Nos. 15-17420, 15-17422

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUGLAS O'CONNOR, THOMAS COLOPY, MATTHEW MANAHAN, AND ELIE GURFINKEL

Plaintiffs/Appellees

v.

UBER TECHNOLOGIES, INC.,

Defendant/Appellant

No. 3:13-cv-03826-EMC (N.D. Cal.)

HAKAN YUCESOY, ABDI MAHAMMED, MOKHATAR TALHA, BRIAN MORIS, and PEDRO SANCHEZ,

Plaintiffs/Appellees

v.

UBER TECHNOLOGIES, INC.,

Defendant/Appellant

No. 3:15-cv-00262-EMC (N.D. Cal.)

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS *AMICUS CURIAE* URGING AFFIRMANCE IN SUPPORT OF PLAINTIFFS-APPELLEES

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TABLE OF CONTENTS

Headings **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES

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

TABLE OF AUTHORITIES

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

TABLE OF AUTHORITIES

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

TABLE OF AUTHORITIES

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

Statutes **Page(s)**

Rules

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

The National Labor Relations Board is an independent federal agency created by Congress to enforce and administer the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 et seq. Its "reasonable construction" of the NLRA "is entitled to considerable deference." *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984); *accord Local Joint Exec. Bd. of Las Vegas v. NLRB*, 515 F.3d 942, 945 (9th Cir. 2008) ("The Board's interpretation of the [NLRA] is accorded considerable deference as long as it is 'rational and consistent' with the statute.").

In *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), *reh'g denied*, No. 12-60031 (Apr. 16, 2014), the Board held that an employer violates the NLRA when it imposes on employees, as a condition of employment, an agreement that requires them to resolve all work-related disputes through individual arbitration, thus precluding collective legal action in all forums, arbitral or judicial. *Id*. at 2277. The Board further found that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., does not dictate a different result. *Id.* The Board reexamined and reaffirmed *D.R. Horton* in *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *petition for reh'g en banc denied*, 5th Cir. No. 14-60800 (May 13, 2016), *petition for cert. filed*, No. 16-307 (Sept. 9, 2016). In *Morris v. Ernst & Young, LLP*, a case

involving an individual-arbitration agreement imposed as a condition of employment, this Court approved the Board's *D.R. Horton/Murphy Oil* rule. 834 F.3d 975, 2016 WL 4433080, at *2-11 (9th Cir. Aug. 22, 2016), *petition for cert. filed*, No. 16-300 (Sep.8, 2016).

In *D.R. Horton*, 357 NLRB at 2289 n.28, the Board specifically reserved the question of whether an individual-arbitration agreement would violate the NLRA if the agreement was not a condition of employment. Subsequently, the Board, with one member dissenting, answered that question in the affirmative in *On Assignment Staffing Services, Inc*. 362 NLRB No. 189, 2015 WL 5113231 (Aug. 27, 2015), *enforcement denied*, No. 15-60642 (5th Cir. June 6, 2016) (summary disposition). *On Assignment* involved an individual-arbitration agreement that contained a procedure permitting employees to opt out of the agreement and explained for the first time why opt-out provisions do not rehabilitate individual-arbitration agreements and, to the contrary, impose additional impermissible burdens on employees' NLRA rights. *Id*. at *5-7.

This Court has never ruled on the Board's construction of the NLRA in *On Assignment*. However, prior to the Board's issuance of that lead decision, this Court held that an opt-out agreement that waives the right to bring concerted legal claims did not violate Section 8(a)(1). *Johnmohammadi v. Bloomingdale's, Inc.*,

755 F.3d 1072, 1075-77 (9th Cir. 2014). Other panels have acknowledged *Johnmohammadi* as circuit law.[1]

It is the Board's position that, notwithstanding *Johnmohammadi,* controlling Supreme Court decisions require this Court to determine whether the Board's decision in *On Assignment* is based on a reasonable construction of the NLRA and, if so, defer to it. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("*Brand X*"). That issue is also presented in a NLRB case pending in this Court in which briefing was recently completed, but that has not yet been set for argument. *See Nijjar Realty, Inc. v. NLRB*, 9th Cir. Nos. 15-73921, 16-70336.[2]

