15-2820-cv

United States Court of Appeals

for the

Second Circuit

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

Plaintiffs-Appellants,

– v. –

RAYMOURS FURNITURE COMPANY, INC.,

Defendant-Appellee.

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

BRIEF FOR PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

NLRB DECISIONS

STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

Plaintiffs-Appellants Connie Patterson and David Ambrose appeal from a final judgment entered by the U.S. District Court for the Southern District of New York (Caproni, J.), after that court: 1) granted defendant Raymours Furniture Company, Inc.'s ("Raymours") motion to compel plaintiffs to arbitrate on an *individual* basis their New York Labor Law and Fair Labor Standards Act class and collective action claims, App. A-179, A-213; and 2) dismissed plaintiffs' federal court complaint, App. A-192, A-217.

In this appeal, Patterson raises only a single issue, which is of enormous importance to workers throughout the Second Circuit and the country: Does federal labor law, in particular Sections 7 and 8(a)(1) of the National Labor Relations Act of 1935 ("NLRA"), 29 U.S.C. §§157, 158(a)(1), and/or Sections 2 and 3 of the Norris-LaGuardia Act of 1932 ("NLGA"), 29 U.S.C. §§102, 103, prohibit an employer from implementing a workplace policy (here, in a mandatory, pre-dispute employment arbitration agreement) that prohibits its employees from joining together to pursue legal challenges to the employer's unlawful workplace practices?

In a series of decisions beginning with *D.R. Horton, Inc*., 357 NLRB No. 184, 2012 WL 36274 (2012), *rev'd in part*, 737 F.3d 344 (5th Cir. 2013), the National Labor Relations Board ("NLRB" or "Board") has consistently held that

an employer that prohibits its employees from pursuing legal claims on a concerted action basis by requiring them to arbitrate their claims individually violates the NLRA and the NLGA – two federal labor statutes that enshrine as the core *substantive* principle of federal labor law the right of workers to join together to pursue "concerted activity" for the purpose of "mutual aid or protection."[1]

Although the Fifth Circuit denied enforcement of relevant portions of the Board's *D.R. Horton* and *Murphy Oil* decisions, neither that court nor any other federal appellate court has yet directly addressed the Board's underlying legal analysis. In particular, those courts have failed to: 1) give deference to the Board's construction of its own statute; 2) address the express statutory language and clear statements of federal labor policy set forth in the NLGA; or 3) analyze the impact

[1] *See, e.g.*, *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (2014), *rev'd in part*, No. 14 Civ. 60800, __ F.3d __, 2015 WL 6457613 (5th Cir. Oct. 26, 2015); *Citigroup Tech., Inc.*, 363 NLRB No. 55, 2015 WL 7769422 (2015); *Price-Simms, Inc.*, 363 NLRB No. 52, 2015 WL 7750756 (2015); *U.S. Xpress Enters., Inc.*, 363 NLRB No. 46, 2015 WL 7750745 (2015); *Bristol Farms*, 363 NLRB No. 45, 2015 WL 7568339 (2015); *Amex Card Servs. Co.*, 363 NLRB No. 40, 2015 WL 6957289 (2015); *Hoot Winc, LLC*, 363 NLRB No. 2, 2015 WL 5143098 (2015); *On Assignment Staffing Servs., Inc.*, 362 NLRB No. 189, 2015 WL 5113231 (2015); *Leslie's Poolmart, Inc.*, 362 NLRB No. 184, 2015 WL 5027605 (2015); *PJ Cheese, Inc.*, 362 NLRB No. 177, 2015 WL 5001023 (2015); *Countrywide Fin. Corp.*, 362 NLRB No. 165, 2015 WL 4882655 (2015); *Neiman Marcus Grp., Inc.*, 362 NLRB No. 157, 2015 WL 4647966 (2015); *Chesapeake Energy Corp.*, 362 NLRB No. 80, 2015 WL 1956197 (2015); *Nijjar Realty, Inc.*, 363 NLRB No. 38, 2015 WL 7444737 (2015); *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, 2015 WL 1205241 (2015); *Philmar Care, LLC*, 363 NLRB No. 57, 2015 WL 8732428 (2015); *Kmart Corp.*, No. 363 NLRB No. 66 (Dec. 16, 2015).

of the broad "savings clause" in Section 2 of the 1925 Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, which eliminates any potential conflict between the implied policies of the FAA and the core, substantive right under the 1932 NLGA and 1935 NLRA for workers to pursue legal challenges to workplace practices on a concerted action basis.[2]

For the reasons stated below and in the Board's recent *D.R. Horton* and *Murphy Oil* decisions, an employer violates the NLRA and the NLGA by requiring its employees as a condition of employment to forfeit their substantive right under federal labor law to enforce workplace rights on a concerted action basis. Because

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[2] Several of the Board decisions cited *supra* at 2 n.1, are currently pending before the courts of appeals on cross-petitions for enforcement and review. This same issue has also arisen in a series of class and collective actions similar to this one, in which the employer moved to compel arbitration based on a mandatory arbitration agreement that prohibited all concerted adjudication.

On November 17, 2015, the Ninth Circuit heard oral argument in one of those cases, *Morris v. Ernst & Young LLP*, No. 13-16599 (9th Cir. filed Aug. 7, 2013). This Court was presented with the issue in another such case, *Sutherland v. Ernst & Young*, 726 F.3d 290, 297 n.8 (2d Cir. 2013) (per curiam), but decided that case on other grounds while noting in a footnote its disapproval of the Board's initial *D.R. Horton* ruling (without addressing the NLGA at all, or the substance of the NLRA analysis). *Id.* at *2 n.8; *see infra* at 47-53 (discussing *Sutherland*). The Eighth Circuit also addressed this issue in *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013), but its brief discussion erroneously concluded that the Board's construction of the NLRA is not entitled to *any* deference; that the plaintiff's ability to file administrative charges with the U.S. Department of Labor, Equal Employment Opportunity Commission, and NLRB was legally sufficient to protect all Section 7 rights; and that the FAA was substantively re-enacted in 1947 and therefore trumps the NLGA and NLRA. Each one of these conclusions is wrong for the reasons stated i*nfra* at 15-21, 41-43 & n.16.

defendant Raymours required plaintiff and her co-workers, as a condition of their employment, to waive their right to pursue *any* legal claims in *any* judicial or arbitral forum on a concerted action basis (including as jointly filed, consolidated, opt-in collective, or opt-out class claims), Raymours' compelled waiver violated Sections 7 and 8(a)(1) of the NLRA and Sections 2 and 3 of the NLGA, and is therefore unenforceable as a matter of federal labor law *as well as* being unenforceable under Section 2 of the FAA, 9 U.S.C. § 2. *See infra* at 26-34. Reversal is therefore required, and the case should be remanded to the district court for further proceedings.

STATEMENT OF JURISDICTION

The district court had federal question jurisdiction over plaintiffs' FLSA claims pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over plaintiffs' state law claims pursuant to 28 U.S.C. § 1367.

Plaintiff appeals the district court's Order granting Raymours' Motion to Compel Arbitration of Plaintiff's Individual Claims and to Dismiss the Complaint pursuant to the Federal Arbitration Act. Because the district court entered a final order that disposed of all claims against Raymours, this Court has appellate

jurisdiction pursuant to 9 U.S.C. § 16(a)(3) and 28 U.S.C. § 1291. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89 (2000).[3]

The district court's Order was entered on March 27, 2015. App. A-179. Plaintiff filed timely a Motion for Reconsideration on April 13, 2015, App. A-193, tolling the running of the 30-day period for appeal. F.R.A.P. 4(a)(4)(A)(iv). The district court denied the motion on August 7, 2015. App. A-213. Plaintiffs' Notice of Appeal was timely filed on September 5, 2015. App. A-218.

STATEMENT OF THE ISSUES

Whether an employer violates the NLRA and/or the NLGA by including in a mandatory employment arbitration agreement a clause prohibiting its employees from pursuing legal claims on a joint, collective, class, or other group-action basis; and, if so, whether such an employer-mandated prohibition of the statutory right to engage in "concerted activity" for the purpose of "mutual aid and protection" is unenforceable in federal court.

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[3] The Second Circuit retains jurisdiction over this case even though the clerk of court in the case below apparently did not docket a judgment as a separate document. *See* App. A-5, A-6. Under Fed. R. App. P. 4(a)(7)(A)(ii), a judgment or order is entered for purposes of Rule 4(a) when "150 days have run from entry of the judgment or order in the civil docket" if the court does not set forth the judgment or order in a separate document. Here, the final order completely concluded this case, and the district court ordered the clerk to terminate the docket and close the case. App. A-6 ("The Clerk of the Court is respectfully directed to terminate docket number 28 and to close the case."). Appellants could therefore file their Notice of Appeal within 150 days of the docketing of that final order. A timely motion to reconsider is treated as a Rule 59(e) motion for tolling purposes. *United States ex rel. McAllan v. City of New York*, 248 F.3d 48, 52 (2d Cir. 2001).

