

THE NLRA V. THE FAA: THE UNLIKELY SHOWDOWN MORE THAN EIGHTY YEARS IN THE MAKING

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The legality of class action waivers in mandatory employment arbitration agreements has made the National Labor Relations Act (NLRA) and the Federal Arbitration Act (FAA) unlikely foes. Due to the sweeping breadth of the Supreme Court's recent pro-arbitration jurisprudence, most federal courts have held that employment arbitration agreements containing class action waivers are enforceable under the FAA. On the other hand, in 2012, the National Labor Relations Board (the Board) ruled that class action waivers contained in mandatory employment arbitration agreements violate the NLRA. Until recently, the Board stood alone. That changed in late May of 2016, however, when the Seventh Circuit broke from the Second, Fifth, and Eighth Circuits and sided with the Board. Shortly thereafter, in August 2016, the Ninth Circuit joined the Seventh Circuit, widening the divide. Thus, despite peacefully coexisting for more than eighty years, the NLRA and FAA will soon be pitted against one another at the Supreme Court.

The stakes of the Supreme Court's resolution of this issue are high. In recent years, employers have increasingly sought to immunize themselves from employment class actions through the use of waiver clauses in arbitration clauses. And scholars predict that this trend will accelerate. If correct, waiver clauses in arbitration agreements may effectively spell the end of employment class actions. Consequently, the implications of the Supreme Court's resolution of this issue are far-reaching for employees and employers.

This article makes the case that despite representing the minority view, the Seventh and Ninth Circuits have correctly held that class waivers violate the broad protection afforded by section 7 of the NLRA. However, these courts have erred in finding that the NLRA and FAA work "hand and glove" and thus can be harmonized. The Supreme Court's view of arbitration as being synonymous with bilateral arbitration is simply irreconcilable with a finding that class waivers in employment arbitration agreements are illegal under the NLRA. Hence, the NLRA and the FAA conflict, and an analysis over which prevails—the NLRA or the FAA—is unavoidable and must be undertaken.

I. INTRODUCTION

The National Labor Relations Act (NLRA)¹ and the Federal Arbitration Act (FAA)² are on a collision course. Despite coexisting for more than eighty years, these two statutes are poised for an unlikely showdown at the Supreme Court. This confrontation was arguably set in motion in 2001 when the FAA first traversed the NLRA's territory in *Circuit City Stores, Inc. v. Adams*.³ There, the Supreme Court first held that the FAA applies to employment contracts. But this conflict became inevitable when the National Labor Relations Board (NLRB or Board) held in *D.R. Horton* that an arbitration agreement that required employees to waive class or collective resolution of claims in any forum, arbitral or judicial, violated the NLRA.⁴

The Fifth Circuit (and the vast majority of federal courts) rejected the Board's view in *D.R. Horton* and held that the Supreme Court's sweeping pro-arbitration jurisprudence made clear that an arbitration agreement containing a class waiver is enforceable under the FAA.⁵ The Fifth Circuit's decision, and the other federal courts that followed suit, seemingly postponed a Supreme Court clash between the NLRA and the FAA. However, the Seventh Circuit's May 2016 decision in *Lewis v. Epic Systems Corporation*,⁶ siding with the Board and creating a circuit split, put the Supreme Court battle between these two venerable statutes on the fast track.

The divide over the enforceability of aggregate dispute resolution waivers⁷ under the NLRA has profound implications for employees and employers. These waivers are becoming increasingly popular amongst employers—and for good reason.⁸ It boils down to a simple question: if a company could effectively immunize itself from the threat of class and collective employment actions, why wouldn't it? Moreover, aggregate dispute resolution waivers are thought to suppress low-dollar claims that are not economically viable on an individual basis.⁹ Once again, given the option of facing less employment claims, every rational business

1. 29 U.S.C. §§ 151–169 (2012).

2. 9 U.S.C. §§ 1–16 (2012).

3. 532 U.S. 105, 119–21 (2001).

4. *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012).

5. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013).

