (instructing parties not to treat Supreme Court decisions as authoritative on issues of law Court did not decide). The Fifth Circuit made a similar error in rejecting the Board's rationale in *D.R. Horton*.[15] That court cited prior FAA cases like *Gilmer* for the proposition that

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policy "solely for the benefit of her fellow employees" when she would not personally be affected), *enforced*, 387 F.3d 908 (D.C. Cir. 2004); *Caval Tool Div.*, 331 NLRB 858, 862-63 (2000) ("[A]n employee who espouses the cause of another employee is engaged in concerted activity, protected by Section 7…."), *enforced*, 262 F.3d 184 (2d Cir. 2001); *accord NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-06 (2d Cir. 1942) (worker solidarity established by employees aiding an aggrieved individual who has the only "immediate stake in the outcome" enlarges the power of employees to secure redress for their grievances and "is 'mutual aid' in the most literal sense").

[15] Likewise, other circuits' decisions rejecting the Board's *D.R. Horton* position in non-Board cases overread Supreme Court precedent and reflect a misunderstanding of the Board's position. *See Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013) (finding *Concepcion* resolved savings-clause issue, and FLSA did not contain congressional command barring enforcement of arbitration agreement);

"there is no substantive right to class procedures under the [ADEA]" or "to proceed collectively under the FLSA." 737 F.3d at 357. But those cases do not answer the materially different question of whether the NLRA protects such a right. And the Fifth Circuit's savings-clause analysis relied solely on *Concepcion*, *id.* at 358-60, while failing to recognize the material differences between the Board's application of longstanding NLRA principles and the judge-made California rule in that case. The Seventh Circuit, by contrast, held that *Concepcion* does not govern because, unlike the rule in that case, the Board's "general principle" barring the prospective waiver of Section 7 activity "extends far beyond collective litigation or arbitration" and is not hostile to the arbitral process. *Lewis*, slip op. at 16.

In sum, because a different right is at stake when a statutory employee asserts his Section 7 rights than in any of the Supreme Court cases that have enforced agreements requiring individual arbitration, a different result is warranted. Even in cases brought to vindicate individual workplace rights under

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Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013) (per curiam) (rejecting citation to Board's *D.R. Horton* decision based on *Owen*, without analysis). The Company also cites (Br. 14, 18) *Walthour v. Chipio Windshield Repair, LLC*, but there the court did not reach the NLRA issue. 745 F.3d 1326, 1330 (11th Cir. 2014) (rejecting argument that optional FLSA collective-action provision overrides FAA's enforcement mandate; no NLRA-based argument). None of those decisions address the Board's savings clause argument. District court decisions rejecting the Board's position suffer from the same analytical flaws.

other statutes, employees covered by the NLRA carry into court not only those individual rights but also the separate Section 7 right to act concertedly. Those employees thus may properly be entitled to more relief than plaintiffs who either do not enjoy or fail to assert that additional right.

Prospective waivers of the right to bring concerted legal action are unlawful under the NLRA even if they do not offend the ADEA or other statutes granting individual rights. Just because an employer's action is not prohibited by one statute "does not mean that [it] is immune from attack on other statutory grounds in an appropriate case." *Emporium Capwell*, 420 U.S. at 71-72; *see also New York Shipping Ass'n, Inc. v. Fed. Mar. Comm'n*, 854 F.2d 1338, 1367 (D.C. Cir. 1988) ("[T]here is no anomaly if conduct privileged under one statute is nonetheless condemned by another; we expect persons in a complex regulatory state to conform their behavior to the dictates of many laws, each serving its own special purpose."). The NLRA's protection of, and prohibition on interference with, concerted activity is what distinguishes it from other employment statutes and what renders agreements that require *individual* arbitration unlawful under the NLRA and unenforceable under the FAA.

II. THE COMPANY VIOLATED SECTION 8(a)(1) BY SEEKING ENFORCEMENT OF THE AGREEMENT

Just as an employer violates Section 8(a)(1) by maintaining an agreement that requires its employees to individually arbitrate all employment-related disputes, so too does it violate Section 8(a)(1) by seeking to enforce such an unlawful agreement. Here, the Company enforced the Agreement by filing a motion, in Vogel's collective wage-and-hour lawsuit in California Superior Court, to compel individual arbitration and stay the judicial proceedings. Because, as shown, the Agreement is unlawful under the NLRA, the Board reasonably found (D&O 2), that the Company's efforts to enforce the Agreement violated Section 8(a)(1). Moreover, the Board acted within its broad discretion in devising a remedy for that violation.

A. The Company's Enforcement of the Agreement Is Not Protected Petitioning under the First Amendment

The Board's finding that the Company violated the NLRA by seeking enforcement of the unlawful Agreement does not, contrary to the Company's assertion (Br. 21),[16] deprive the Company of its First Amendment rights. *See Murphy Oil*, 2014 WL 5465454, at *27-28. In *Bill Johnson's Restaurants v. NLRB*, the Supreme Court explained that although the First Amendment's

[16] Although the Company purports to challenge only the Board's remedial choices, its arguments effectively attack the Board's unfair-labor-practice finding.