STATEMENT OF THE CASE

This is an action for unpaid wages and other employment law violations under the FLSA, 29 U.S.C. § 207(a)(1), and the New York Labor Law ("NYLL"), N.Y. Lab. Law §§191(1)(c), 195(1), 195(3), 650 *et seq.*; N.Y.C.R.R, Part 142-2.2. Plaintiff Connie Patterson brought these claims on her own behalf and on behalf of all similarly situated co-workers whom she sought to represent under Section 16(b) of the FLSA, 29 U.S.C. §216(b), and Fed. R. Civ. P. 23. App. A-7. On August 6, 2014, Patterson's co-worker David Ambrose joined the lawsuit by filing an FLSA consent to sue form. App. A-29. Plaintiffs contended that Raymours misclassified them and all similarly situated Sales Associates, Associates, Home Furnishing Consultants, and other commissioned employees in New York as exempt from the overtime protections of the FLSA and NYLL, and failed to pay them legally mandated overtime premiums despite requiring them to work more than 40 hours per week. App. A-12-15. Plaintiffs also contended that Raymours failed to pay commissions due to its Sales Associates, to provide spread-of-hours pay, to keep accurate records of wages earned and hours worked, and to furnish proper wage notices, wage statements, and commission statements to its Sales Associates in violation of various provisions of the NYLL. *Id*.

The district court dismissed plaintiffs' complaint and compelled plaintiffs to arbitrate their claims individually, based on the clause in Raymours' mandatory

employment arbitration agreement that barred all group legal activity. *Patterson v. Raymours Furniture Co.*, 96 F. Supp. 3d 71 (S.D.N.Y. 2015). The sole question presented on appeal is the legal validity of that order.

STATEMENT OF FACTS

Raymours requires all employees, as a condition of their employment, to be bound by its Employment Arbitration Program ("EAP"), which includes a mandatory pre-dispute employment arbitration agreement that prohibits any form of group or collective arbitration. App. A-53, A-61 (2012 EAP at 57, 65); App. A-132, A-140 (2013 EAP at 58, 66).[4] The agreement broadly defines covered claims to encompass the FLSA and NYLL claims alleged by plaintiffs:

> 'Claim' and 'Claims' mean any employment-related or compensation-related claims, disputes, controversies, or actions between you and us that in any way arise from or relate to your employment with us **and** that are based upon a 'legally protected right.'" . . . Examples of such Claims include . . . failure to pay wages in accordance with law.

App. A-133 (emphases in original). The EAP broadly defines "legally protected right" to include rights under "the federal Fair Labor Standards Act or any state wage and hour laws" and "any other federal, state or local statute, regulation or

[4] The EAP was first introduced in 2012. App. A-35 (McPeak Decl. ¶12). It was revised in 2013, App. A-36 (McPeak Decl. ¶18), but those revisions have no bearing on the "Class Action Waiver" section of the EAP at issue.

common law doctrine regarding . . . payment of salary, wages, [or] commissions." App. A-133-34.

Raymours' EAP expressly precludes covered employees from joining together to pursue any covered workplace claim against Raymours in any forum:

> Claims under this Program cannot be litigated by way of class or collective action. Nor may Claims be arbitrated by way of a class or collective action. All Claims between you and us must be decided individually. This means that, notwithstanding any other provision of this Program, if you or we elect to arbitrate a Claim, neither you nor we will have the right, with respect to that Claim, to do any of the following in court or before an arbitrator under this Program:
>
> - obtain relief from a class action or collective action, either as a class representative, class member or class opponent
> - act as a private attorney general; or
> - join or consolidate your Claim with the Claims of any other person.

App. A-140; *see also* App. A-61. Raymours' EAP thus bans not only class actions, but any and all forms of joint, consolidated, and opt-in collective actions.

To remain employees of Raymours, Plaintiffs had no choice but to accept this waiver of the right to pursue workplace claims on a collective basis. As the EAP states:

> This Program is an essential element of your continued employment relationship with Raymour & Flanigan and is a condition of your employment.

App. A-132; *see also* App. A-79 ("Continuing employment after the issuance of this Handbook (or any subsequent revision) constitutes the associate's agreement to rules, policies, practices and procedures contained herein or therein.").

While this case was pending in district court, Patterson, Ambrose, and other co-workers filed a joint unfair labor practice charge with the NLRB, alleging that Raymours' EAP violated Sections 7 and 8(a)(1) of the NLRA. *Raymour's* [*sic*] *Furniture Co., Inc.*, N.L.R.B. Case No. 02-CA-136163 (filed Sept. 8, 2014). After an investigation, the Board's Regional Director on January 30, 2015 concluded that the charge had merit and issued a Complaint and Notice of Hearing. The parties waived their right to an evidentiary hearing before an administrative law judge and agreed to present the issues directly to the Board on a stipulated record. *See* Joint Motion and Stipulation of Facts and Exhibits to the Board, *Raymour's Furniture Co., Inc.*, N.L.R.B. Case No. 02-CA-136163 (Oct. 27, 2015). That motion remains pending before the Board.

SUMMARY OF ARGUMENT

Defendant Raymours' EAP prohibits all concerted legal activity in violation of its employees' statutory labor law rights under the NLGA and NLRA, substantive federal rights that have been guaranteed since the 1930s. The law has been settled for decades that employees covered by these federal statutes have a federally protected right to engage in "concerted activity" – which the Supreme

Court and other courts have repeatedly held includes concerted *legal* activity. That right to act in concert with fellow workers, by jointly pursuing workplace claims and seeking to represent and be represented by fellow workers, has been a cornerstone of federal labor policy since the start of the New Deal, when Congress enacted the NLGA and NLRA in response to employers' efforts to impose contract terms that stripped workers of the ability to act collectively to address workplace issues of common concern.

The *Lochner*-era days of "liberty of contract" are long since over. The Supreme Court has repeatedly held that private contracts that violate federal labor law rights are unenforceable, no less than any other contract that violates clearly articulated public policy set forth in federal statutes. *See, e.g.*, *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944). Congress itself made clear in the NLGA that "any" contract that violates the policies and rights protected by that Act is unenforceable by "any" court. 29 U.S.C. § 103.

Based on these well-established principles, the Board has repeatedly held in recent years – based on decades of prior precedent – that an employer may *not* subject its employees to any workplace policy or employment agreement that prohibits those employees from pursuing concerted legal action in any and all judicial and arbitral forums. The Board has further explained why its construction

of the "core substantive" federal labor law protections of the NLRA and NLGA does not conflict with any express or implied policies of the FAA; and that even if a conflict did exist between the FAA and the later-enacted NLGA and NLRA, that conflict would have to be resolved in favor of the more recent and specific federal labor statutes, especially given Section 15 of the NLGA, 29 U.S.C. § 115, in which Congress declared, seven years after the enactment of the FAA, that "[a]ll acts and parts of acts in conflict with the provisions of this chapter are repealed."

The Board's construction of Sections 7 and 8(a)(1) of the NLRA is entitled to substantial deference, because Congress vested the Board with primary authority to determine the scope and application of the NLRA. The Board's further conclusion that no actual conflict exists between the NLRA/NLGA and the FAA is correct, even if not entitled to any particular deference, because: 1) the FAA's savings clause, 9 U.S.C. § 2, explicitly provides that private arbitration agreements are generally enforceable *unless* they would be invalid on any "grounds as exist at law or in equity for the revocation of any contract" – which includes invalidity due to a conflict with federal statutory rights; and 2) the Supreme Court has repeatedly held that the FAA's implied policy favoring enforcement of private arbitration agreements does not extend to arbitration provisions that would strip individuals of substantive statutory rights – which includes substantive federal labor law rights.

Finally, even if there were some actual conflict between the federal labor statutes and the FAA, the FAA's implied policy favoring streamlined and efficient dispute resolution would *not* be undermined by permitting employees a judicial or other meaningful forum to pursue class, collective, or other joint claims; and even if it were, that *implied* policy must yield to the express, *core* substantive statutory right to concerted activity that is explicitly guaranteed by the *later-enacted* NLGA and NLRA.

STANDARD OF REVIEW

This Court reviews *de novo* a district court order granting or denying a motion to compel arbitration. *Opals on Ice Lingerie v. Bodylines Inc.*, 320 F.3d 362, 368 n.2 (2d Cir. 2003); *Abram Landau Real Estate v. Bevona*, 123 F.3d 69, 72 (2d Cir. 1997). This appeal therefore raises a pure question of law: whether an employer-imposed, mandatory pre-dispute arbitration policy may prohibit employees from pursuing concerted legal activity to resolve employment-related disputes, in violation of their federally protected statutory right to engage in "concerted activity" for their "mutual aid and protection" under the NLGA and NLRA.

ARGUMENT

I. Employees Have a Substantive Statutory Right Under the NLGA and NLRA to Pursue Workplace Claims on a Concerted Basis

A. The Statutory Origin of the Right to Concerted Legal Action

Since the early 1930s, federal law has guaranteed employees the right to engage in "concerted activity" for the purpose of "mutual aid or protection." This fundamental principle of national labor policy was first established by the NLGA in 1932, when Congress declared as "the public policy of the United States" that individual employees have the right to be "free from the interference, restraint, or coercion of employers" in the "designation of . . . representatives" and "other concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 102. The NLGA also states, unequivocally, that "[a]ny undertaking or promise . . . in conflict with" that policy is "contrary to the public policy of the United States [and] *shall not be enforceable in any court* of the United States . . . ." 29 U.S.C. § 103 (emphasis added); *see also On Assignment Staffing Servs., Inc.*, 2015 WL 5113231, at *10 (describing purpose and scope of NLGA).