6. 823 F.3d 1147 (7th Cir. 2016). The Ninth Circuit's August 2016 decision in *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), all but assures that the Supreme Court will weigh in on this issue in the near future.

7. For ease and consistency, I refer to class, collective, and joint claim waivers that apply to both arbitration and litigation as “aggregate dispute resolution waivers.”

8. *See infra* Part II.C.

9. *See infra* notes 67–68 and accompanying text.

would take it.

For the very reasons that aggregate dispute resolution waivers are attractive for employers, they are repugnant to employees. These waivers eliminate the efficiencies of scale of aggregate litigation, suppress low-dollar claims, and tilt an already-unequal relationship further against employees.¹⁰ That is all to say, the enforceability of aggregate dispute resolution waivers in arbitration agreements matters to both employees and employers as each party has much at stake. This article tracks how the NLRA and the FAA came into one another's crosshairs and explains which statute should prevail before the Supreme Court.

Part II provides further context of why the resolution of this issue is so important to employers and employees and to the future of aggregate litigation in the employment arena. It starts by detailing the mechanics of arbitration generally and mandatory employment arbitration in particular.¹¹ In doing so, it details the scholarly debate over the efficacy of mandatory nonunion¹² employment arbitration and the increased use of aggregate dispute resolution waivers in the workplace.¹³ Part III moves to a discussion of the NLRA and the FAA and sets the stage for how these federal statutes became unlikely adversaries.¹⁴ Part IV addresses the current split in authority over the enforceability of these waivers, starting with the Board's landmark decision in *D.R. Horton*, and moving to the recent schism amongst the federal appellate courts.¹⁵

Part V proposes a resolution to this discord and seeks to outline the proper analytical framework for reconciling the disparate views of the Second, Fifth, and Eighth Circuits and those of the Seventh and Ninth Circuits. In particular, Part V argues that the Seventh and Ninth Circuits have correctly held that aggregate dispute resolution waivers violate the NLRA.¹⁶ But contrary to the Seventh and Ninth Circuit's decisions, this determination necessarily creates a conflict between the FAA and NLRA due, in large part, to the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*.¹⁷ Thus, an analysis over which prevails—the NLRA or the FAA—is unavoidable and must be undertaken. Ultimately, Part V makes the case that the NLRA prevails and the aggregate dispute resolution waivers are unenforceable in the

10. See *infra* notes 52–68 and accompanying text.

11. See *infra* Part II.A.

12. This article focuses on nonunion mandatory employment arbitration which differs from collectively bargained arbitration in the union context. See *infra* note 93 and accompanying text.

13. See *infra* Part II.C.

14. See *infra* Part III.

15. See *infra* Part IV.

16. See *infra* Part V.

17. 563 U.S. 333 (2011).

employment context.¹⁸ Part VI offers concluding remarks and recounts how this result is not only consistent with the text of the NLRA and FAA and the decisions interpreting the same, but that it will reverse a trend that threatens to eliminate class and collective actions in the employment context. In this respect, Congress's vision that group activity would serve to level the playing field in the workplace will continue to have teeth going forward.

II. MANDATORY EMPLOYMENT ARBITRATION

A. The Mechanics of Arbitration

The heart of arbitration law is the enforcement of private agreements to engage in extrajudicial dispute resolution.¹⁹ By agreeing to arbitration, parties opt to resolve future disputes outside of the courts through use of a neutral arbitrator rather than a judge or jury.²⁰ When a party fails to honor an arbitration agreement, the other party can invoke the FAA and request that a court compel arbitration.

Unlike litigation, arbitration is flexible and can be tailored to the needs of the parties.²¹ This flexibility is furthered by the fact that the FAA does not define the term "arbitration," leaving the parties to develop an arbitration format to their liking.²² Nevertheless, arbitration generally has four key components: (1) a process to settle disputes between parties; (2) a neutral third party; (3) an opportunity for the parties to be heard; and (4) a final, binding decision or award by the neutral third party after the hearing.²³ With respect to procedure, parties

18. See *infra* Part V.

19. See Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427, 432 (2007) ("Arbitration law is about enforcing consensual arrangements for private dispute resolution, with a central tenet being effectuation of the intent of the parties as expressed in their agreement.").