This case is on appeal from a decision of the U.S. District Court for the Northern District of California, which declined to enforce agreements mandating that Uber drivers pursue the resolution of all disputes with Uber through individual arbitration. *O'Connor v. Uber Tech., Inc.*, 150 F.Supp.3d 1095 (N.D. Cal. 2015). The district court held that the agreements, which contain opt-out provisions like

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[1] *Morris*, 2016 WL 4433080, at *4 n.4; *Mohamed v. Uber Technologies, Inc.*, Nos. 15-16178, 15-16181, 15-16250, 2016 WL 4651409, at *6 n.6 (9th Cir. Sept. 7, 2016), *petition for rehearing en banc pending* (filed Sept. 21, 2016).

[2] No other circuit court has yet to issue a decision reviewing the Board's *On Assignment* rationale, although the issue has been fully briefed in *AT&T Mobility Services., Inc. v. NLRB*, 4th Cir. Nos. 16-1099, 16-1159 (scheduled for argument Dec. 7, 2016).

the agreement in *On Assignment*, were invalid under state-law unconscionability principles. In light of that holding, the court found that it need not reach the drivers' argument that the agreements were also unenforceable because they violate the NLRA pursuant to the Board's *D.R. Horton/Murphy Oil* rule.

The state-law grounds upon which the district court ruled, thereby avoiding the NLRA issue, have since been rejected by the Court.[3] As a result, in this appeal, the drivers have renewed their argument that Uber's agreements are unenforceable under the NLRA. For the reasons explained in *On Assignment*, the Board agrees with the drivers' position that the agreements violate the NLRA.[4] And, consistent with the Board's position in *Nijjar Realty, Inc.*, 363 NLRB No. 38, 2015 WL 7444737, at *5 (Nov. 20, 2015), the Board submits this brief, pursuant to FRAP 29(a), to demonstrate that *Johnmohammadi* does not prevent this Court from upholding *On Assignment*, which is a reasonable construction of the NLRA

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[3] The district court invalidated the agreements for the reasons set forth in its decision in *Mohamed v. Uber Technologies, Inc.*, 109 F.Supp.3d 1185 (N.D. Cal. 2015), which involved the identical arbitration agreements at issue here, and which this Court has since rejected. 2016 WL 4651409, at *3, 6, 8.

[4] The Board takes no position on whether the drivers in this case are "employees" under Section 2(3) of the NLRA, 29 U.S.C. § 152(3), entitled to the statute's protections. *See* Drivers' Brief, pp. 29-32. This brief is limited to defending the Board's holding that employers cannot lawfully maintain or enforce agreements like the ones at issue here to the extent such agreements apply to statutory employees within the meaning of the NLRA. For purposes of that analysis, it will refer to Uber's drivers as "employees."

by the agency with primary jurisdiction to decide the meaning and proper application of that statute.

I. BACKGROUND: THIS COURT'S *MORRIS* DECISION

In *Morris*, this Court agreed with the Board's holding in *D.R. Horton* and *Murphy Oil* that an employer violates the NLRA when it requires its employees to arbitrate all work-related disputes individually, precluding them from pursuing joint, class, or collective claims in any forum, arbitral or judicial. 2016 WL 4433080, at *2-5. The Court concluded that the Board's interpretation of the NLRA effectuates the plain statutory language and is consistent with Congress's intent in enacting the NLRA. *Id*. at *4.

In Section 7, Congress conferred on statutory employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" and "to refrain from any or all of such activities." 29 U.S.C. § 157. *Morris* held that "[t]he intent of Congress is clear from the statute and is consistent with the Board's interpretation" that Section 7 encompasses the concerted pursuit of work-related legal claims. 2016 WL 4433080, at *3. It further noted that the Supreme Court has described the rights under Section 7 as including employees' efforts "to improve working conditions through resort to administrative and judicial forums,"

id., at *3 (quoting *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 566 (1978)), and has described "[c]oncerted action [as] the basic tenet of federal labor policy," *id*. at *4 (citing *City Disposal*, 465 U.S. at 834-35). Consistent with the Court's holding, the Board and the courts have long held that Section 7 protects the right to pursue work-related legal claims concertedly. *See D.R. Horton*, 357 NLRB at 2278 & n.4 (collecting Board decisions); *Morris*, 2016 WL 4433080, at *4 (collecting cases).