The NLGA was enacted in response to employers' then-common practice of requiring workers, as a condition of employment, to submit to contract terms that prohibited them from joining a union (or certain disfavored unions) or from engaging in other group or concerted action to improve workplace conditions. *See Iskanian v. CLS Transp. L.A., LLC*, 59 Cal.4th 348, 397-400 (2014), *cert denied*,

135 S.Ct. 1155 (2015) (Werdegar, J., concurring and dissenting) (describing history of NLGA and explaining that "[e]ight decades ago, Congress made clear that employees have a right to engage in collective action and that contractual clauses purporting to strip them of those rights as a condition of employment are illegal."); *id*. at 399 (quoting the NLGA's co-sponsor, who urged enactment to "end a regime in which 'the laboring man . . . must singly present any grievance he has.'" (Remarks of Sen. Norris, Debate on Sen. No. 935, 72nd Cong., 1st Sess., 75 Cong. Rec. 4504 (1932))); Matthew W. Finkin, "The Meaning and Contemporary Vitality of the Norris LaGuardia Act," 93 Neb. L. Rev. 6 (2014) ("Finkin").

Just three years after Congress enacted the NLGA, it reiterated those central principles of federal labor policy in the NLRA. In the section of the NLRA entitled "*Rights* of employees as to organization, collective bargaining, etc.," Congress expressly guaranteed "[e]mployees . . . *the right* . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection," 29 U.S.C. § 157 (emphasis added); and in the next section, Congress provided that "[i]t 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," 29 U.S.C. § 158(a)(1); *see also Murphy Oil*, 2014 WL 5465454, at *1, *9-*10, *13 (describing statutory basis and history of right to engage in concerted activity). Both Depression-era statutes were enacted to address the enormous

disparity of bargaining power that left individual employees unable to meaningfully improve the terms and conditions of their employment. *See Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 753-54 (1985). As the Supreme Court has explained, the right to engage in concerted activity under Section 7 "[is] protected not for [its] own sake but as an instrument of the national labor policy . . . ." *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975).

When Congress enacted the NLRA, it delegated authority to the Board to construe and apply the Act and to invalidate any employment contract or workplace policy that interfered with the fundamental statutory rights guaranteed by the NLRA. *See NLRB v. Curtin Matheson Sci., Inc.*, 494 U.S. 775, 786 (1990). Any contract or policy that violates these important principles of federal labor law is unenforceable. *See Kaiser Steel*, 455 U.S. at 83 ("It is . . . well established . . . that a federal court has a duty to determine whether a contract violates federal law before enforcing it."); *J.I. Case*, 321 U.S. at 337 (courts may not enforce individual employment contract provisions that violate the NLRA); *see also* 29 U.S.C. §§ 103, 104(d).

B. A Long and Consistent Line of Board and Court Decisions Holds That Employees Have a Substantive Statutory Right to Participate in Concerted Legal Actions to Improve Workplace Conditions

The broad statutory guarantee of the right to engage in collective activity under the NLRA and NLGA, which the Supreme Court has characterized as

"fundamental" to national labor policy, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937), has long been held to protect collective efforts to improve working conditions "through resort to administrative and judicial forums" – *i.e.*, through collective legal action. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978); *see also NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 835 (1984) ("There is no indication that Congress intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way.").

The Board and the courts have thus consistently held that an employee's effort to vindicate workplace rights by pursuing legal claims on a joint, class, or collective action basis constitutes protected concerted activity under federal labor law. *See, e.g.*, *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 [NLRA]"); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365, 1975 WL 6428, at *2-*3 (1975) ("filing of the civil action by a group of employees is protected activity"), *enforced*, 567 F.2d 391 (7th Cir. 1977) (mem. disp.), *cert. denied*, 438 U.S. 914 (1978).[5]

[5] *Accord NLRB v. City Disposal Sys.*, 465 U.S. 822 (collective grievances in arbitration); *Mohave Elec. Co-op., Inc. v. NLRB*, 206 F.3d 1183, 1188-89 (D.C. Cir. 2000) (filing judicial petition "supported by fellow employees and joined by a

The statutory right to engage in collective legal activity is clearly established by these cases. But even if it were not, the Board's consistent construction of Section 7 in the line of cases beginning with *D.R. Horton* should be controlling under settled principles of administrative deference. *See City of Arlington v. FCC*, 133 S.Ct. 1863, 1868-71 (2013) (agency's interpretation of statute within its

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(continued)
co-employee" constitutes protected concerted activity); *United Parcel Serv., Inc.*, 252 NLRB 1015, 1018, 1022 n.26, 1980 WL 12506, at *7, *13 n.26 (1980) ("It is well settled that activities of this nature [filing class action and soliciting support from fellow workers] are concerted, protected activities"), *enforced*, 677 F.2d 421 (6th Cir. 1982); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) (participation in union lawsuit); *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 853-54, 1952 WL 10970, at *2-*4 (1952), *enforced*, 206 F.2d 325, 328 (9th Cir. 1953) (designating employee as co-workers' representative to seek FLSA back wages); *Moss Planing Mill Co.*, 103 NLRB 414, 418-19, 426, 1953 WL 11064, at *3-*4, *10 (1953) (wage-and-hour claim before administrative agency), *enforced*, 206 F.2d 557 (4th Cir. 1953); *Harco Trucking, LLC*, 344 NLRB 478, 479, 481, 2005 WL 762110, at *2, *7, *11 (2005) (former employee engaged in "protected concerted activity" by "filing and maintaining the class action lawsuit against Harco"); *Tri-County Transp., Inc.*, 331 NLRB 1153, 1155, 2000 WL 1258391, at *4-*5 (2000) (three employees engaged in protected activity by filing unemployment claims together); *127 Rest. Corp.*, 331 NLRB 269, 275-76, 2000 WL 718228, at *15-*16 (2000) ("by joining together to file the lawsuit [the 19 employees] engaged in [protected] concerted activity"); *Novotel New York*, 321 NLRB 624, 633, 1996 WL 384240, at *13-*14 (1996) (filing FLSA collective action lawsuit is protected Section 7 activity); *Auto. Club of Mich.*, 231 NLRB 1179, 1181, 1977 WL 9491, at *4 (1977) ("the filing of a civil action by a group of employees against their employer is protected under the Act unless done with malice or in bad faith"); *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-49, 1942 WL 11428, at *5 (1942) (three employees' joint FLSA lawsuit); *see also* cases cited *supra* at 2 n.1.

expertise may be rejected only if "foreclose[d]" by the statutory text); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-45 (1984).

Congress delegated to the Board the task of interpreting and applying the NLRA in furtherance of national labor policy. *See* 29 U.S.C. §§ 153-156. As the Supreme Court reiterated in *City Disposal Systems*, responsibility for construing Section 7 "is for the Board to perform in the first instance," and "on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference." 465 U.S. at 829-30 (citing *Eastex,* 437 U.S. at 568), and *NLRB v. Iron Workers*, 434 U.S. 335, 350 (1978)); *accord Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500-01 (1978). This same degree of deference is owed whether or not the Board is an actual party and whether or not a Board order is directly under review. *See, e.g.*, *Idaho Bldg. & Construct Trades Council AFL-CIO v. Inland Pac. Chapter of Assoc. Builders & Contractors, Inc.*, 801 F.3d 950, 962 (9th Cir. 2015). To ignore "the views of the agencies responsible for enforcing [the statute], would be to 'embar[k] upon a voyage without a compass.'" *Mead Corp v. Tilley*, 490 U.S. 714, 726 (1989).

The Board has repeatedly held that the longstanding "right to engage in collective action – including collective *legal* action – is the *core* substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." *See, e.g.*, *Murphy Oil*, 2014 WL 5465454, at *9 (quoting *D.R.*

Horton, 2012 WL 36274, at *12 (emphasis in original)).[6] That statement is demonstrably true as a historical fact and is fully supported by the plain text of the Act.

The principle that an employer's express prohibition of concerted activity violates federal labor law would be unassailable even if no administrative deference were required.[7] After all, collective action lawsuits, like most collective actions undertaken by workers to protest unfair or unlawful workplace activity, are simply an alternative to economic pressure such as strikes or picketing – the types of disruptive self-help remedies that Congress sought to discourage when it created a federally protected right to engage in concerted activity. *Id.* at *9 (if concerted legal activity were prohibited, "[t]he substantive right at the core of the NLRA

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[6] *See also Murphy Oil*, 2014 WL 5465454, at *1 (Section 7 right to engage in concerted activity is "[t]he core objective of the [NLRA]" and "the basic premise of Federal labor policy"); *id.* at *9 ("[N]ational labor policy . . . is built on the principle that workers may act collectively – at work and in other forums, including the courts – to improve their working conditions."); *id.* at *10.

[7] As the Board noted in *Murphy Oil*, 2014 WL 5465454, at *2 & n.15, the academic commentary has been uniformly supportive of the Board's *D.R. Horton* decision, and has explained in depth the historical underpinnings of the right to concerted legal action guaranteed by the NLGA and NLRA. *See, e.g.*, Finkin, 93 Neb. L. Rev. 6; Note, "Deference and the Federal Arbitration Act," 128 Harv. L. Rev. 907 (2015); Catherine Fisk, "Collective Actions and Joinder of Parties in Arbitration: Implications of *D.R. Horton* and *Concepcion*," 35 Berkeley J. Emp. & Lab. L. 175 (2015); Michael Schwartz, "A Substantive Right to Class Proceedings: The False Conflict Between the FAA and NLRA," 81 Fordham L. Rev. 2945 (2013); Charles A. Sullivan & Timothy P. Glynn, "*Horton* Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution," 64 Ala. L. Rev. 1013 (2013).

would be severely compromised, effectively forcing workers into economically disruptive forms of concerted activity and threatening the sort of 'industrial strife' that Congress recognized as harmful."). Indeed, resort to judicial or arbitral forums presents far less potential for economic and social disruption than undeniably protected concerted activities such as strikes or boycotts. *See id.* at *10.