20. See Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069, 1069–70 (1998).

21. See, e.g., R. Gaul Silberman et al., *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 LA. L. REV. 1533, 1538 (1994) ("The wide range of ADR methods enables a company to tailor a program to fit its particular needs"); Stipanowich, *supra* note 19, at 432 ("Within the ambit of the FAA and the more prescriptive framework of some state arbitration statutes . . . parties are afforded considerable flexibility to structure processes as they see fit.").

22. See Imre Stephen Szalai, *More Than Class Action Killers: The Impact of Concepcion and American Express on Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 31, 57 (2014) ("Strikingly, the FAA focuses on arbitration, and yet the statute never defines this key term.").

23. See Stipanowich, *supra* note 19, at 435–36 (listing four elements of arbitration as "(a) a process to settle disputes between parties; (b) a neutral third party; (c) an opportunity for the parties to be heard; and (d) a final, binding decision, or award by the third party after the hearing"); Silberman et al., *supra* note 21, at 1537 (explaining that arbitration involves a third party hearing arguments, reviewing evidence, and issuing a final binding decision).

can agree to adopt the rules governing litigation, do away with them altogether, or chart a course in between.²⁴ Indeed, “[a]s a creature of contract, both the substance and procedure for arbitration can be agreed upon in advance.”²⁵

Historically, arbitration has permitted less extensive discovery than litigation²⁶ and has been viewed as a speedy and economical means of dispute resolution.²⁷ But these advantages stripped parties of some of the protections afforded by the courts. Parties traded the protections afforded by the court’s procedural rigor and appellate review of for the efficiency and speed of private arbitrators.²⁸ But the mechanics of arbitration have changed dramatically since the FAA was passed in 1935. Back then, arbitration was characterized as “simple, speedy, and inexpensive.”²⁹ Arbitrators were commonly experts in the dispute’s subject matter and applied their own understanding of the issues to decide the merits.³⁰ Thus, protracted discovery and motions practice was less common than in litigation.³¹ The focus of the arbitration process was instead selecting a “trusted and expert decision maker” that was “likely to rule on the equities of the factual context in an informal manner.”³² Under this framework, law played a subordinate role to industry experts.³³

Over time, most arbitration forums have adopted more formal litigation-like procedures.³⁴ As a corollary, costs have increased due to more expansive discovery and motions practice.³⁵ Despite rising costs

24. Silberman et al., *supra* note 21, at 1539.

25. Republic of Kazakhstan v. Biedermann Int’l, 168 F.3d 880, 883 (5th Cir. 1999).

26. See Norman T. Braslow, *Contractual Stipulation for Judicial Review and Discovery in United States-Japan Arbitration Contracts*, 27 SEATTLE U. L. REV. 659, 667 (2004) (“[A]rbitration can be considerably less expensive because there is far less discovery than is generally permitted in litigation.”). But see Theodore O. Rogers, Jr., *The Procedural Differences Between Litigating in Court and Arbitration: Who Benefits?*, 16 OHIO ST. J. ON DISP. RESOL. 633, 634–35 (2001) (noting that while depositions are more limited in arbitration than in court, “[t]he scope of document discovery allowed by arbitrators is often as broad in court, and sometimes more so”).

27. Republic of Kazakhstan, 168 F.3d at 883.

28. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011).

29. See Jill I. Gross, *Justice Scalia’s Hat Trick and the Supreme Court’s Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOK. L. REV. 111, 118 (2015).

30. *Id.*

31. *Id.*

32. See Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 43 (1999).

33. *Id.* at 44.

34. See Gross, *supra* note 29, at 119 (noting that oft-used arbitration forums, such as the American Arbitration Association (AAA), JAMS, and FINRA Dispute Resolution, involve more formalities and litigation-like processes); Brunet, *supra* note 32, at 45 (“Today, many arbitrations resemble litigation.”).