Congress enforced Section 7 in Section 8(a)(1) by making it unlawful for employers to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section [7]." 29 U.S.C. § 158(a)(1). As this Court explained in *Morris*, "Section 8 has long been held to prevent employers from circumventing the NLRA's protection for *concerted* activity by requiring employees to agree to *individual* activity in its place." 2016 WL 4433080, at *4 (discussing *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 360-61 (1940) (individual contracts in which employees prospectively relinquish 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]"), and *NLRB v. Stone*, 125 F.2d 752 (7th Cir. 1942) (agreements requiring that employees resolve disputes individually would nullify right to engage in concerted activity) (additional citations omitted)). Based on that longstanding caselaw and on the plain statutory language, the Court agreed with

the Board's interpretation of Section 8(a)(1) as barring employers from requiring, as a condition of employment, individual contracts restricting employees from engaging in concerted activity – including collective legal action. *Morris*, 2016 WL 4433080, at *4-5 (citing *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1155 (7th Cir. 2016), *petition for cert. pending*, No. 16-285 (filed Sept. 2, 2016)).

Morris also held that the fact that a concerted-action waiver is included in an arbitration agreement subject to the FAA "does not dictate a contrary result." *Id*. at *6. 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 (emphasis added). Joining the Seventh Circuit and the Board, this Court held that an agreement that violates the NLRA meets the criteria of the FAA's saving-clause exemption to enforcement. *Morris*, 2016 WL 4433080 at *6-7; *accord Lewis*, 823 F.3d at 1157. Specifically, the Court found that the Board's interpretation of the NLRA to bar prospective waiver of Section 7 rights applied to all contracts and neither targeted nor disfavored arbitration agreements. *Morris*, 2016 WL 4433080 at *9-10. Accordingly, the Court held that finding individual-arbitration agreements unenforceable advances the FAA's purpose of "plac[ing] arbitration contracts 'on equal footing with all other contracts . . . .'"

Id. at *6 (quoting *DIRECTV, Inc. v. Imburgia*, —U.S. —, 136 S. Ct. 463, 468 (2015)) (additional citations omitted).

In short, *Morris* held, in agreement with the Board's *D.R. Horton/Murphy Oil* rule, that "[a]n employer may not condition employment on the requirement that an employee sign" an agreement foreclosing employees' Section 7 right to pursue concerted work-related legal claims. 2016 WL 4433080 at *11. As we show below, in *On Assignment* the Board reasonably extended the *D.R. Horton*/*Murphy Oil* rule that this Court subsequently approved in *Morris*, and concluded that individual agreements prospectively waiving the right to engage in concerted activity for mutual aid or protection violate Section 8(a)(1) of the NLRA even if voluntary. The Board's reasonable construction warrants approval by this Court, notwithstanding *Johnmohammadi*.

II. AN ARBITRATION AGREEMENT THAT WAIVES STATUTORY EMPLOYEES' RIGHT TO PURSUE WORK-RELATED DISPUTES COLLECTIVELY IS UNLAWFUL EVEN IF IT CONTAINS AN OPT-OUT PROVISION