protection of the right to petition the Government for redress of grievances includes the right of access to the courts, it does not protect petitioning that "has an objective that is illegal under federal law." 461 U.S. 731, 737 n.5 (1983). Under that exception to First Amendment protection, litigation only constitutes an unfair labor practice if, "[o]n the surface," it "seek[s] objectives which [are] illegal under federal law." *Id.* at 236; *see Wright Elec., Inc. v. NLRB*, 200 F.3d 1162, 1166-67 (8th Cir. 2000) (holding Board could enjoin employer's discovery request seeking union-authorization cards in state-court misrepresentation suit because request had illegal objective of interfering with employees' NLRA right to organize). That is true regardless of the merits of the underlying lawsuit. *See Teamsters Local 776 v. NLRB*, 973 F.2d 230, 236 (3d Cir. 1992).[17]

Consequently, under settled law, the Board may restrain litigation that has the illegal objective of enforcing a contract that restricts employees' Section 7 rights, even if the suit is otherwise meritorious. *Id.*; *Truck Drivers, Oil Drivers, Filling Station & Platform Workers' Union Local 705 v. NLRB*, 820 F.2d 448, 452 (D.C. Cir. 1987); *see also Murphy Oil*, 2014 WL 5465454, at *27-28 (and cases

[17] In the absence of an illegal objective, the Board may find a lawsuit unlawful only if it is both objectively baseless *and* subjectively motivated by an unlawful purpose. *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 531 (2002). Although the Company argues (Br. 22-23) that its efforts to enforce the Agreement in the Superior Court did not meet that standard, the Board never reached the issue, having found an illegal objective.

cited therein). Because the Company moved the court to compel individual arbitration – and stay a protected, concerted lawsuit – based on the unlawful Agreement, the Board reasonably found that the Company's efforts had an illegal objective and thus fell outside the protection of the First Amendment.[18]

While the Company "presume[s]" (Br. 21) that the Board would find any violation of the NLRA "constitutes an illegal objective," this is patently false. That argument fails to discern the "subtle" distinction between a lawsuit that is unlawfully motivated under the NLRA, and one that seeks an outcome that is illegal under federal law, regardless of subjective motivation. *Teamsters Local 776*, 973 F.2d at 236. Under the reasoning in *Bill Johnson's*, a party may file a lawsuit with the unlawful subjective intent of retaliating against an employee so long as the (reasonably based) suit pursues a legitimate legal outcome. But filing a suit – or in this case a motion to compel individual arbitration and stay the judicial proceeding – that seeks to achieve an outcome contrary to federal law is subject to

[18] The Company asserts (Br. 23) that its motion cannot be found to have an illegal objective because no circuit court has upheld the Board's position that agreements mandating individual arbitration are unlawful. But that argument disregards the analytical flaws in those decisions. *See* p. __. Whether a favorable court decision precludes a finding of an illegal objective ultimately turns on the correctness of that court decision. *See, e.g., Sheet Metal Workers Int'l Ass'n Local Union No. 27, AFL-CIO v. E.P. Donnelly, Inc.*, 737 F.3d 879, 892-99 (3d Cir. 2013) (upholding the Board's illegal-objective finding and reversing district-court decision finding otherwise).

restraint, regardless of whether it was initiated with a subjectively retaliatory intent.[19]

B. The Company's Challenges to the Remedy Are Unavailing

Equally deficient is the Company's argument (Br. 27-28 & n.7), that the Board exceeded its authority in selecting a remedy for the Company's unlawful motion (i.e., ordering the Company to stop enforcing the Agreement and to pay Vogel's attorneys' fees and litigation expenses incurred in opposing the motion to compel individual arbitration). Section 10(c) empowers the Board to order a party, found to have violated the NLRA, "to take such affirmative action . . . as will effectuate the purposes of the Act." 29 U.S.C. § 160(c). The Board carries out that goal by crafting remedies that provide for "a restoration of the situation, as nearly as possible, to that which would have obtained but for the [unfair labor practice]." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *accord Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 314-15 (D.C. Cir. 2003). "The Board's discretion in

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[19] Nor, contrary to the Company's contention (Br. 24), does the Board's unfair-labor-practice finding impermissibly interfere with the Company's ability to defend itself. Unlike the rulings in the cases the Company cites, allowing a collective FLSA suit to proceed would not resolve the claims against the Company without allowing it an opportunity to address the merits of the allegations against it. *See Nat'l Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 47 (1954) (dismissing appeal for appellant's failure to purge itself of contempt not a due process violation); *Hovey v. Elliott*, 167 U.S. 409, 415-18 (1897) (striking an answer and rendering judgment as punishment for contempt is unconstitutional denial of due process).

fashioning remedies under the [NLRA] is extremely broad and subject to very limited judicial review." *Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 738 (D.C. Cir. 2015); *accord Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964).

It is well within the Board's broad remedial discretion to order reimbursement of fees incurred defending a legal proceeding that is unlawful under the NLRA. *See Fibreboard Paper Prods.*, 379 U.S. at 216 (broad discretion); *Bill Johnson's*, 461 U.S. at 747 ("If [a labor law] violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses."). Indeed, this Court has enforced similar Board orders awarding litigation expenses against parties who have maintained legal actions found to violate the NLRA. *See Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 35 (D.C. Cir. 2001); *Local 32B-32J, Serv. Employees Int'l Union v. NLRB*, 68 F.3d 490, 496 (D.C. Cir.1995). Those cases rebut the Company's unsubstantiated arguments (Br. 28 n.7) that awarding expenses here would interfere with the California Superior Court's authority over Vogel's case, and that the Board only awards such expenses to "discourage frivolous litigation."