35. Gross, *supra* note 29, at 119.

associated with arbitration,³⁶ parties continue to arbitrate because it provides at least some of the advantages of litigation at a lower cost.³⁷ Further, as explained *infra*, businesses increasingly choose to implement mandatory arbitration as a way to eliminate aggregate employment actions.³⁸

B. The Debate Over Mandatory Employment Arbitration

At English common law, arbitration was disfavored.³⁹ Early on, American courts borrowed this view and approached arbitration with skepticism.⁴⁰ Thus, an agreement to arbitrate was usually revocable until rendered so as not to “oust” the courts “from their jurisdiction.”⁴¹ Frustrated by the judiciary’s view of arbitration, Congress passed the FAA to reverse longstanding judicial hostility of arbitration agreements and “to place arbitration agreements ‘upon the same footing as other contracts.’”⁴² The FAA further sought to “relieve congestion in courts and to provide parties with an alternative method for dispute resolution that was speedier and less costly than litigation.”⁴³ Whether Congress’s vision has been realized, and the efficacy of arbitration more generally, has been the subject of considerable debate.⁴⁴ This debate is particularly contentious in the workplace, where a significant power

36. See Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 421–24 (2000) (noting “growing legal costs” associated with employment arbitration and arguing that “no studies have been performed to show whether arbitration or litigation is more cost effective for employers”).

37. Stephen J. Ware, *Arbitration Under Assault: Trial Lawyers Lead the Charge*, CATO INST. 3 (Apr. 18, 2002), <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa433.pdf> (citing to studies that “conclude that process costs are much lower in arbitration than in litigation”).

38. See *infra* Part II.C.

39. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

40. *Id.*

41. See Brian T. Burns, *Freedom, Finality, and Federal Preemption: Seeking Expanded Judicial Review of Arbitration Awards Under State Law After Hall Street*, 78 FORDHAM L. REV. 1813, 1817 (2010) (citing H.R. Rep. No. 68-96, at 1–2).

42. *Id.* at 1817–18.

43. *O.R. Sec., Inc. v. Prof'l Planning Assocs., Inc.*, 857 F.2d 742, 745 (11th Cir. 1988).

44. See, e.g., Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 878–80 (2003) (discussing the debate). For criticism of mandatory arbitration, see Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. & EMP. L.J. 1, 44–55 (1996); Katherine Van Wezel Stone, *Labor/Employment Law: Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U.L. REV. 1017, 1036–42 (1996); and Szalai, *supra* note 22, at 57–58. For a contrary view, see David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 99–100 (1999); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 562–63 (2001).

imbalance exists between the contracting parties.⁴⁵ In this context, both commentators and the courts have questioned the fairness of offering employees take-it-or-leave-it arbitration agreements that employers are free to draft in ways that may systematically disadvantage employees.⁴⁶

Proponents of arbitration tout that it is “fair and effective,” it “takes less time and costs less than litigation,” and it provides “a quick, cheap, and easy dispute resolution mechanism that is more efficient than resolving disputes through litigation.”⁴⁷ It follows that “[e]mployees benefit from access to a more efficient, expeditious and inexpensive form of justice” and “employers save litigation costs and avoid the disruptive effects on management of protracted legal proceedings open to the public.”⁴⁸ Because arbitration is more affordable, proponents posit that it permits increased access to lower- and middle-income employees to vindicate claims.⁴⁹ Advocates further argue that arbitration is less susceptible to abuse than litigation.⁵⁰ Federal courts, and the Supreme Court in particular, have largely echoed many of these perceived benefits in espousing a federal policy in favor of arbitration.⁵¹

45. See Green, *supra* note 36, at 409–10 (noting that a “bitter debate about the use of mandatory arbitration has developed since *Gilmer*” and recounting that “[t]he plaintiffs’ bar, government agencies, academics, and ADR providers have all sought to ban mandatory arbitration”).