None of the appellate decisions that have expressed disagreement with or questioned the Board's *D.R. Horton* ruling have taken issue with *this* threshold, but fundamental, aspect of the Board's statutory analysis – that an employer's express ban on a particular category of concerted activity violates the NLRA and NLGA. *See Murphy Oil*, 2015 WL 6457613; *D.R. Horton*, 737 F.3d at 356-57; *Owen*, 702 F.3d 1050, 1053-54 (8th Cir. 2015); *see also Sutherland*, 726 F.3d at 297 n.8. Nor could they, because this first part of the Board's decision is solidly rooted in a long and unbroken line of cases stretching back more than 70 years, in which employees have been held entitled to avail themselves of their Section 7 right to act in concert to seek enforcement of their workplace rights. That exercise of collective legal action is "an effective weapon for obtaining that to which [employees], as individuals, are already 'legally' entitled" but cannot obtain in practice without exerting "group pressure." *Salt River Valley Water Users' Ass'n v. NLRB*, 206 F.2d 325, 328 (9th Cir. 1953).

In short, a condition of employment that strips workers of their right to act together – including an arbitration policy that prohibits all forms of group legal activity in all judicial and arbitral forums – not only deprives those workers of an effective voice, but also deprives them of a core statutory protection in plain derogation of Congress' express, longstanding, and consistently maintained intent.

C. An Employer's Prohibition of Protected Concerted Activity Violates Federal Labor Law and Policy Because it Interferes with, Restrains, and Coerces Employees in the Exercise of Protected Rights

Black-letter law holds that any employer policy or agreement that interferes with, restrains, or coerces employees in their exercise of Section 7 rights constitutes an unfair labor practice under Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), and is therefore unenforceable. *See, e.g.*, *New England Health Care Emp. Union v. NLRB*, 448 F.3d 189, 191 (2d Cir. 2006); *NLRB v. Caval Tool Div.*, 262 F.3d 184, 188 (2d Cir. 2001). The most straightforward violations of Section 8(a)(1) are those in which an employer (like Raymours here) imposes a workplace policy or agreement that "*explicitly* restricts activities protected by Section 7," because such a policy necessarily interferes with, restrains, or coerces employees in the exercise of Section 7 rights. *See, e.g.*, *Martin Luther Mem'l Home, Inc.*, 343 NLRB 646, 646, 2004 WL 2678632, at *1 (2004) (emphasis in original). A mandatory employment arbitration agreement that prohibits employees from initiating, joining, or supporting class or collective actions, like any other contract

or workplace policy prohibiting concerted protected activity, is therefore unlawful on its face, whether that prohibition would be independently unenforceable as a matter of state contract law or not. *See id*. at 646 n.5; *Ashley Furniture Indus. Inc.*, 353 NLRB 649, 653-54, 2008 WL 5427716, at *10-*11 (2008).[8]

For purposes of the NLRA and NLGA, there is no conceptual difference between a mandatory employment agreement that prohibits group activity designed to seek formal adjudication of disputes to improve workplace conditions and a mandatory employment agreement that prohibits other forms of Section 7-protected group activity to improve workplace conditions – such as picketing, strikes, or collective bargaining (all of which are forms of concerted activity that employees could use to pressure an employer to comply with its wage and overtime obligations under state and federal law).

An employer obviously could not evade the requirements of Sections 7 and 8(a)(1) by inserting an otherwise unlawful prohibition against strikes, pickets, or collective bargaining into an arbitration agreement (for example, by stating that the

[8] Even if there were some uncertainty about whether an employer intended its agreement to prohibit the exercise of protected Section 7 rights (*unlike* in this case), the governing inquiry under Section 8(a)(1) would be whether "reasonable employees would construe the language to prohibit Section 7 activity" – which is an alternative basis for establishing Section 8(a)(1) liability. *U-Haul Co. of California*, 347 NLRB 375, 377-78, 2006 WL 1635426, at *5-*6 (2006) (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646); *see also Murphy Oil*, 2014 WL 5465454, at *26.

only permissible procedure for challenging workplace conditions or terms of employment is through individual arbitration). That same principle should fully apply to an employer that tries to nullify the protections of the NLRA and NLGA by requiring individual arbitration in lieu of concerted legal activity. As the Board explained in *Murphy Oil*:

> We doubt seriously . . . that any court, would uphold – or could uphold, consistent with either the NLRA or the [NLGA], with its longstanding prohibition against 'yellow dog' contracts – a mandatory, individual arbitration agreement that compelled employees to give up the right to strike or picket, to hold a march or rally, to sign a petition, or to seek a consumer boycott, as a means to resolve a dispute with their employer over compliance with a federal statute. All of these forms of concerted activity are protected by Section 7, as is concerted legal activity.

2014 WL 5465454, at *10. If Raymours were right that the FAA elevates an employer's right to require individual arbitration over its employees' right to pursue concerted activity under the NLRA and NLGA, it would necessarily follow that an employer could compel individual arbitration of *any* workplace "controversy," thereby precluding its employees from engaging in any form of protected concerted activity related to that controversy – and rendering Section 7 a nullity.

Raymours' EAP violates federal labor law because it prohibits employees from joining together in any judicial and arbitral forum to pursue the adjudication of commonly held workplace rights. The problem is not that Raymours requires

arbitration of workplace disputes; after all, the NLRA and NLGA do not prohibit all mandatory employment arbitration agreements. Nor do the NLRA and NLGA prohibit an employer from requiring individual arbitration of individual workplace disputes *if* the employer also permits its workers to pursue their collective claims in a concerted manner in another comparable forum. *See O'Charley's, Inc.*, Case No. 26-CA-19974, 2001 WL 1155416, at *4 (NLRB GC Div. of Advice Apr. 16, 2001). What the NLRA and NLGA prohibit, as held in a long and unbroken line of cases, is any employer contract or policy that strips workers of their right to engage in concerted legal activity in *every* judicial or arbitral forum. "Mandatory arbitration agreements that bar employees from bringing joint, class, or collective workplace claims in any forum restrict the exercise of the *substantive* right to act concertedly for mutual aid or protection that is central to the National Labor Relations Act." *Murphy Oil*, 2014 WL 5465454, at *6 (emphasis in original); *see also D.R. Horton*, 737 F.3d at 364 (Graves, J., dissenting) ("I agree with the Board that the [arbitration agreement] interferes with the exercise of employees' substantive rights under Section 7 of the NLRA.").[9]

[9] It bears emphasis that the NLRA and NLGA right at issue is the right to *initiate* a class, collective or other form of concerted legal action – *i.e.,* to be able to present the case for joinder, consolidation, or class certification – not the right to *obtain* an order of joinder, consolidation, or certification. What is illegal under federal labor law is a policy that prohibits employees as a threshold matter from having the opportunity to pursue group relief under the same rules that would have applied in the absence of the employer's unlawful prohibitory policy. *See Murphy*

Patterson sought to exercise her and her co-workers' Section 7 right to pursue workplace claims in concert when she initiated this lawsuit, just as her co-plaintiff, David Ambrose, sought to exercise those rights when he filed his FLSA consent to sue form. App. A-29; *see Brady*, 644 F.3d at 673 ("[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 [NLRA].") (emphasis in original); *Murphy Oil*, 2014 WL 5465454, at *16 ("[C]oncerted activity includes cases 'where individual employees seek to initiate or to induce or to prepare for group action . . . .'") (quoting *Meyers Indus.*, 281 NLRB 882, 887, 1986 WL 54414, at *7 (1986)). Because Raymours' mandatory arbitration agreement "*explicitly* restricts activities protected by Section 7," it necessarily violates Section 8(a)(1) of the NLRA. *Martin Luther Mem'l Home, Inc.*, 343 NLRB at 646 (emphasis in original).[10]

(continued)
Oil, 2014 WL 5465454, at *22 ("[T]he NLRA does not create a right to class certification or the equivalent; rather, it creates a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint.") (emphasis in original); *D.R. Horton*, 2012 WL 36274, at *12.

[10] Although the prohibition of protected activity by itself is enough to violate federal labor law, *see supra* at 21-23, the unlawful coercive effect of Raymours' prohibition is particularly severe because the company not only prohibits its employees from exercising protected statutory rights, but it also retains the right to subject its employees to discipline – up to and including termination – for violating workplace policies and rules, which necessarily includes taking steps to engage in

II. The Statutory Right to Engage in Concerted Legal Activity Does Not Conflict With Federal Arbitration Policy

The Fifth and Eighth Circuits both assumed, without explanation, that if a clause in an employer's mandatory arbitration agreement were found unlawful under federal labor law, a conflict would exist between those federal labor laws and the FAA. *See D.R. Horton*, 737 F.3d at 359; *Murphy Oil*, 2015 WL 6457613, at *4-*5; *Owen*, 702 F.3d at 1053-54. But neither court responded to the Board's explanation of why those statutory schemes are not in conflict.