Finally, the Board's decision does not, as the Company's asserts (Br. 24-26), create an "untenable framework." The fact that the Board can only remedy unfair-labor-practice violations if a charge is filed, and that only some individuals benefit

from the NLRA's protections, does not serve to invalidate the Board's rule. The NLRA affords statutory employees, but not others (e.g., statutory supervisors and managerial employees), the right to band together for mutual aid or protection. That some employees may not file charges with the Board when their rights are violated, or that supervisors and managers may face restrictions that employers cannot lawfully impose on statutory employees, does not undermine or constrain the Board's power to effectuate the NLRA by remedying unfair labor practices properly brought before it.

CONCLUSION

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

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National Labor Relations Board
May 2016

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PRICE-SIMMS, INC., D/B/A TOYOTA SUNNYVALE	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 15-1457
	*	16-1010
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	32-CA-138015
	*	
Respondent/Cross-Petitioner	*	
	*	
and	*	
	*	
RICHARD VOGEL	*	
	*	
Intervenor	*	
	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 11,037 words of proportionally-spaced, 14-point type and the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
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Dated at Washington, DC
this 27th day of May, 2016

STATUTORY ADDENDUM

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PRICE-SIMMS, INC., D/B/A TOYOTA SUNNYVALE	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 15-1457
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	*	
Respondent/Cross-Petitioner	*	
	*	
and	*	
	*	
RICHARD VOGEL	*	
	*	
Intervenor	*	
	*	

STATUTORY ADDENDUM

National Labor Relations Act, 29 U.S.C. § 151, et. seq.

Section 1 (29 U.S.C. § 151) 2
Section 7 (29 U.S.C. § 157) 2
Section 8(a)(1) (29 U.S.C. § 158(a)(1)) 2
Section 10(a) (29 U.S.C. § 160(a)) 3
Section 10(c) (29 U.S.C. § 160(c)) 3
Section 10(e) (29 U.S.C. § 160(e)) 3
Section 10(f) (29 U.S.C. § 160(f)) 4

Norris-LaGuardia Act, 29 U.S.C. § 101 et. seq.

Section 102 (29 U.S.C. § 102) 4
Section 103 (29 U.S.C. § 103) 5
Section 104 (29 U.S.C. § 104) 6

NATIONAL LABOR RELATIONS ACT

Section 1 of the NLRA (29 U.S.C. § 151): Findings and Policies.

* * *

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 7 of the NLRA (29 U.S.C. § 157): Right of employees as to organization, collective bargaining, etc.

Employees shall have 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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 of the NLRA (29 U.S.C. § 158): Unfair Labor Practices.

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer-

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

Section 10 of the NLRA (29 U.S.C. § 160): Prevention of Unfair Labor Practices.

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. . . .

(c) Reduction of testimony to writing; findings and orders of Board

. . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter . . . .

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there

were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. . . .

NORRIS-LaGUARDIA ACT

Section 102 of the Norris-LaGuardia Act (29 U.S.C. § 102): Public Policy in Labor Matters Declared

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, 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, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

Section 103 of the Norris-LaGuardia Act (29 U.S.C. § 103): Nonenforceability of undertakings in conflict with public policy; "yellow dog" contracts

Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 10 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

Section 104 of the Norris-LaGuardia Act (29 U.S.C. § 104): Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103of this title.

ADDENDUM

***Lewis v. Epic Sys. Corp.*,**
No. 15-2997, slip op. (7th Cir. May 26, 2016)

In the

United States Court of Appeals

For the Seventh Circuit

No. 15-2997

JACOB LEWIS,

Plaintiff-Appellee,

v.

EPIC SYSTEMS CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Wisconsin.
No. 15-cv-82-bbc — **Barbara B. Crabb**, *Judge*.

ARGUED FEBRUARY 12, 2016 — DECIDED MAY 26, 2016

Before WOOD, *Chief Judge*, ROVNER, *Circuit Judge*, and BLAKEY, *District Judge*.*

WOOD, *Chief Judge*. Epic Systems, a health care software company, required certain groups of employees to agree to bring any wage-and-hour claims against the company only through individual arbitration. The agreement did not permit

* Of the Northern District of Illinois, sitting by designation.

collective arbitration or collective action in any other forum. We conclude that this agreement violates the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151, *et seq.*, and is also unenforceable under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1, *et seq*. We therefore affirm the district court's denial of Epic's motion to compel arbitration.

I

On April 2, 2014, Epic Systems sent an email to some of its employees. The email contained an arbitration agreement mandating that wage-and-hour claims could be brought only through individual arbitration and that the employees waived "the right to participate in or receive money or any other relief from any class, collective, or representative proceeding." The agreement included a clause stating that if the "Waiver of Class and Collective Claims" was unenforceable, "any claim brought on a class, collective, or representative action basis must be filed in a court of competent jurisdiction." It also said that employees were "deemed to have accepted this Agreement" if they "continue[d] to work at Epic." Epic gave employees no option to decline if they wanted to keep their jobs. The email requested that recipients review the agreement and acknowledge their agreement by clicking two buttons. The following day, Jacob Lewis, then a "technical writer" at Epic, followed those instructions for registering his agreement.