46. See, e.g., Cole v. Burns Int’l Sec. Servs., 105 F.3d 1465, 1477 (D.C. Cir. 1997) (“[M]andatory arbitration agreements in individual employees’ contracts often are presented on a take-it-or-leave-it basis; there is no union to negotiate the terms. Thus, employers are free to structure arbitration in ways that may systematically disadvantage employees.”); Richard A. Bales & Jason N.W. Plowman, *Compulsory Arbitration as Part of a Broader Dispute Resolution Process: The Anheuser-Busch Example*, 26 HOFSTRA LAB. & EMP. L.J. 1, 4 (2008) (noting that “[f]ederal and state case reporters that are filled with lopsided employment arbitration agreements” including those that “waive the employee’s right to recovery punitive damages, and attorneys’ fees, cap the amount of consequential damages well below the amount permitted by statute, impose shortened statutes of limitation, impose filing fees and other prohibitive costs on would-be claimants, require employees . . . to submit their claims to arbitration while leaving the company free to litigate, forbid class actions, restrict or eliminate discovery, and give the company unilateral authority to appoint arbitrators”).

47. Eisenberg et al., *supra* note 44, at 878; see also Sherwyn, *supra* note 44, at 99 (arguing that “[b]ecause [arbitration] is faster and less expensive, arbitration is arguably more accessible to employees”); Silberman et al., *supra* note 21, at 1539 (“*Arbitration* has many of the advantages of litigation at a much lower cost.”).

48. Silberman et al., *supra* note 21, at 1539.

49. Jyotin Hamid & Emily J. Mathieu, *The Arbitration Fairness Act: Performing Surgery With A Hatchet Instead of a Scalpel?*, 74 ALB. L. REV. 769, 785 (2010–2011) (noting that one study has found that 72% of employees arbitrating pursuant to agreements that have not been individually negotiated “were of low to middle income and did not earn enough income to gain access to the courts with an employment-related claim”).

50. See Sherwyn, *supra* note 44, at 76 (positing that arbitration is “less susceptible to abuse than the current court system”).

51. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (explaining that in arbitration parties “trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration”) (internal citations and quotations omitted); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) (noting that arbitration agreements result in “streamlined proceedings and expeditious results”).

On the other hand, detractors claim that mandatory employment arbitration is unfair to employees on numerous fronts: procedure, access, and outcome.⁵² This critique is multifaceted, but the overarching objection is that mandatory arbitration denies employees their day in court.⁵³ Procedurally, dissenters claim shortened statutes of limitations, discovery restrictions, non-neutral arbitrators (i.e., the repeat player effect),⁵⁴ and unpublished decisions negatively impact employees.⁵⁵ They further contend that the lack of formal discovery in arbitration has a disproportionate negative impact on employees. Namely, because employers control the majority of evidence the employee needs to make his or her case in the form of emails, other documents, and testimony from management, such limited discovery is particularly harmful for an individual employee.⁵⁶ More globally, scholars claim that the procedures implemented in arbitration fail to ensure due process for employees.⁵⁷

This camp also claims arbitration is less accessible than litigation. Far from increasing access to justice, they claim arbitration does just the opposite. They argue that the costs associated with arbitration can make arbitration a less amenable forum than litigation,⁵⁸ and that arbitration often makes a case less attractive to plaintiffs' attorneys.⁵⁹ Thus,

52. See David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1254–58 (2009).

53. See Ariana R. Levinson, *What The Awards Tell Us About Labor Arbitration of Employment-Discrimination Claims*, 46 U. MICH. J.L. REFORM 789, 794 (2013) (noting that scholars “primary objection is that mandatory arbitration denies employees their day in court”).

54. The repeat player effect refers to the argument that arbitrators are predisposed to side with the employer because the employer is a potential source of repeat business.

55. See Ann C. Hodges & Douglas Scherer, *The Employment Law Decisions of the October 2000 Term of the Supreme Court: A Review and Analysis*, 5 EMP. RTS. & EMP. POL'Y J. 391, 402 (2001) (listing issues that may impact fairness of arbitration).