A. The Court's Decision in *Johnmohammadi* Is Not Dispositive of This Case

This Court's decision in *Johnmohammadi*, 755 F.3d at 1075-77, does not control the result here because it predated the Board's decision in *On Assignment*. Under established administrative-law principles, now that the Board has exercised its statutory authority to interpret the NLRA in *On Assignment*, the Court's review

of the agency's expert statutory interpretation is governed by the deferential framework established in *Chevron*. *See Brand X*, 545 U.S. at 982 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). As the Supreme Court made clear, *Chevron* deference applies to such agency interpretations even where, as here, a court has previously construed the same statutory provision, unless that prior decision held that the court's "construction follow[ed] from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.*; *compare Mercado-Zazueta v. Holder*, 580 F.3d 1102, 1115 (9th Cir. 2009) (rejecting Board of Immigration Appeals' interpretation of Immigration and Nationality Act under *Brand X*, finding court had previously "considered and rejected th[at] precise interpretation"), *abrogated on other grounds*, *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011 (2012), *with Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235 (9th Cir. 2013) (deferring to Secretary of Department of Health and Human Services' interpretation of Medicaid Act, where prior contrary decision in case to which federal government was not a party did not address deference and "did not hold that [the court's] view of [the provision] represented the *only* reasonable interpretation of that statute").

The Court reached no such definitive holding in *Johnmohammadi*. Nowhere in its decision did the Court state that Section 8(a)(1) is unambiguous or that the statute leaves no room for agency interpretation. Because *Johnmohammadi* thus

did not foreclose the Board's position, the question before the Court is whether the Board's construction of Section 8(a)(1) is a "permissible reading" of the NLRA. *See Brand X*, 545 U.S. at 986. The Board submits that it is. As detailed below, individual-arbitration agreements, even those containing an opt-out procedure, interfere with employees' ability to engage in concerted legal activity. That statutory interpretation follows from the language of Section 8(a)(1), which categorically bars all such interference, and from the congressional policies animating the NLRA.

B. The Board Has Reasonably Construed The NLRA To Find That An Arbitration Agreement That Waives An Employee's Right To Pursue Work-Related Disputes Collectively Is Unlawful Even If It Contains An Opt-Out Provision

In *On Assignment*, 2015 WL 5113231, at *5-11, the Board first confronted the question of whether an opt-out provision places an agreement "outside the scope of the *D.R. Horton* prohibition on mandatory individual arbitration agreements." *Id*. at *5. Like Uber, the employer in *On Assignment* imposed an individual-arbitration agreement on employees as a condition of employment, unless they followed a procedure to opt out of the agreement. The Board explained that the presence of an opt-out procedure does not render an individual-arbitration agreement lawful because, whether voluntary or not, individual agreements that prospectively waive Section 7 rights directly undermine Congress's goal of protecting employees' "full freedom of association." *Id*. at *9 (quoting

29 U.S.C. § 151). Furthermore, the opt-out procedure itself burdens employees' exercise of Section 7 rights. *Id*. at *5-9. Because *On Assignment* represents the Board's expert construction of the NLRA, the Court reviews the Board's decision with "considerable deference." *Morris*, 2016 WL 4433080 at *2 (quoting *City Disposal*, 465 U.S. at 829); *see also City Disposal*, 465 U.S. at 829 (Supreme Court has "often reaffirmed 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") (internal quotation omitted).

The Board's holding in *On Assignment* – that individual prospective waivers of Section 7 rights violate Section 8(a)(1) even when not imposed as a condition of employment – is a reasonable construction of the NLRA. That statutory interpretation is supported by the language and purposes of the NLRA, and by longstanding precedent. Section 8(a)(1) forbids not only employer-imposed "restrain[t]" of Section 7 activity, but also employer-imposed "interference with" protected activity. 29 U.S.C. §158(a)(1). The Board has thus found that even a voluntary agreement runs afoul of the NLRA if its maintenance stands as an obstacle to employees' participation in protected, concerted activity. That principle is in accord with the Supreme Court's decision in *J.I. Case Co. v. NLRB*, which affirmed the Board's finding that individual contracts that conflict with the Board's function of preventing NLRA violations are unlawful even if "the status of

individual employees [is not] affected by reason of signing or failing to sign." 321 U.S. 332, 333, 337 (1944); *see also Nat'l Licorice*, 309 U.S. at 364 ("employers cannot set at naught the [NLRA] by inducing their workmen to agree not to demand performance of the duties which [the statute] imposes"). Similarly, in *Stone*, the Seventh Circuit held that individual contracts that require employees to adjust their grievances with their employer individually "constitute[] a violation of the [NLRA] per se," even if "the contract[s were] entered into without coercion and . . . the employees understood they were not being deprived of their rights under the [NLRA]." 125 F.2d at 756; *accord Lewis*, 823 F.3d at 1155 (reaffirming *Stone*); *Western Cartridge Co. v. NLRB*, 134 F.2d 240, 244 (7th Cir. 1943) (voluntary individual contracts requiring employees to refrain from organizing activities constitute unlawful interference).