Later, however, Lewis had a dispute with Epic, and he did not proceed under the arbitration clause. Instead, he sued Epic in federal court, contending that it had violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, *et seq.* and Wisconsin law by misclassifying him and his fellow technical writers and thereby unlawfully depriving them of overtime

pay. Epic moved to dismiss Lewis's claim and compel individual arbitration. Lewis responded that the arbitration clause violated the NLRA because it interfered with employees' right to engage in concerted activities for mutual aid and protection and was therefore unenforceable. The district court agreed and denied Epic's motion. Epic appeals, arguing that the district court erred in declining to enforce the agreement under the FAA. We review *de novo* a district court's decision to deny a motion to compel arbitration. *Gore v. Alltel Commc'ns, LLC*, 666 F.3d 1027, 1033 (7th Cir. 2012).

II

A

Section 7 of the NLRA provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8 enforces Section 7 unconditionally by deeming that it "shall be an unfair labor practice for an employer ... to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." *Id.* § 158(a)(1). The National Labor Relations Board is "empowered ... to prevent any person from engaging in any unfair labor practice ... affecting commerce." *Id.* § 160(a).

Contracts "stipulat[ing] ... the renunciation by the employees of rights guaranteed by the [NLRA]" are unlawful and may be declared to be unenforceable by the Board. *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 365 (1940) ("[I]t will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do

them, would violate the Board's order or be inconsistent with any part of it[.]"); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) ("Wherever private contracts conflict with [the Board's] functions, they obviously must yield or the [NLRA] would be reduced to a futility."). In accordance with this longstanding doctrine, the Board has, "from its earliest days," held that "employer-imposed, individual agreements that purport to restrict Section 7 rights" are unenforceable. *D. R. Horton, Inc.*, 357 N.L.R.B. No. 184 at *5 (2012) (collecting cases as early as 1939), *enf'd in part and granted in part*, *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). It has done so with "uniform judicial approval." *Id.* (citing as examples *NLRB v. Vincennes Steel Corp.*, 117 F.2d 169, 172 (7th Cir. 1941), *NLRB v. Jahn & Ollier Engraving Co.*, 123 F.2d 589, 593 (7th Cir. 1941), and *NLRB v. Adel Clay Products Co.*, 134 F.2d 342 (8th Cir. 1943)).

Section 7's "other concerted activities" have long been held to include "resort to administrative and judicial forums." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978) (collecting cases). Similarly, both courts and the Board have held that filing a collective or class action suit constitutes "concerted activit[y]" under Section 7. See *Brady v. Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under § 7 of the National Labor Relations Act."); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) (same); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (same); *Mohave Elec. Co-op., Inc. v. NLRB*, 206 F.3d 1183, 1189 (D.C. Cir. 2000) (single employee's filing of a judicial petition constituted "concerted action" under NLRA where "supported by fellow employees"); *D. R. Horton*, 357 N.L.R.B. No. 184, at *2 n.4 (collecting cases). This precedent is in line with the Supreme Court's rule

recognizing that even when an employee acts alone, she may "engage in concerted activities" where she "intends to induce group activity" or "acts as a representative of at least one other employee." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 831 (1984).

Section 7's text, history, and purpose support this rule. In evaluating statutory language, a court asks first "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Exelon Generation Co., LLC v. Local 15, Int'l Bhd. of Elec. Workers, AFL-CIO*, 676 F.3d 566, 570 (7th Cir. 2012). In doing so, it "giv[es] the words used their ordinary meaning." *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1165 (2014) (internal citation omitted). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

The NLRA does not define "concerted activities." The ordinary meaning of the word "concerted" is: "jointly arranged, planned, or carried out; coordinated." *Concerted*, NEW OXFORD AMERICAN DICTIONARY 359 (3d ed. 2010). Activities are "thing[s] that a person or group does or has done" or "actions taken by a group in order to achieve their aims." *Id*. at 16. Collective or class legal proceedings fit well within the ordinary understanding of "concerted activities."

The NLRA's history and purpose confirm that the phrase "concerted activities" in Section 7 should be read broadly to include resort to representative, joint, collective, or class legal remedies. (There is no hint that it is limited to actions taken by a formally recognized union.) Congress recognized that, before the NLRA, "a single employee was helpless in dealing

with an employer," and "that union was essential to give laborers opportunity to deal on an equality with their employer." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937). In enacting the NLRA, Congress's purpose was to "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." *City Disposal Systems*, 465 U.S. at 835. Congress gave "no indication that [it] intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way." *Id.*

Collective, representative, and class legal remedies allow employees to band together and thereby equalize bargaining power. See *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 809 (1985) (noting that the class action procedure allows plaintiffs who would otherwise "have no realistic day in court" to enforce their rights); Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941) (noting that class suits allow those "individually in a poor position to seek legal redress" to do so, and that "an effective and inclusive group remedy" is necessary to ensure proper enforcement of rights). Given Section 7's intentionally broad sweep, there is no reason to think that Congress meant to exclude collective remedies from its compass.

Straining to read the term through our most Epic-tinted glasses, "concerted activity" might, at the most, be read as ambiguous as applied to collective lawsuits. But even if Section 7 *were* ambiguous—and it is not—the Board, in accordance with the reasoning above, has interpreted Sections 7 and

8 to prohibit employers from making agreements with individual employees barring access to class or collective remedies. See *D. R. Horton*, 357 N.L.R.B. No. 184, at *5. The Board's interpretations of ambiguous provisions of the NLRA are "entitled to judicial deference." *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992). This Court has held that the Board's views are entitled to *Chevron* deference, see *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998), and the Supreme Court has repeatedly cited *Chevron* in describing its deference to the NLRB's interpretation of the NLRA, see, *e.g.*, *Lechmere*, 502 U.S. at 536; *NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112, 123 (1987). The Board's interpretation is, at a minimum, a sensible way to understand the statutory language, and thus we must follow it.