The portion of the Board's analysis that describes the interaction between the federal labor statutes and the FAA does not require the same deference as the portion addressing the scope and application of Sections 7 and 8(a)(1) of the NLRA. Nonetheless, a clear-eyed reading of the statutory language shows that the Board got it exactly right, because there is no actual conflict between the two sets of statutes.

A. The FAA's Savings Clause Does Not Permit Enforcement of an Agreement That Violates NLRA or NLGA Rights Because under that Savings Clause, Contracts that Violate Clearly Articulated Public Policies Are Void and Unenforceable

The first reason no conflict exists between the express, substantive rights created by the NLRA and NLGA and the implied protections of the FAA is

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(continued)
concerted activity in violation of Raymours' unlawful workplace policy. App. A-147-49, A-152.

because the FAA's "savings clause," 9 U.S.C. § 2, carves out an express exception from the general rule that private arbitration agreements are judicially enforceable. Under Section 2 of the FAA, an arbitration agreement, like any other contract, is *not* enforceable if any "grounds . . . exist at law or in equity for [its] revocation . . . ." 9 U.S.C. § 2; *see also Murphy Oil*, 2014 WL 5465454, at *7; *D.R. Horton*, 2012 WL 36274, at *11-*12.

Contracts that violate expressly stated public policy have always been void and unenforceable. *See, e.g.*, *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987); *United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 28 (2d Cir. 1989). Any contract term that violates the NLRA and/or NLGA is therefore invalid, both as a matter of national labor policy and under the specific provisions of the NLGA. *See, e.g.*, *Kaiser Steel*, 455 U.S. at 83 ("It is . . . well established . . . that a federal court has a duty to determine whether a contract violates federal law before enforcing it."); *J.I. Case*, 321 U.S. at 337 (courts may not enforce individual employment contract provisions that violate the NLRA); 29 U.S.C. § 103. Because the FAA's implied policy favoring enforcement of arbitration agreements does *not* apply to provisions that would be void as a matter of clearly articulated public policy if not contained in an arbitration agreement, there is no conflict between the NLRA/NLGA and the FAA. The FAA itself declares that those terms are not enforceable.

Section 2 of the FAA thus eliminates the potential conflict between the two sets of statutory rights. Nothing in the language or underlying purposes of the FAA requires courts to enforce an otherwise unlawful contract term simply because it has been incorporated into an arbitration agreement rather than some other type of agreement. After all, "the purpose of Congress [in enacting the FAA] was to make arbitration agreements as enforceable as other contracts, but not more so. To immunize an arbitration agreement from judicial challenge [on grounds applicable to other contracts] would be to elevate it over other forms of contract – a situation inconsistent with the 'saving clause.'" *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). The Board in *Murphy Oil* made this same point, noting that one reason its analysis is fully consistent with the FAA is because it "treats an arbitration agreement no less favorably than any other private contract that conflicts with federal law." 2014 WL 5465454, at *7.

There is no logical reason why an employer should be able to avoid invalidation of an otherwise unlawful prohibition against concerted action simply by incorporating that prohibition into a mandatory arbitration agreement. In *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), the Supreme Court held that contracts that "forbid," or even "discourage," employees from presenting grievances collectively "or in any way except personally" were unenforceable and a "continuing means of thwarting the policy of the Act." *Id*. at 360-61. Thus, if an

employer adopts a naked, stand-alone policy, separate and apart from any arbitration agreement that prohibits its employees from engaging in concerted legal activity – *e.g.*, "No employee may file a legal claim in any judicial or arbitral forum except on an individual basis" – that prohibition would unquestionably violate the NLRA and NLGA, and would for that reason be unenforceable. *See Murphy Oil*, 2014 WL 5465454 at *11 (citing *J.I. Case*, 321 U.S. 332, and *Nat'l Licorice*, 309 U.S. at 364). Indeed, an agreement having precisely that effect was held unenforceable by the court in *Grant v. Convergys Corp.*, No. 12 Civ. 496 (CEJ), 2013 WL 781898 (E.D. Mo. Mar. 1, 2013), and by the Board in *Convergys Corp.*, 363 NLRB No. 51, 2015 WL 7750753 (2015).[11]

Those same labor law principles apply whether the employer announces its unlawful prohibition as a stand-alone policy or incorporates it into a mandatory arbitration agreement. No one could seriously argue that Raymours could impose a workplace policy prohibiting its employees from engaging in strikes, slow

[11] A long line of Board cases similarly holds that an employer violates the NLRA by entering into contracts with its employees that require them to adjust their grievances individually, rather than concertedly, even when those contracts are "entered into without coercion." *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942); *see also NLRB v. Port Gibson Veneer & Box Co.*, 167 F.2d 144, 146 (5th Cir. 1948) (employers "may not require individual employees to sign employment contracts which, though not unlawful in their terms, are used to deter self-organization"). There is nothing arbitration-specific in the Board's analysis. *Cf. DirecTV, Inc. v. Imburgia*, No. 14-462, __ S.Ct. __, 2015 WL 8546242 (Dec. 14, 2015) (invalidating state court's construction of contract on implied preemption grounds because it treated arbitration contracts differently than other contracts).

downs, or group protests as a means of pressuring it to favorably resolve a workplace dispute. The result would be no different if, instead, Raymours inserted the identical prohibition in an agreement that required "arbitration" of any such dispute and prohibited these other forms of concerted protected activity. After all, employer-mandated agreements requiring workers to contract away their right to act in concert – not just the right to join a union, but the right to engage in any group activity to obtain or protect workplace rights – were one of the principal targets of the NLGA's drafters, and one of the principal purposes of the NLGA was to prohibit *all* such rights-stripping agreements. *See* S. Rep. No. 163, 72nd Cong., 1st Sess. at 9-16 (1932); H.R. Rep. No. 669, 72d Cong., 1st Sess., at 6 (1932).

B. Arbitration Agreements May Not Prevent Parties From Exercising Substantive Statutory Rights

The second reason no conflict exists between the FAA and the NLRA and NLGA is because, as the Supreme Court has repeatedly held (consistent with FAA § 2), any federal policy favoring enforcement of private arbitration agreements must yield to the extent the agreement prevents a claimant from exercising substantive statutory rights.

From *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S 614, 628 (1985), through *American Express v. Italian Colors*, 133 S.Ct. 2304 (2013), a constant theme underlying the Supreme Court's arbitration jurisprudence

has been "that '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute . . . .'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi*, 473 U.S at 628). In determining whether a right is substantive for purposes of the FAA, courts are required to consider to the statutory text and the Congressional purpose. *Id.* at 27-28. To be sure, several courts have held that the rights established by statutes such as the FLSA, the ADEA, and Title VII do not confer a substantive right to proceed collectively. *See, e.g.*, *Gilmer*, 500 U.S. at 32; *Sutherland*, 726 F.3d at 296-97. But those cases say nothing about the nature of the substantive right to engage in concerted activity that is guaranteed by the NLGA and NLRA.[12]

The statutory labor law right of employees to pursue concerted legal activity *is* a substantive right, as the Board has repeatedly concluded. *See* "Deference and the Federal Arbitration Act," 128 Harv. L. Rev. at 913 nn.56-57. It is not simply a

[12] The Supreme Court's decision in *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012), is not to the contrary. *See Murphy Oil*, 2014 WL 5465454, at *12 & nn.51, 53 (discussing *CompuCredit*). The issue in *CompuCredit* was whether a consumer credit company could enforce an arbitration agreement that encompassed statutory claims arising under the Credit Repair Organization Act, 15 U.S.C. § 1679. That case addressed an entirely different issue: not what rights are created by federal statute, but whether Congress intended to preclude arbitration of those rights. 132 S.Ct. at 669-70. Although the *CompuCredit* decision might apply where the issue is whether Congress intended to bar employees from waiving their right to file an unfair labor practice charge with the NLRB, it has no bearing on the question of whether the federal labor statutes create a substantive right to engage in concerted legal activity or whether any such right is trumped by the FAA.

procedural mechanism derived from the joinder provisions of FLSA or from Rules 20 or 23 of the Federal Rules of Civil Procedure, but is a substantive right guaranteed by Section 7 of the NLRA and Section 2 of the NLGA. 29 U.S.C. §§ 102, 103, 157, 158(a)(1). Those statutes protect concerted activity regardless of form or forum; petitioning a court is no less protected than joining a union or striking. *City Disposal Sys.*, 465 U.S. at 835; *Eastex*, 437 U.S. at 565-66. Indeed, the right to engage in concerted activity for mutual aid and protection (including concerted legal activity) has been the "core substantive" right protected by federal labor law since the 1930s, *see infra* at 43-47, and no Supreme Court case permits forced waiver of such a substantive right. *See, e.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) ("[A] substantive waiver of federally protected civil rights will not be upheld.").