The Board, with court approval, has thus long held that an employee "can be coerced and restrained by a condition voluntarily accepted when compliance with that condition would interfere with the . . . exercise of his section 7 rights." *NLRB v. Local 73, Sheet Metal Workers' Int'l Ass'n*, 840 F.2d 501, 506 (7th Cir. 1988) (emphasis omitted); *accord United Mine Workers*, 305 NLRB 516, 520 (1991) (rejecting argument that when employees "voluntarily undertake a contractual commitment[,] . . . holding them to that promise cannot be considered 'restraint or coercion'" of Section 7 rights). An employee's Section 7 rights cannot

prospectively be "traded away" through an individual agreement with her employer, even if the employee herself was "responsible for instigating" the agreement. *Mandel Sec. Bureau Inc.*, 202 NLRB 117, 119 (1973). In *NLRB v. Bratten Pontiac Corp.*, for example, the Fourth Circuit held that an employer violated Section 8(a)(1) by offering employees a "pay plan" that they could choose whether or not to accept, because the plan included an agreement not to engage in concerted activity. 406 F.2d 349, 350-51 (1969); s*ee also Ishikawa Gasket Am., Inc.*, 337 NLRB 175, 175-76 (2001) (employer unlawfully conditioned employee's severance payments on agreement not to engage with 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); *Eddyleon Chocolate Co.*, 301 NLRB 887, 887 (1991) (employer violated Section 8(a)(1) by "request[ing]" that job applicant agree not to join union).

Based on that rationale, the Board reasonably found in *On Assignment* that the existence of an opt-out provision does not rehabilitate an otherwise unlawful agreement that prospectively restrains Section 7 activity. 2015 WL 5113231, at *8-9. To the contrary, "individual agreements [that] limit the ability of workers to act collectively . . . detract from the 'full freedom of association' [that] Congress deemed so essential to accomplishing the [NLRA's] stated objectives." *Id*. at *9 (quoting 29 U.S.C. § 151). As such, "it is the individual *agreement* itself not to

engage in concerted activity that threatens the statutory scheme," not how the agreement was secured. *Id*.

The general principle applied in *On Assignment*, that individual prospective waivers of Section 7 rights violate Section 8(a)(1) even when voluntary, flows from the unique characteristics of those rights and the practical circumstances of their exercise. 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). That purpose is best achieved if the safety valve of concerted activity is available when employees are presented with actual workplace problems and have to decide among themselves how to respond. *See, e.g.*, *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14-15 (1962) (concerted activity spurred by extreme cold in plant); *Salt River Valley Water Users' Ass'n v. NLRB*, 206 F.2d 325, 328 (9th Cir. 1953) (concerted activity prompted by violations of minimum-wage laws). The decision whether collectively to walk out of a cold plant or to join other employees in a wage-and-hour lawsuit 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 to review filed*, No. 15-73921 (9th Cir. Dec. 30, 2015). Protected concerted activity – of unorganized employees in particular – often arises spontaneously. When the opportunity to exercise Section 7 rights is presented, employees must be able to decide whether "to engage in . . . concerted activity which they decide is appropriate." *Plastilite Corp.*, 153 NLRB 180, 183 (1965), *enforced in relevant part*, 375 F.2d 343 (8th Cir. 1967); *accord Serendippity-Un-Ltd.*, 263 NLRB 768, 775 (1982) (same).