56. Schwartz, *supra* note 52, at 1275.

57. See Theodore J. St. Antoine, *Mandatory Employment Arbitration: Keeping It Fair, Keeping It Lawful*, 60 CASE W. RES. L. REV. 629, 641 (2010) (arguing that “the critical problem in mandatory arbitration is ensuring due process for the employees affected”).

58. See Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1312 (2015) (“available empirical evidence now shows that mandatory employment arbitration is bringing the opposite result—eroding rather than boosting employees’ access to justice by suppressing employees’ ability to file claims”); Lincoln L. Davies, *Lessons for an Endangered Movement: What a Historical Juxtaposition of the Legal Response to Civil Rights and Environmentalism Has to Teach Environmentalists Today*, 31 ENVTL. L. 229, 309 (2001) (noting that some arbitration clauses require employees to pay the procedure’s cost making access to arbitration a less amenable forum than litigation). *But see* Hamid & Mathieu, *supra* note 49 (noting that one study has found 72% of employees arbitrating pursuant to agreements that have not been individually negotiated “were low to middle income and did not earn enough income to gain access to the courts with an employment-related claim”).

59. See Sternlight, *supra* note 58, at 1340 (“[I]t is clear that when employers require their employees to pursue claims in arbitration, rather than litigation, the employers make it more difficult for

employees are less likely to vindicate their statutory rights in arbitration than litigation.

With respect to outcome, scholars submit that employees prevail less often in arbitration than in litigation.⁶⁰ And, when they do win, they win less money than in litigation.⁶¹ On a macro level, commentators lament that the confidential nature of arbitration awards and results removes the deterrent effect that a lawsuit has on discrimination in the workplace.⁶² Thus, without the prospect of publicity surrounding allegations of discrimination, a company has less incentive to voluntarily eradicate discriminatory practices in the workplace.⁶³

In recent years, academics, governmental agencies, and the plaintiffs' bar have been particularly critical of mandatory employment arbitration clauses that bar aggregate litigation and arbitration. They claim that mandatory employment arbitration is not aimed at facilitating better dispute resolution, but instead at eradicating aggregate litigation.⁶⁴ Indeed, some evidence suggests that the primary reason companies implement arbitration provisions is to avoid class action procedures.⁶⁵

their employees to obtain representation.”).

60. *See id.* at 1312 (noting that evidence demonstrates “employees win less often and win less money in arbitration than in litigation”).

61. *See id.* (noting that evidence demonstrates “employees win less often and win less money in arbitration than in litigation”). These claims, of course, are countered by studies that demonstrate “as long as certain procedural guarantees are provided to the claimants, employees will obtain far better opportunities to have their claims heard through a mandatory arbitration process rather than being subjected to the tremendous limitations inherent in the judicial process.” Green, *supra* note 36, at 419.

62. *See* Stephen Plass, *Private Dispute Resolution and the Future of Institutional Workplace Discrimination*, 54 HOW. L.J. 45, 46–47 (2010) (arguing that the confidential nature of private arbitration removes the deterrent impact that a public lawsuit has on discrimination in the workplace); Reginald Alleyne, *Statutory Discrimination Claims: Rights “Waived” and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. & EMP. L.J. 381, 429–31 (1996) (arguing that private arbitration eliminate deterrent value associated with remedial statutes); Silberman et al., *supra* note 21, at 1539–40 (noting that “[t]he generally private nature of arbitral proceedings and the lack of publicized decisions have made plaintiffs skeptical of the appropriateness of arbitration for public law claims such as discrimination”).

63. Critiques of mandatory arbitration do not lie solely with employees. On the employer side, businesses have often objected to the use of arbitration based on the perception that arbitrators often “split the baby.” *See* Carter Greenbaum, *Putting the Baby to Rest: Dispelling a Common Arbitration Myth*, 26 AM. REV. INT’L ARB. 101, 101–02 (2015) (discussing lack of empirical evidence that arbitrators in fact “split the baby” but noting that it is a commonly held view). Data does not necessarily bear out truth to this perception, but it persists nonetheless. *Id.* Other employers are also skeptical of implementing mandatory arbitration because they have high success rates in litigation. Most of the critiques of mandatory employee arbitration, however, center on the purported inequities bestowed on employees.