Epic argues that because the Rule 23 class action procedure did not exist in 1935, when the NLRA was passed, the Act could not have been meant to protect employees' rights to class remedies. See FED. R. CIV. P. 23 (Committee Notes describing the initial 1937 version of the rule and later amendments). We are not persuaded. First, by protecting not only employees' "right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing" but also "*other* concerted activities for the purpose of ... other mutual aid or protection," Section 7's text signals that the activities protected are to be construed broadly. 29 U.S.C. § 157 (emphasis added); see *City Disposal Systems*, 465 U.S. at 835. There is no reason to think that Congress intended the NLRA to protect only "concerted activities" that were available at the time of the NLRA's enactment.

Second, the contract here purports to address *all* collective or representative procedures and remedies, not just class actions. Rule 23 may have been yet to come at the time of the NLRA's passage, but it was not written on a clean slate. Other class and collective procedures had existed for a long time on the equity side of the court: permissive joinder of parties, for instance, had long been part of Anglo-American civil procedure and was encouraged in 19th-century federal courts. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 7 FEDERAL PRACTICE AND PROCEDURE § 1651 (3d ed. 2015) (noting that federal equity courts encouraged permissive joinder of parties as early as 1872). As early as 1853, it was "well established" that representative suits were appropriate "where the parties interested are numerous, and the suit is for an object common to them all." *Smith v. Swormstedt*, 57 U.S. 288, 302 (1853) (allowing representative suit on behalf of more than 1,500 Methodist preachers). In fact, representative and collective legal procedures have been employed since the medieval period. See STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 38 (1987) (discussing group litigation in England occurring as early as 1199 C.E.). The FLSA itself provided for collective and representative actions when it was passed in 1938. See, *e.g.*, *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 390 n.3 (1942) (allowing suits by employees on behalf of "him or themselves and other employees similarly situated" (quoting FLSA, 29 U.S.C. § 216(b))).

Congress was aware of class, representative, and collective legal proceedings when it enacted the NLRA. The plain language of Section 7 encompasses them, and there is no evidence that Congress intended them to be excluded. Section 7's

plain language controls, *GTE Sylvania*, 447 U.S. at 108, and protects collective legal processes. Along with Section 8, it renders unenforceable any contract provision purporting to waive employees' access to such remedies.

B

The question thus becomes whether Epic's arbitration provision impinges on "Section 7 rights." The answer is yes.

In relevant part, the contract states "that covered claims will be arbitrated only on an individual basis," and that employees "waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding." It stipulates that "[n]o party may bring a claim on behalf of other individuals, and any arbitrator hearing [a] claim may not: (i) combine more than one individual's claim or claims into a single case; (ii) participate in or facilitate notification of others of potential claims; or (iii) arbitrate any form of a class, collective or representative proceeding." It notes that "covered claims" include any "claimed violation of wage-and-hour practices or procedures under local, state, or federal statutory or common law." It thus combines two distinct rules: first, any wage-and-hour dispute must be submitted to arbitration rather than pursued in court; and second, no matter where the claim is brought, the plaintiff may not take advantage of any collective procedures available in the tribunal.

Insofar as the second aspect of its provision is concerned, Epic's clause runs straight into the teeth of Section 7. The provision prohibits any collective, representative, or class legal proceeding. Section 7 provides that "[e]mployees shall have the right to ... engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29

U.S.C. § 157. A collective, representative, or class legal proceeding is just such a "concerted activit[y]." See *Eastex*, 437 U.S. at 566; *Brady*, 644 F.3d at 673; *D. R. Horton*, 357 N.L.R.B. No. 184, at *2–3. Under Section 8, any employer action that "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in [Section 7]" constitutes an "unfair labor practice." 29 U.S.C. § 158(a)(1). Contracts that stipulate away employees' Section 7 rights or otherwise require actions unlawful under the NRLA are unenforceable. See *Nat'l Licorice Co.*, 309 U.S. at 361; *D. R. Horton*, 357 N.L.R.B. No. 184, at *5.

We are aware that the circuits have some differences of opinion in this area, although those differences do not affect our analysis here. The Ninth Circuit has held that an arbitration agreement mandating individual arbitration may be enforceable where the employee had the right to opt out of the agreement without penalty, reasoning that the employer therefore did not "interfere with, restrain, or coerce" her in violation of Section 8. *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1077 (9th Cir. 2014). The Ninth Circuit's decision in *Johnmohammadi* conflicts with a much earlier decision from this court, which held that contracts between employers and individual employees that stipulate away Section 7 rights necessarily interfere with employees' exercise of those rights in violation of Section 8. See *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942). *Stone*, which has never been undermined, held that where the "employee was obligated to bargain individually," an arbitration agreement limiting Section 7 rights was a *per se* violation of the NLRA and could not "be legalized by showing the contract was entered into without coercion." *Id.* ("This is the very antithesis of collective bargaining." (citing *NLRB v. Superior Tanning Co.*, 117 F.2d 881, 890 (7th Cir.