Some parties have argued to the Board that not opting out from an individual-arbitration agreement constitutes a proper exercise of an employees' Section 7 "right to refrain" from concerted activity. 29 U.S.C. § 157. That argument fails to recognize the difference between an employee's decision not to engage in a particular form concerted activity at the time it takes place, and the prospective, irrevocable waiver of the right to do so under any circumstances. Similar to the choice to engage in concerted activity, the right to refrain belongs to employees to exercise when confronted with the practical economic consequences of participating in a work-related dispute. For that reason, as the Supreme Court has explained, "the vitality of [Section] 7 requires that the [employee] be free to refrain in November from the actions he endorsed in May." *NLRB v. Granite State Joint Bd., Textile Workers Local 1029*, 409 U.S. 213, 217-18 (1972) (Section 7

protects right of employees who resign from union not to take part in strike they once supported). In short, in the NLRA context, the policy barring prospective waivers of the right to engage in concerted activity for mutual aid and protection protects the "full freedom" of the signatory employees to decide, at the time a dispute arises, whether to participate in concerted activity. *See Nat'l Licorice*, 309 U.S. at 361; *accord Pattern Makers' League of N. Am. v. NLRB*, 473 U.S. 95, 101-07 (1985) (union could not maintain rule prospectively restricting employee resignations); *Mission Valley Ford Truck Sales*, 295 NLRB 889, 892 (1989) (employer could not hold employee to "earlier unconditional promises to refrain from organizational activity").[5]

Finally, as the Board recognized in *On Assignment*, 2015 WL 5113231, at *9, maintenance of individual employee agreements prospectively waiving Section 7 rights weakens the collective right of all employees to band together for mutual aid or protection. An employee's ability to engage in concerted activity

[5] Although this Court, in *Johnmohammadi*, discussed *National Licorice*, 309 U.S. at 360, as well as *Stone*, 125 F.2d at 754, and *Ishikawa Gasket*, 337 NLRB at 175-76, 755 F.3d at 1076, it did so only in the context of theory based on unlawful employer motivation that plays no part in the Board's statutory analysis in *On Assignment.* As shown, the Board relied on the impact such agreements impose on Section 7 rights. As the Board concluded, "individual agreements [that] limit the ability of workers to act collectively . . . detract from the 'full freedom of association' [that] Congress deemed so essential to accomplishing the [NLRA's] stated objectives." 2015 WL 5113231, at *9 (quoting 29 U.S.C. § 151).

depends on her ability to communicate with and appeal to fellow employees to join in that action. *See, e.g.*, *Signature Flight Support*, 333 NLRB 1250, 1257 (2001) (finding employee efforts "to persuade other employees to engage in concerted activities" protected), *enforced mem.*, 31 F. App'x 931 (11th Cir. 2002); *Am. Fed'n of Gov't Emps.*, 278 NLRB 378, 382 (1986) (describing as "indisputable" that one employee "had a Section 7 right to appeal to [another employee] to join" in protected activity); *Harlan Fuel Co.*, 8 NLRB 25, 32 (1938) (rights guaranteed to employees by Section 7 include "full freedom to receive aid, advice and information from others concerning [their self-organization] rights"). But such real-time appeals would be futile if employees are picked off one-by-one through individual waivers. While an employee not bound by a prospective waiver may choose in a particular instance not to assist her coworkers, an employee who has waived her Section 7 rights prospectively can never assist her coworkers regardless of the force of their appeals for assistance. Accordingly, in the case of individual-arbitration agreements like Uber's, even those employees who opt out are affected by their signatory co-workers' irrevocable waiver of the right to litigate concertedly. Such prospective, individual restrictions thus diminish each employee's right to mutual aid and protection and the ability of employees together to advance their interests in the workplace.

For all of those reasons, even voluntary individual-arbitration agreements are unlawful as applied to statutory employees' work-related claims. The inclusion of an opt-out provision in an individual-arbitration agreement does not eliminate the agreement's interference with the NLRA's core purpose to minimize industrial strife by protecting the right of employees to decide for themselves, when a dispute arises, whether or not to engage in concerted activity for mutual aid and protection.