Under federal labor law, an employer can no more prohibit its workers from joining together to pursue workplace rights through legal activity than it can prohibit them from joining a union – or joining together to protest workplace discrimination. The same federal labor law prohibitions against "yellow dog" contracts that require invalidation of an employee's agreement to forego union activity or other common pursuit of improved workplace conditions also require invalidation of any agreement that "purport[s] to restrict employees' Section 7

rights, including agreements that require employees to pursue claims against their employer individually . . . ." *Murphy Oil*, 2014 WL 5465454, at *6.[13]

Although the Supreme Court in *Italian Colors* allowed the enforcement of a class action prohibition in a case between two businesses (*i.e.*, not an employment case), the Court's reasoning fully supports plaintiffs' position here. In *Italian Colors*, the Supreme Court reversed a lower court ruling that had invalidated a class action prohibition in a mandatory arbitration agreement that made it too costly for plaintiffs to effectively vindicate their statutory antitrust rights. 133 S.Ct. at 2312. The Court distinguished between arbitration rules that make it *impractical* to pursue (or "effectively vindicate") statutory rights, and arbitration rules that erect barriers that *actually* preclude the assertion of statutory rights (such as excessive filing fees or substantive right prohibitions). *Id.* at 2310. The Court

[13] *See Eddyleon Chocolate Co.*, 301 NLRB 887, 887, 1991 WL 46146, at *1 (1991) ("yellow dog" contracts and their solicitation are barred under the NLRA); *First Legal Support Servs.*, 342 NLRB 350, 362-63, 2004 WL 1509036, at *24 (2004) (describing history of yellow dog contracts); *see also Extendicare Homes*, 348 NLRB 1062, 1062, 2006 WL 3225087, at *1-*2 (2006) (employer cannot lawfully condition return to work on a promise not to engage in Section 7 activity); *Bethany Med. Ctr.*, 328 NLRB 1094, 1095, 1999 WL 596222, at *3 (1999) (ordering employer to cease and desist from requiring employees to waive right to engage in concerted activity as condition of rehire); *Carlisle Lumber Co.*, 2 NLRB 248, 266, 1936 WL 7766, at *13-*14 (1936), *enforced as mod. on other grounds*, 94 F.2d 138 (9th Cir. 1937), *cert. denied*, 304 U.S. 575 (1938) (employer who refuses to hire union employees unless they renounce union membership "has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act").

stated that the latter set of rules "would certainly" be invalid because they would effect a "'prospective waiver of a party's *right to pursue* statutory remedies.'" *Id*. (quoting *Mitsubishi*, 473 U.S. at 637 n.19 (emphasis in original)). *Italian Colors* simply reaffirmed in a different context the distinction drawn long ago in *Gilmer*, 500 U.S. at 20, between procedural forum waivers that are enforceable under the FAA and prospective waivers of substantive rights that are not enforceable. The statutory labor law rights at issue in this case fall squarely within the latter category.

III. Even if There Were a Conflict Between Section 7 and the FAA, That Conflict Must be Resolved in Favor of the Federal Labor Statutes

Under established Supreme Court precedent, courts must construe federal statutes to avoid potential inter-statutory conflicts, and express language in the FAA, NLGA, and NLRA makes clear that such construction is possible here. Nonetheless, if there were a conflict, it would have to be resolved in favor of the federal labor statutes: first, because the NLRA and NLGA were enacted *after* the FAA; and second, because the right to engage in concerted activity plays a far more central role in the NLRA and NLGA statutory schemes than the FAA's more limited policy favoring enforcement of private arbitration agreements (which is subject to the exceptions set forth in FAA § 2).

A. Supremacy Clause Preemption Principles Have No Application to Issues Involving Potential Conflicts Between Federal Statutes

We begin by emphasizing what analysis is required when a potential conflict arises between two federal statutes. Although some courts have held that the Board's decisions are inconsistent with the Supreme Court's reasoning in *AT&T Mobility, Inc. v. Concepcion*, 563 U.S. 333 (2011), *Concepcion* was an implied preemption case under the Supremacy Clause, involving a potential conflict between the FAA and *state law*. *See, e.g.*, *D.R. Horton*, 737 F.3d at 359-60 (citing *Concepcion*, 563 U.S. at 339-50); *Owen*, 702 F.3d at 1054 (citing *Concepcion*, 563 U.S. 333). An entirely different type of analysis is required when two sets of *federal* statutes are said to be in conflict.

The issue in *Concepcion* was whether the FAA impliedly preempted a state law rule invalidating a clause in AT&T's customer arbitration agreement that prohibited consumer class actions. Under the implied preemption analysis applied by the Court, the inquiry was whether application of that state law rule "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the federal arbitration statute. *Concepcion*, 563 U.S. 352 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (internal quotation marks omitted).

That doctrine of implied preemption was the sole basis for decision in *Concepcion*, yet that doctrine has no application to disputes over the primacy of one set of federal statutes versus another:

> In pre-emption cases, the question is whether state law is pre-empted by a federal statute, or in some instances, a federal agency action. . . . This case, however, concerns the alleged preclusion of a cause of action under one federal statute by the provisions of another federal statute. So the state-federal balance does not frame the inquiry. . . .

POM Wonderful LLC v. Coca-Cola Co., 134 S.Ct. 2228, 2236 (2014).

The preemption doctrine only applies under the Supremacy Clause when a conflict exists between federal law and inconsistent *state* law. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Concepcion*, 563 U.S. at 336 ("We consider whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures"); *DirecTV*, 2015 WL 8546242, at *7. One federal statute (like the FAA) cannot preempt another federal statute (like the NLRA or NLGA) even if an actual, direct conflict exists. *See Baker v. IBP, Inc.*, 357 F.3d 685, 688 (7th Cir. 2004); *Felt v. Atchison, Topeka, & Santa Fe Ry. Co.*, 60 F.3d 1416, 1418-19 (9th Cir. 1995); *see also DeSilva v. N. Shore-Long Island Jewish Health Sys. Inc.*, 770 F. Supp. 2d 497, 511 n.6 (E.D.N.Y. 2011) (discussing imprecise use of term "preempt").

Where a case involves two federal statutes and a question arises concerning a potential conflict, the relevant inquiry is one of "implied repeal" – whether Congress intended to repeal part or all of a previously enacted statute as a result of its enactment of a subsequent, inconsistent statute. Findings of implied repeal are highly disfavored and may never be presumed. *See, e.g.*, *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Intern., Inc.*, 534 U.S. 124, 142 (2001) ("stringent" standard requires "irreconcilable conflict"); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (intention must be "clear and manifest"). Even when two federal statutes cover the same subject, "the rule is to give effect to both if possible." *Borden*, 308 U.S. at 198; *see also Murphy Oil*, 2014 WL 5465454, at *9 ("[T]he Board, like the courts, must carefully accommodate *both* the NLRA and the FAA.") (emphasis in original).

The proper analysis for this appeal, then, must focus on whether any actual conflict exists between the federal labor law rights identified by the Board (and the decades of consistent case law that it relies upon) and the policies of the FAA identified in *Concepcion* (and more recently, *Italian Colors*, 133 S.Ct. 2304 (2013), discussed *supra* at 33-34). Because of the Section 2 savings clause discussed *supra* at 26-30, no such conflict exists. But even if there were a conflict, the statutory schemes can be readily reconciled while giving full effect to Congress' intent and the applicable rules of statutory construction. *See Murphy*

Oil, 2014 WL 5465454, at *6-*7; *see also D.R. Horton*, 737 F.3d at 364-65 (Graves, J., dissenting).

B. The Balance Struck by the Board Accommodates the Federal Labor Statutes and the FAA

Arbitration under the FAA is designed to be a flexible dispute-resolution procedure, elastic enough to allow resolution of all manner of claims, including employment law claims filed on behalf of two or more employees. While class arbitrations are now common,[14] jointly filed and other multiparty proceedings have been routine in arbitration for decades and are entirely consistent with the traditional arbitration model. After all, disputes arising under labor-management collective bargaining agreements have long been arbitrated on a representative basis on behalf of all employees in the affected bargaining unit.[15] And the Supreme Court has expressly acknowledged on several occasions (including in *Concepcion* itself) that *consensual* Rule 23 class arbitration remains permitted

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[14] *See* https://www.adr.org/aaa/faces/services/disputeresolutionservices (Class Arbitration Case Docket) (last visited Dec. 18, 2015).

[15] *See also Great W. Ins. Co. v. United States*, 19 Ct.Cl. 206, 215-16, *aff'd*, 112 U.S. 193 (1884) (referring to post-Civil War "tribunal of arbitration" that considered "'all the claims growing out of acts committed'" by Confederate ships launched from ports in Great Britain); *Southern Commc'ns Serv., Inc. v. Thomas*, 720 F.3d 1352 (11th Cir. 2013), *cert. denied*, 134 S.Ct. 1001 (2014) (decision that contract permitted class arbitration did not exceed arbitrator's powers); *Donahue v. Susquehanna Collieries Co.*, 138 F.2d 3 (3d Cir. 1943) (staying court proceedings pending arbitration of FLSA collective action); *Smith & Wollensky Rest. Grp., Inc. v. Passow*, 831 F. Supp. 2d 390, 392 (D. Mass. 2011) (upholding arbitrator's decision that arbitration could proceed as class action).

under the FAA, meaning there is no irreconcilable conflict between class and collective actions and arbitration. *See, e.g.*, *Concepcion*, 563 U.S. at 334, 346-49; *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 450-52 (2003).