64. *See* Sternlight, *supra* note 58, at 1311; Szalai, *supra* note 22, at 32 (“[C]ompanies can use arbitration agreements to immunize themselves from class action liability.”).

65. *See* Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court’s Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 477 (2011) (“[T]he evidence also shows that the primary reason many companies implement arbitration provisions is to avoid class action procedures.”)

On a macro level, this practice may eliminate entirely the ability to secure broad relief aimed at eradicating unlawful employment conduct.⁶⁶ At the same time, claims of lower-wage earners unable to afford bilateral arbitration could be eliminated entirely.⁶⁷ Thus, not only are employers immunized from class and collective actions, low-wage-earner claims are suppressed as well. Taken together, these waivers lessen the effectiveness of our nation's employment laws.⁶⁸

C. Increased Use of Arbitration Agreements in the Workplace

As is explained in Part V, a series of recent FAA Supreme Court decisions have made mandatory employment arbitration agreements more attractive. Most importantly, following the Court's decisions in *Concepcion* and *Italian Colors*, most federal courts have held that aggregate dispute resolution waivers are enforceable in the employment context.⁶⁹ That is not to say that mandatory employment arbitration was not popular prior to these decisions; it was. In 2003, estimates suggested that nearly 25% of private sector nonunion workers were required to submit to arbitration as a condition of employment.⁷⁰ More recently, estimates reveal that 33% or more of nonunion employees are subject to mandatory arbitration of employment claims.⁷¹ And in some industries—such as telecommunications, credit, and financial services—it has been estimated that nearly 93% of the most prominent firms insert arbitration clauses into their employment contracts.⁷² Studies also indicate that 41.6% of senior executive contracts and 37% of executive contracts contain arbitration clauses.⁷³

But following the Supreme Court's recent decisions upholding aggregate dispute resolution waivers in other contexts,⁷⁴ scholars predict that employers will increasingly use mandatory arbitration clauses to

66. See Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 WAKE FOREST L. REV. 173, 174–75 (2003) (noting that the cost of arbitration and abolition of class actions could potentially eliminate low-dollar claims and claims by lower-wage earners who are unable to afford arbitration).

67. See *id.*

68. See *id.* at 175.

69. See, e.g., *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 384 (5th Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013).

70. Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RIGHTS. & EMP'T POL'Y J. 405, 410 (2007).

71. Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 2 (2011).

72. Eisenberg et al., *supra* note 44, at 886.

73. *Id.* at 878.

74. See *infra* Part III.B.

eliminate class employment actions.⁷⁵ A survey reported by the Wall Street Journal in April 2015 conducted by defense firm Carlton Fields Jorden Burt, LLP supports this hypothesis.⁷⁶ As relevant here, the survey of 350 companies showed that, in 2014, 43% of companies used arbitration clauses that precluded class action claims in the employment context—an increase from 16% in 2012 of the same survey participants.⁷⁷ Perhaps this timing is coincidental. It seems likely, however, that the Supreme Court’s decisions in *Concepcion* and *Italian Colors* influenced this trend. In any event, it is hard to make the case that the trend will not continue; it is simply good business to immunize oneself from class and collective employment claims.⁷⁸

This prediction seems even more likely given the Supreme Court’s decision in *Tyson Foods, Inc. v. Bouaphakeo*.⁷⁹ In *Tyson Foods*, the Supreme Court provided employees with a (somewhat) easier path forward in proving collective Fair Labor Standards Act (FLSA) class actions.⁸⁰ That is, the Supreme Court approved of the use of “representative,” “sample,” or “anecdotal evidence” in instances where an employer failed to keep time records.⁸¹ Thus, “trial by formula” has been provided new life with respect to FLSA collective actions. According to Justice Thomas’ dissent, this leaves employers with a difficult choice: either track any time that might be the subject of an innovative lawsuit or defend class actions against representative

75. See Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 199 (2015) (predicting that “businesses will eventually employ these waivers en masse against consumers and employees”); Einer Elhauge, *How Italian Colors Guts Private Antitrust Enforcement by Replacing it with Ineffective Forms of Arbitration*, 38 FORDHAM INT’L L.J. 771, 775 (2015) (stating that “it is hard to see why all businesses would not . . . insert arbitration clauses into their contracts that preclude class arbitration”).