1940))). The Board has long held the same. See *D.R. Horton*, 357 N.L.R.B. No. 184, at *5–7 (citing *J. H. Stone & Sons*, 33 N.L.R.B. 1014 (1941) and *Superior Tanning Co.*, 14 N.L.R.B. 942 (1939)). (In *Johnmohammadi*, the Ninth Circuit, without explanation, did not defer to the Board.) We have no need to resolve these differences today, however, because in our case, it is undisputed that assent to Epic's arbitration provision was a condition of continued employment. A contract that limits Section 7 rights that is agreed to as a condition of continued employment qualifies as "interfer[ing] with" or "restrain[ing] ... employees in the exercise" of those rights in violation of Section 8(a)(1). 29 U.S.C. § 157(a)(1).

In short, Sections 7 and 8 of the NLRA render Epic's arbitration provision unenforceable. Even if this were not the case, the Board has found that substantively identical arbitration agreements, agreed to under similar conditions, violate Sections 7 and 8. See *D. R. Horton*, 357 N.L.R.B. No. 184; *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014), *enf'd in part and granted in part*, *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). We conclude that, insofar as it prohibits collective action, Epic's arbitration provision violates Sections 7 and 8 of the NLRA.

III

That would be all that needs to be said, were it not for the Federal Arbitration Act. Epic argues that the FAA overrides the labor law doctrines we have been discussing and entitles it to enforce its arbitration clause in full. Looking at the arbitration agreement, it is not clear to us that the FAA has anything to do with this case. The contract imposes two rules: (1) no collective action, and (2) proceed in arbitration. But it does not stop there. It also states that if the collective-action waiver

is unenforceable, then any collective claim must proceed in court, not arbitration. Since we have concluded in Part II of this opinion that the collective-action waiver is incompatible with the NLRA, we could probably stop here: the contract itself demands that Lewis's claim be brought in a court. Epic, however, contends that we should ignore the contract's saving clause because the FAA trumps the NLRA. In essence, Epic says that even if the NLRA killed off the collective-action waiver, the FAA resuscitates it, and along with it, the rest of the arbitration apparatus. We reject this reading of the two laws.

In relevant part, the FAA provides that any written contract "evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Enacted in "response to judicial hostility to arbitration," *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 668 (2012), its purpose was "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). Federal statutory claims are just as arbitrable as anything else, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit*, 132 S. Ct. at 669 (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)). The FAA's "saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses,' ... but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 563

U.S. 333, 339 (2011) (quoting *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

Epic argues that the NLRA contains no "contrary congressional command" against arbitration, and that the FAA therefore trumps the NLRA. But this argument puts the cart before the horse. Before we rush to decide whether one statute eclipses another, we must stop to see if the two statutes conflict at all. See *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995). In order for there to be a conflict between the NLRA as we have interpreted it and the FAA, the FAA would have to mandate the enforcement of Epic's arbitration clause. As we now explain, it does not.

A

Epic must overcome a heavy presumption to show that the FAA clashes with the NLRA. "[W]hen two statutes are capable of co-existence ... it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Vimar Seguros*, 515 U.S. at 533 (applying canon to find FAA compatible with other statute) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). Moreover, "[w]hen two statutes complement each other"—that is, "each has its own scope and purpose" and imposes "different requirements and protections"—finding that one precludes the other would flout the congressional design. *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014) (internal citations omitted). Courts will harmonize overlapping statutes "so long as each reaches some distinct cases." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 144 (2001). Implied repeal should be found only when there is an "'irreconcilable conflict' between the two federal statutes at issue." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381

(1996) (quoting *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 468 (1982)).

Epic has not carried that burden, because there is no conflict between the NLRA and the FAA, let alone an irreconcilable one. As a general matter, there is "no doubt that illegal promises will not be enforced in cases controlled by the federal law." *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982). The FAA incorporates that principle through its saving clause: it confirms that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Illegality is one of those grounds. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006) (noting that illegality is a ground preventing enforcement under § 2). The NLRA prohibits the enforcement of contract provisions like Epic's, which strip away employees' rights to engage in "concerted activities." Because the provision at issue is unlawful under Section 7 of the NLRA, it is illegal, and meets the criteria of the FAA's saving clause for nonenforcement. Here, the NLRA and FAA work hand in glove.

B

In *D.R. Horton, Inc. v. NLRB*, the Fifth Circuit came to the opposite conclusion.[†] 737 F.3d at 357. Drawing from dicta that first appeared in *Concepcion*, 563 U.S. at 348, and was then repeated in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013), the Fifth Circuit reasoned that because class arbitration sacrifices arbitration's "principal advantage"

[†] Because this opinion would create a conflict in the circuits, we have circulated it to all judges in active service under Circuit Rule 40(e). No judge wished to hear the case en banc.

of informality, "makes the process slower, more costly, and more likely to generate procedural morass than final judgment," "greatly increases risks to defendants," and "is poorly suited to the higher stakes of class litigation," the "effect of requiring class arbitration procedures is to disfavor arbitration." *D.R. Horton*, 737 F.3d at 359 (quoting *Concepcion*, 563 U.S. at 348–52); see also *Italian Colors*, 133 S. Ct. at 2312. The Fifth Circuit suggested that because the FAA "embod[ies] a national policy favoring arbitration and a liberal federal policy favoring arbitration agreements," *Concepcion*, 563 U.S. at 346 (internal quotation marks and citations omitted), any law that even incidentally burdens arbitration—here, Section 7 of the NLRA—necessarily conflicts with the FAA. See *D.R. Horton*, 737 F.3d at 360 ("Requiring a class mechanism is an actual impediment to arbitration and violates the FAA. The saving clause is not a basis for invalidating the waiver of class procedures in the arbitration agreement.").