Moreover, quite apart from the adverse impact that prospective waivers have on employees' full freedom of association, the Board also found that opt-out provisions affirmatively impose additional impermissible burdens on the exercise of those rights. *See On Assignment*, 2015 WL 5113231, at *5-7. First, an opt-out provision forces employees to take affirmative steps to retain their statutory rights or else lose those rights altogether. The opt-out requirement thus resembles the type of employer-imposed precondition to engaging in concerted activity that the Board has found to violate Section 8(a)(1). *See, e.g.*, *Chromalloy Gas Turbine Corp.*, 331 NLRB 858, 858 (2000) (unlawful to require employees to seek permission before engaging in concerted activity), *enforced*, 262 F.3d 184 (2d Cir. 2001); *Savage Gateway Supermarket, Inc.*, 286 NLRB 180, 183 (1987) (unlawful to require employees to notify employer before engaging in concerted activity), *enforced*, 865 F.2d 1269 (6th Cir. 1989).

Second, an opt-out provision also impairs Section 7 rights by requiring employees who wish to retain those rights to "make 'an observable choice that demonstrates their support for or rejection of' concerted activity." *On Assignment*, 2015 WL 5113231, at *6 (quoting *Allegheny Ludlum Corp.*, 333 NLRB 734, 740 (2001), *enforced*, 301 F.3d 167 (3d Cir. 2002)). That runs counter to well-established Board law providing that employees are entitled to keep private from employers their views and sympathies about unionism and collective action. *Id.*; *see also Stoner Lumber, Inc.*, 187 NLRB 923, 930 (1971) ("Employees' right to remain silent . . . to protect the secrecy of their concerted activities[] is protected by Section 7 of the Act."), *enforced mem.*, 1972 WL 3035 (6th Cir. May 26, 1972). The Court in *Johnmohommadi* did not consider either of the additional burdens placed on the exercise of Section 7 rights by an opt-out procedure that the Board identified in *On Assignment*.[6]

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[6] The Board does not agree with the drivers' attempt to distinguish *Johnmohammadi* by arguing that the agreement at issue there was less burdensome than Uber's. *See* Drivers' Br. 24. Both agreements unlawfully require employees to take affirmative steps to retain their Section 7 rights and to reveal their choice to their employers. As the Board explained in *On Assignment*, all such opt outs are unlawfully burdensome "[r]egardless of the procedures required." *On Assignment*, 2015 WL 5113231, at *6.

In sum, the Board's construction of the NLRA in *On Assignment* as prohibiting all individual agreements that prospectively waive employees' right to pursue legal claims concertedly in any forum, whether or not the agreements allow employees to opt out, effectuates Section 8(a)(1)'s express prohibition against employer interference with Section 7 activity. That construction is consistent with long-established Board and court decisions finding such agreements unlawful.

CONCLUSION

It is established law in this circuit that agreements between employers and employees that require employees, as a condition of employment, to prospectively waive their right to engage in collective legal activity violate Section 8(a)(1) of the NLRA. That an employer permits employees to opt out of such an agreement does not render the agreement lawful, for Section 8(a)(1) bars even voluntary prospective waivers of Section 7 rights. Moreover, requiring that employees follow an employer-imposed procedure to retain their statutory rights, or lose them irrevocably, is antithetical to the NLRA's purpose of protecting employees' right to engage in concerted activity free from employer interference.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUGLAS O'CONNOR, THOMAS COLOPY, MATTHEW MANAHAN, AND ELIE GURFINKEL Plaintiffs/Appellees v. UBER TECHNOLOGIES, INC., Defendant/Appellant	)	No. 15-17420 District Court Case No. 3:13-cv-03826-EMC
HAKAN YUCESOY, ABDI MAHAMMED, MOKHATAR TALHA, BRIAN MORRIS, AND PEDRO SANCHEZ Plaintiffs/Appellees v. UBER TECHNOLOGIES, INC., Defendant/Appellant	)	No. 15-17422 District Court Case No. 3:15-cv-00262-EMC

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 4,816 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 2nd day of November, 2016

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CERTIFICATE OF SERVICE

I certify that on November 2, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, and that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

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