Even if concerted legal action were fundamentally incompatible with arbitration (which it is not for the reasons stated *supra* at 38-39), and even if it were not clear that the core labor law rights guaranteed by the later-enacted NLGA and NLRA would take precedence over the FAA in the event of a true statutory conflict (for the reasons stated *infra* at 41-47), both sets of statutory provisions can be reconciled in this case by invalidating Raymours' unlawful arbitration agreement only in part. The reason Raymours' arbitration agreement violates federal labor law is *not* because it mandates arbitration, but because it prohibits employees from concertedly pursuing legal challenges to workplace practices in every forum. By striking only that unlawful provision, the Court could preserve plaintiffs' federal labor law rights while still allowing Raymours to require arbitration of its employees' individual claims. Indeed, that is precisely how employment arbitration is structured in the financial services industry under the Financial Industry Regulatory Authority ("FINRA") regulations, which mandate arbitration of individual claims but permit litigation in court of all class action claims. *See* FINRA Rule 13204(a)(1) and (2) (prohibiting arbitration of class actions, while preserving judicial forum for claims pleaded as class actions); *In re*

Lehman Bros. Sec. and ERISA Litig., No. 09 MD 2017(LAK), 2013 WL 440622, at *5 (S.D.N.Y. Jan 23, 2013).

Under the Board's *D.R. Horton* line of decisions, an employer that wishes to compel arbitration of workplace disputes *may* prohibit concerted actions in arbitration as long as it allows those concerted actions to be pursued in court. This approach fully "accommodates" the various statutory policies by not precluding arbitration, while ensuring that an employer's contractual prohibition of concerted legal activity that would be contrary to public policy outside the arbitration context is not treated any differently simply because it has been incorporated into an arbitration agreement. *See Murphy Oil*, 2014 WL 5465454, at *9, *12, *20-21.

For this reason, *even if* Section 2 of the FAA did not resolve any potential conflict between federal labor and arbitration law, and *even if* the NLRA and NLGA did not create a "substantive" right to engage in concerted legal activity, the Board's approach properly reconciles any protected statutory conflicts by invalidating the sweeping prohibition of *all* concerted legal activity while still permitting the company to require arbitration of workplace disputes. *See Murphy Oil*, 2014 WL 5465454, at *9, *13, *20-22; *In re DR Horton*, 2012 WL 36274, at *10 (citing *Southern Steamship Co.,* 316 U.S. 31, 47 (1942); *Direct Press Modern*

Litho, 328 NLRB 860, 861, 1999 WL 454367, at *2-*3 (1999); *Image Sys.*, 285 NLRB 370, 371, 1999 WL 454367, at *2 (1987)).[16]

C. In Case of Actual Conflict, the Later-Enacted NLGA and NLRA Must Supersede any Contrary Implied Policy of the FAA

Nothing in the FAA states, or even suggests, that Congress intended the FAA to be used to prevent workers from pursuing workplace claims in concert with their co-workers, or from designating a co-worker as their representative (including as their class or collective action representative) – the central substantive rights that Congress enshrined in the 1932 NLGA and the 1935 NLRA. Certainly the 1925 FAA did not repeal *in advance* the fundamental labor law right

[16] Although the Eighth Circuit in *Owen* suggested that Section 7 rights might be sufficiently protected by an arbitration agreement that allowed administrative claims to be filed with the NLRB or other agencies, 702 F.3d at 1054, it is settled that an employer may not justify its elimination of an existing category of concerted action rights under § 2 by pointing to some other category of concerted action rights that remains intact. Having access to the Board or other agency has never been held an adequate substitute for the right to engage in the broad range of protected concerted activities guaranteed by the NLRA and NLGA, and the Eighth Circuit never explained why it concluded otherwise. *See also Murphy Oil*, 2014 WL 5465454, at *25 (explaining why, even if an agreement permitted administrative agencies to seek classwide relief, the NLRA would still not permit the employer to prohibit its employees from pursuing or participating in such a concerted legal action). Moreover, even if those few cases where an employee is able to persuade the Department of Labor or other agency to devote limited agency resources to pursuing workplace relief, the employees themselves cannot participate in that administrative action as parties, class members, or active representatives of their co-workers.

to join with co-workers in seeking to vindicate workplace rights through collective legal activity.

The NLRA and NLGA were both enacted *after* the FAA; and Congress specifically provided in the NLGA that "[a]ll acts and parts of acts in conflict with the provisions of this chapter are repealed," 29 U.S.C. § 115; *see also Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936) (in the rare case of an "irreconcilable" statutory conflict, the *later*-enacted statute controls). Moreover, from a historical perspective, Congress could not have enacted the FAA in 1925 with the intention that it override the *later*-enacted NLGA and NLRA – not only because Congress could not have anticipated those later enactments, but also because at the time Congress enacted the FAA the *only* employees whom Congress had the power to regulate under the Commerce Clause (as it was then narrowly construed) were transportation workers who physically crossed state lines, and Congress expressly *excluded* those workers from the FAA's coverage in 9 U.S.C. § 1. *See Circuit City v. Adams*, 532 U.S. 105, 120-21 (2001). These historical circumstances preclude any possibility that Congress intended the FAA to eliminate in advance the statutory right of employees whom it did not at the time have the power to regulate to engage in concerted activity to enforce workplace rights.

Although the Eighth Circuit cited the 1947 recodification of the FAA in concluding that Congress intended the FAA to trump any inconsistent provisions in

the NLGA and NLRA (which itself *was* substantively amended in 1947), *see Owen*, 702 F.3d at 1053, the legislative history of the FAA's recodification makes clear that no substantive change was made or intended. *See* H.R. Rep. No. 80-251 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1511 (1947 recodification made "no attempt" to amend existing law); H.R. Rep. No. 80-225 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1515 (same). Re-codification by itself is not a substantive amendment. *See, e.g.*, *Finley v. United States*, 490 U.S. 545, 554 (1989); *United States v. Welden*, 377 U.S. 95, 98-99 (1964); *Fourco Glass Co. v. Transmirra Corp.*, 353 U.S. 222, 227 (1957); *Anderson v. Pacific Coast S. S. Co.*, 225 U.S. 187, 198-99 (1912). The Supreme Court has thus held that, for purposes of the later-in-time enactment rule, a non-substantive re-enactment of a statute does not take precedence over an earlier enacted statute. *See Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). Consequently, under the last-in-time analysis, the NLRA and NLGA would take precedence over the FAA even if there were an actual, irreconcilable conflict and even if that conflict affected equally core statutory policies.

D. The Right to Concerted Activity for Mutual Aid or Protection is Fundamental to Federal Labor Policy and Displaces Any Implied Policy in Favor of Enforcement of all Terms of Arbitration Agreements

Even if a legitimate dispute existed over which set of statutory protections came first (or whether Congress meant what it said in NLGA § 15, *see supra* at 10-

11, 41-42), any resolution of perceived conflicts between federal labor and arbitration policy must take into account the relative significance of those competing policies to their respective statutory schemes.[17]

The right to engage in concerted activity has been the expressly protected centerpiece of federal labor policy for more than eight decades. By contrast, any supposed preference for the "streamlined" model of arbitration is neither expressly stated in the FAA nor absolute. To the contrary, that policy preference is subject to many limitations, including in the FAA § 2 carve-out for otherwise unenforceable contract terms, described above. These differences in the relative intra-statutory hierarchy of the competing rights at issue provide further reason to conclude that, in the event of unavoidable conflict, Congress would have intended to preserve

[17] The Board's obligation to accommodate other statutory concerns, even when crafting a remedial order, is weakest where, as here, the alleged conflict involves concerns that are central to the NLRA yet only implicit, or of limited import, under another statute. Each of the Supreme Court cases recognizing conflicts between the NLRA and other statutory regimes involve explicit conflicts between discretionary *remedial* orders and expressly articulated substantive statutory rights. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984) (Board must condition backpay remedy on legal re-admittance to the United States because the INA explicitly bars unlawful entry); *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 43 (1942) (Board's remedy "ignore[d] the plain Congressional mandate that a rebellion by seamen against their officers on board a vessel anywhere within the admiralty and maritime jurisdiction of the United States is to be punished as mutiny"); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147-50 (2002) (backpay could not be awarded to undocumented immigrant employee as it would encourage violations of Immigration Reform and Control Act's "central" policy against employment of undocumented immigrants).

substantive federal labor law rights in the face of an arbitration agreement that prohibited the exercise of those rights.

The Section 7 right to engage in concerted activity is "[t]he core objective of the [NLRA]" and "the basic premise of Federal labor policy." *Murphy Oil*, 2014 WL 5465454, at *1; *see also id.* at *9, *18; *On Assignment*, 2015 WL 5113231, at *10. This principle is confirmed by a long line of Supreme Court precedent. *See Metro. Life v. Massachusetts*, 471 U.S. 724, 754-55 (1985); *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 735 (1981); *Emporium Capwell*, 420 U.S. at 61-62; *Jones & Laughlin Steel*, 301 U.S. at 33 (concerted activity "a fundamental right" of the NLRA).

As Congress declared in language that is as applicable today as it was in 1932, protecting the right to engage in concerted activity is the critical first step in ensuring workplace fairness and equality, because without the ability to join together with co-workers, "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor." 29 U.S.C. § 102; *see also* 29 U.S.C. § 151 (NLRA statement of policy). The NLGA and NLRA were the product of decades of often violent labor disputes that wracked the country in the late-nineteenth and early-twentieth centuries. Guaranteeing the right to engage in concerted activity was the centerpiece of Congress's effort to create an environment more conducive to constructive

workplace relations. Depriving workers of that right directly undermines the purpose and policy of those federal statutes. *See Murphy Oil*, 2014 WL 5465454, at *9 ("[T]he right to engage in collective action – including collective *legal* action – is the *core* substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest").