There are several problems with this logic. First, it makes no effort to harmonize the FAA and NLRA. When addressing the interactions of federal statutes, courts are not supposed to go out *looking* for trouble: they may not "pick and choose among congressional enactments." *Morton*, 417 U.S. at 551. Rather, they must employ a strong presumption that the statutes may both be given effect. See *id.* The savings clause of the FAA ensures that, at least on these facts, there is no irreconcilable conflict between the NLRA and the FAA.

Indeed, finding the NLRA in conflict with the FAA would be ironic considering that the NLRA is in fact *pro*-arbitration: it expressly allows unions and employers to arbitrate disputes between each other, see 29 U.S.C. § 171(b), and to negotiate collective bargaining agreements that require employees to

arbitrate individual employment disputes. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257-58 (2009); *City Disposal Systems*, 465 U.S. at 836–37. The NLRA does not disfavor arbitration; in fact, it is entirely possible that the NLRA would not bar Epic's provision if it were included in a collective bargaining agreement. See *City Disposal Systems*, 465 U.S. at 837. ("[I]f an employer does not wish to tolerate certain methods by which employees invoke their collectively bargained rights, [it] is free to negotiate a provision in [its] collective-bargaining agreement that limits the availability of such methods."). If Epic's provision had permitted collective arbitration, it would not have run afoul of Section 7 either. But it did not, and so it ran up against the substantive right to act collectively that the NLRA gives to employees.

Neither *Concepcion* nor *Italian Colors* goes so far as to say that *anything* that conceivably makes arbitration less attractive automatically conflicts with the FAA, nor does either case hold that an arbitration clause automatically precludes collective action even if it is silent on that point. In *Concepcion*, the Supreme Court found incompatible with the FAA a state law that declared arbitration clauses to be unconscionable for low-value consumer claims. See *Concepcion*, 563 U.S. at 340. The law was directed toward arbitration, and it was hostile to the process. Here, we have nothing of the sort. Instead, we are reconciling two federal statutes, which must be treated on equal footing. The protection for collective action found in the NLRA, moreover, extends far beyond collective litigation or arbitration; it is a general principle that affects countless aspects of the employer/employee relationship.

This case is actually the inverse of *Italian Colors*. There the plaintiffs argued that requiring them to litigate individually

"contravene[d] the policies of the antitrust laws." 133 S. Ct. at 2309. The Court rejected this argument, noting that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." With regard to the enforcement of the antitrust laws, the Court commented that "no legislation pursues its purposes at all costs." *Id.* (quoting *Rodriguez v. United States*, 480 U.S. 522, 525–526 (1987) (per curiam)). In this case, the shoe is on the other foot. The FAA does not "pursue its purposes at all costs"—that is why it contains a saving clause. *Id.* If these statutes are to be harmonized—and according to all the traditional rules of statutory construction, they must be—it is through the FAA's saving clause, which provides for the very situation at hand. Because the NLRA renders Epic's arbitration provision illegal, the FAA does not mandate its enforcement.

We add that even if the dicta from *Concepcion* and *Italian Colors* lent itself to the Fifth Circuit's interpretation, it would not apply here: Sections 7 and 8 do not mandate class arbitration. Indeed, they say nothing about class arbitration, or even arbitration generally. Instead, they broadly restrain *employers* from interfering with employees' engaging in concerted activities. See 29 U.S.C. §§ 157, 158. Sections 7 and 8 stay *Epic's* hand. (This is why, in addition to its being waived, Epic's argument that Lewis relinquished his Section 7 rights fails.) Epic acted unlawfully in attempting to contract with Lewis to waive his Section 7 rights, regardless of whether Lewis agreed to that contract. The very formation of the contract was illegal. See *Italian Colors*, 133 S. Ct. at 2312 (Thomas, J., concurring) (noting, in adopting the narrowest characterization of the FAA's saving clause of any Justice, that defenses to contract formation block an order compelling arbitration under FAA).

Finally, finding the NLRA in conflict with the FAA would render the FAA's saving clause a nullity. See *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (noting the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant"). Illegality is a standard contract defense contemplated by the FAA's saving clause. See *Buckeye Check Cashing*, 546 U.S. at 444. If the NLRA does not render an arbitration provision sufficiently illegal to trigger the saving clause, the saving clause does not mean what it says.

Epic warns us against creating a circuit split, noting that at least two circuits agree with the Fifth. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013) (rejecting argument that there is inherent conflict between NLRA/Norris LaGuardia Act and FAA); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013) (rejecting NLRA-based argument without analysis); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013) (noting "[w]ithout deciding the issue" that a number of courts have "determined that they should not defer to the NLRB's decision in *D.R. Horton*"). Of these courts, however, none has engaged substantively with the relevant arguments.

The FAA contains a general policy "favoring arbitration and a liberal federal policy favoring arbitration agreements." *Concepcion*, 563 U.S. at 346 (internal quotation marks and citations omitted). Its "substantive command" is "that arbitration agreements be treated like all other contracts." See *Buckeye Check Cashing*, 546 U.S. at 447. Its purpose is "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint*, 388 U.S. at 404 n.12 (holding that FAA's

saving clause prevents enforcement of both void and voidable arbitration contracts). "To immunize an arbitration agreement from judicial challenge on" a traditional ground such as illegality "would be to elevate it over other forms of contract—a situation inconsistent with the 'saving clause.'" *Id.* (applying same principle to fraud in the inducement). The FAA therefore renders Epic's arbitration provision unenforceable.

C

Last, Epic contends that even if the NLRA does protect a right to class or collective action, any such right is procedural only, not substantive, and thus the FAA demands enforcement. The right to collective action in section 7 of the NLRA is not, however, merely a procedural one. It instead lies at the heart of the restructuring of employer/employee relationships that Congress meant to achieve in the statute. See *Allen-Bradley Local No. 1111, United Elec., Radio & Mach. Workers of Am. v. Wis. Employ't Relations Bd.*, 315 U.S. 740, 750 (1942) ("[Section 7] guarantees labor its 'fundamental right' to self-organization and collective bargaining." (quoting *Jones & Laughlin Steel*, 301 U.S. 1, 33)); *D. R. Horton*, 357 N.L.R.B. No. 184, at *12 (noting that the Section 7 right to concerted action "is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest"). That Section 7's rights are "substantive" is plain from the structure of the NLRA: Section 7 is the NLRA's *only* substantive provision. Every other provision of the statute serves to enforce the rights Section 7 protects. Compare 29 U.S.C. § 157 with *id.* §§ 151–169. One of those rights is "to engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection," *id.* § 157; "concerted activities" include

collective, representative, and class legal proceedings. See *Eastex*, 437 U.S. at 566; *Brady*, 644 F.3d at 673; *D. R. Horton*, 357 N.L.R.B. No. 184, at *2–3.

The Supreme Court has held that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). (Contrary to the Fifth Circuit's assertion in *D.R. Horton*, the Supreme Court has never held that arbitration does not "deny a party any statutory right." 737 F.3d at 357.)

Arbitration agreements that act as a "prospective waiver of a party's *right to pursue* statutory remedies"—that is, of a substantive right—are not enforceable. *Italian Colors*, 133 S. Ct. at 2310 (quoting *Mitsubishi Motors*, 473 U.S. at 637 n.19). Courts routinely invalidate arbitration provisions that interfere with substantive statutory rights. See, *e.g.*, *McCaskill v. SCI Mgmt. Corp.*, 285 F.3d 623, 626 (7th Cir. 2002) (holding unenforceable arbitration agreement that did not provide for award of attorney fees in accordance with right guaranteed by Title VII); *Kristian v. Comcast Corp.*, 446 F.3d 25, 48 (1st Cir. 2006) (holding unenforceable arbitration provision precluding treble damages available under federal antitrust law); *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 83 (D.C. Cir. 2005) (holding unenforceable and severing clause in arbitration agreement proscribing exemplary and punitive damages available under Title VII); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 (5th Cir. 2003) (same); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 670 (6th Cir. 2003) (holding unenforceable arbitra-

tion agreement that limited remedies under Title VII); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (same).

Epic pushes back with three arguments, but none changes the result. It points out the Federal Rule of Civil Procedure 23 simply creates a procedural device. We have no quarrel with that, but Epic forgets that its clause also prohibits the employees from using *any* collective device, whether in arbitration, outside of any tribunal, or litigation. Rule 23 is not the source of the collective right here; Section 7 of the NLRA is. Epic also notes that courts have held that other employment statutes that provide for Rule 23 class actions do not provide a substantive right to a class action. See, *e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (Age Discrimination in Employment Act (ADEA)); *D.R. Horton*, 737 F.3d at 357 (citing court of appeals cases for FLSA). It bears repeating: just as the NLRA is not Rule 23, it is not the ADEA or the FLSA. While the FLSA and ADEA allow class or collective actions, they do not guarantee collective process. See 29 U.S.C. §§ 216(b), 626. The NLRA does. See *id.* § 157. Epic's third argument is that because Section 7 deals with *how* workers pursue their grievances—through concerted action—it must be procedural. But just because the Section 7 right is associational does not mean that it is not substantive. It would be odd indeed to consider associational rights, such as the one guaranteed by the First Amendment to the U.S. Constitution, nonsubstantive. Moreover, if Congress had meant for Section 7 to cover only "concerted activities" related to collective bargaining, there would have been no need for it to protect employees' "right to ... engage in other concerted activities for the purpose of collective bargaining *or other mutual aid or protection*." 29 U.S.C. § 157 (emphasis added).

IV

Because it precludes employees from seeking any class, collective, or representative remedies to wage-and-hour disputes, Epic's arbitration provision violates Sections 7 and 8 of the NLRA. Nothing in the FAA saves the ban on collective action. The judgment of the district court is therefore AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PRICE-SIMMS, INC., D/B/A TOYOTA SUNNYVALE	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 15-1457
	*	16-1010
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	32-CA-138015
	*	
Respondent/Cross-Petitioner	*	
	*	
and	*	
	*	
RICHARD VOGEL	*	
	*	
Intervenor	*	
	*	

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Dated at Washington, DC
this 27th day of May, 2016