A workplace policy that forces workers to waive their future Section 7 right to engage in concerted legal activity as a non-negotiable condition of employment violates federal labor policy in many ways. It strips employees of their group voice and collective power (including negotiating power), increases their individual costs of adjudication and the resulting burden of pursuing workplace relief, impairs their ability to help co-workers vindicate such rights and to alert co-workers about workplace rights (including through class and collective action notice), diminishes their chances of obtaining representation by well-qualified counsel (and to represent each other, as federal labor policy expressly permits), and increases their legitimate fear of workplace retaliation – all to their individual and collective detriment and in derogation of the federal labor policies underlying the NLRA and NLGA. *See Eastex*, 437 U.S. at 566; *City Disposal Sys.*, 465 U.S. at 834-35; *Salt River Valley Water Users*, 206 F.2d at 328; *NLRB v. Stone*, 125 F.2d at 756; *D.R. Horton*, 2012 WL 36274, at *2-*4 & nn.4-5.

For these reasons as well, if any actual conflict exists between the NLRA/NLGA and the FAA, that conflict should be resolved in a manner that preserves the core right under federal labor law to pursue legal claims on a concerted action basis.

E. No Contrary Result is Required by *Sutherland*

In a footnote in its per curiam decision in *Sutherland*, this Court stated that the Board's reasoning in its then-recent *D.R. Horton* decision is not entitled to any deference. 726 F.3d at 297 n.8. As an initial matter, that panel's comments on the Board's *D.R. Horton* analysis has little bearing here because the *D.R. Horton* decision has been superseded by almost two dozen subsequent Board decisions, beginning with *Murphy Oil*, which expand and extend the Board's analysis and respond to every criticism of *D.R. Horton* that was asserted by the Fifth and Eighth Circuits, including the criticisms cited in the *Sutherland* footnote. *See, e.g.*, *Murphy Oil*, 2014 WL 5465454, at *6-*15. Moreover, there was no discussion in either *Sutherland* or *Owen* of the NLGA, which provides a separate and independent statutory ground for refusing to enforce Raymours' prohibition against concerted legal activity (because Sections 2 and 3 of the NLGA expressly prohibit courts from enforcing any such contractual ban on concerted action). *See supra* at 10-11.

Because *Sutherland*'s per curiam decision does not discuss the substance of the argument that the NLRA prohibits an employer's compelled waiver of the right to pursue class, collective, and other joint legal actions, and because that decision did not discuss the NLGA at all, its footnote does not constitute binding precedent. *See Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) ("[S]ince we have never squarely addressed the issue, and have at most assumed [its resolution], we are free to address the issue on the merits."); *United States v. Ortiz*, 621 F.3d 82, 87 n.3 (2d Cir. 2010) (prior decision "contain[ing] no discussion" of an issue is not binding because "'a *sub silentio* holding is not binding precedent'"); *United States v. Hardwick*, 523 F.3d 94, 101 n.5 (2d Cir. 2008) (prior decision not binding where it "did not independently analyze" issue); *United States v. Johnson*, 256 F.3d 895, 915 (9th Cir. 2001) (en banc) (Kozinski, J., concurring) (court is not bound by statement of law "made casually and without analysis, . . . uttered in passing without due consideration of the alternatives or where it is merely a prelude to another legal issue that commands the panel's full attention"), *cited with approval in Hardwick*, 523 F.3d at 101 n.5; *see also Herrington v. Waterstone Mortg. Corp.*, 993 F. Supp. 2d 940, 946 (W.D. Wis. 2014) ("[T]he Court of Appeals for the Second Circuit did not provide any reasoning for th[e] decision [to reject the Board's *D.R. Horton* analysis].").

Moreover, while the panel in *Sutherland* was correct that the Board's *D.R. Horton* analysis is not entitled to deference *in its entirety*, it is equally clear that the portion of the Board's analysis in *D.R. Horton* and later decisions construing the scope of Sections 7 and 8(a)(1) of the NLRA *is* entitled to substantial deference, as the Supreme Court has repeatedly required. *See supra* at 18-21. Further, even though the latter portions of the Board's analysis (construing the NLGA and concluding that no conflict exists between the NLRA/NLGA and the FAA) are not entitled to deference, that does not mean that the Board's analysis of those issues was wrong, only that de novo rather than deferential review is required of those portions of the Board's analysis. Yet the panel in *Sutherland* did not address the substance of those issues.

The principal issue before this Court in *Sutherland* had nothing to do with the NLRA or NLGA. Rather, the parties' briefing and the panel's decision focused upon whether Congress intended to allow employers to force their employees to individually arbitrate their FLSA claims, even though the statute explicitly allows employees to opt in to an FLSA collective action. 726 F.3d at 292 (identifying question presented). The panel concluded that Congress had no such intent, and that nothing in the *FLSA's* language or legislative history supersedes the FAA's implied policy favoring enforcement of private arbitration agreements by their terms. *See id.* at 296-97. The per curiam *Sutherland* decision also concluded that

the so-called "effective vindication" doctrine did not invalidate the parties' contractual waiver either, because that doctrine had recently been rejected by the Supreme Court. *Id.* at 298 (citing *Italian Colors*, 133 S.Ct. at 2310-11).

Those two conclusions were the "holding" of *Sutherland*. As the panel stated in the final section of its opinion:

> To summarize, *we hold* that:
>
> (1) The Fair Labor Standards Act of 1938 does not include a "contrary congressional command" that prevents a class-action waiver provision in an arbitration agreement from being enforced by its terms; and
>
> (2) In light of the Supreme Court's recent decision in *American Express Co. v. Italian Colors Restaurant*, ___ U.S. ___, 133 S.Ct. 2304 (2013), Sutherland's argument that proceeding individually in arbitration would be "prohibitively expensive" is not a sufficient basis to invalidate the class-action waiver provision at issue here under the "effective vindication doctrine."

Id. at 299 (emphasis added). In a two-sentence footnote that referred to "[o]ne of Sutherland's alternative arguments," the panel then stated that it would decline to follow the Board's analysis in *D.R. Horton* for three reasons, each of which rested on mistaken assumptions. *See id.* at 297 n.8.

First, the panel quoted the Eighth Circuit's decision in *Owen* for the proposition that the Board's reasoning in *D.R. Horton* is not entitled to any deference. *Id.* As noted *supra* at 18-21, though, the Board's construction of the *NLRA is* entitled to deference; and even if the Board's analysis of the *FAA* did not

warrant deference, that by itself "cannot mean that the Board's statutory interpretation is somehow illegitimate or necessarily incorrect." *Murphy Oil*, 2014 WL 5465454, at *13.

Second, the panel in *Sutherland* stated that it would not follow *D.R. Horton* because of concern that the Board may have lacked a proper quorum when *D.R. Horton* was decided. 726 F.3d at 297 n.8 (citing *Noel Canning v. NLRB*, 705 F.3d 490, 499 (D.C. Cir. 2013)). A subsequent U.S. Supreme Court decision that reversed the D.C. Circuit's *Noel Canning* decision in part makes clear that the Board *did* have a quorum (because Member Becker's appointment was constitutionally valid). *NLRB v. Noel Canning*, 134 S.Ct. 2550, 2577 (2014). Because that intervening Supreme Court decision knocked out a key part of the *Sutherland* panel's rationale, the Court is not bound to follow it. *In re Arab Bank, PLC Alien Tort Statute Litig.*, No. 13-4650, 2015 WL 8122895, at *7 (2d Cir. Dec. 8, 2015) ("exception to . . . general rule" of following prior panel decisions "when an 'intervening Supreme Court decision . . . casts doubt on our controlling precedent'") (quoting *Wojchowski v. Daines*, 498 F.3d 99, 106 (2d Cir. 2007)). Moreover, the Board unquestionably had a properly confirmed quorum when it decided each of the post-*D.R. Horton* cases cited *supra* at 2 n.1.

Finally, the per curiam ruling in *Sutherland* also noted that courts "have [] never deferred to the Board's remedial preferences where such preferences

potentially trench upon federal statutes and policies unrelated to the NLRA." 726 F.3d at 297 n.8 (quoting *Hoffman Plastic Compounds*, 535 U.S. at 144). However, the Board in *D.R. Horton* (and later in *Murphy Oil* and the subsequent cases) was not issuing a discretionary remedy *after* finding an unfair labor practice, but was analyzing what constitutes an unfair labor practice in light of the "core, substantive" statutory right to engage in concerted activity under Section 7 of the NLRA. *See D.R. Horton*, 2012 WL 36274, at *10 n.19 ("[O]ur holding here is that the [employer's prohibition] violates the substantive terms of the NLRA; it does not rest on an exercise of remedial discretion."); *Murphy Oil*, 2014 WL 5465454, at *21; *supra* at 44 n.17. Besides, even if the Board's ultimate holdings were not entitled to "deference," that would be only the beginning of the judicial inquiry, because the question would still remain whether, on de novo review, the Board's construction of Sections 7 and 8(a)(1) – which *is* entitled to deference – can be reconciled with the FAA; and, if not, how the conflict between federal labor law and federal arbitration law can be resolved consistent with Congressional intent.

For these reasons, and because the panel in *Sutherland* did not have the benefit of the Board's more detailed analysis in *Murphy Oil* and later cases – including the Board's detailed rebuttal of the Fifth Circuit's and Eighth Circuit's contrary holdings – this Court is not bound by its prior statements in *Sutherland*

and should address the merits of the Board's analysis and the arguments presented above.

CONCLUSION

For the reasons set forth above, the judgment of the district court should be vacated and the case remanded for further proceedings.

Dated: December 18, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 13,503 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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