76. Lauren Weber, *More Companies Block Employees from Filing Suits*, WALL ST. J. (Mar. 31, 2015), <http://www.wsj.com/articles/more-companies-block-staff-from-suing-1427824287>.

77. *Id.*

78. See Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1595 (2016) (referring to increase in the use of class waivers in arbitration claims and noting that “[i]t is all but certain that this trend will continue”).

79. 136 S. Ct. 1036 (2016).

80. See, e.g., *Attorneys React to High Court’s Tyson Class Action Ruling*, LAW 360 (Mar. 22, 2016), <http://www.law360.com/articles/774760/attorneys-react-to-high-court-s-tyson-class-action-ruling> (interviewing attorneys from numerous defense side firms who provided the following observations about *Tyson Foods*: it “gives employees another tool for bringing class action lawsuits against their employees;” “[b]y allowing the use of statistical evidence to substitute for individualized proof, the Supreme Court’s decision makes it easier for plaintiffs to obtain class certification where the class members’ evidence as to liability is varied;” “[p]erhaps the most significant aspect of the court’s decision . . . is the litigation it will ignite;” it is “significant to employers because it allows plaintiffs to recover based on statistics rather than actual time worked;” and “[t]oday’s opinion is a rare legal victory for American workers who are too often taken advantage of by large corporations”).

81. *Tyson Foods*, 136 S. Ct. at 1046–50.

evidence that unfairly homogenizes an individual issue.⁸² But, as noted herein, a third choice exists: mandatory arbitration that includes an aggregate dispute resolution waiver.⁸³ For employers in industries plagued with difficult questions over whether certain activities are compensable, these waivers may be particularly attractive.

In short, mandatory arbitration clauses containing aggregate dispute resolution waivers are becoming more popular among employers and this trend will likely continue. It simply makes too much sense for employers not to jump on board. Part III discusses why this trend has put aggregate dispute resolution waivers front and center with the NLRA and simultaneously moved the NLRA and FAA into one another's path.

III. COMING TOGETHER: THE FAA AND THE NLRA

For the most part, the FAA (passed in 1925) and NLRA (passed in 1935) have kept out of each other's way. Both statutes have been analyzed by the Supreme Court on numerous occasions, and both statutes have been interpreted broadly.⁸⁴ In recent years, however, developments in FAA jurisprudence as well as Board and judicial decisions interpreting the NLRA have put these statutes as adversaries when it comes to aggregate dispute resolution waivers. The developments that have culminated in a federal circuit court split on the enforceability of these waivers are discussed below.

With respect to the FAA, the conversation starts with a series of pro-arbitration Supreme Court decisions resulting in an affirmation that the FAA applies to employment contracts.⁸⁵ But a series of more recent Supreme Court decisions related to aggregate dispute resolution waivers outside of the employment context are the heart of the story. First, in *Concepcion*, the Court held that the FAA preempted a California state law that mandated most collective-arbitration waivers in consumer contracts were deemed unenforceable,⁸⁶ severely curtailing the reach of the FAA's saving clause. Second, the Supreme Court rejected a challenge in *Italian Colors* from a class of plaintiffs that sought to avoid arbitration on the grounds that their individual antitrust claims would be prohibitively costly.⁸⁷ *Italian Colors*, like *Concepcion*, further

82. *Id.* at 1059 (Thomas, J. dissenting).

83. *See infra* Parts III and IV.

84. *See infra* Parts III. A., III. B., and III. C.

85. *Circuit City v. Adams*, 532 U.S. 105, 109 (2001) (finding that FAA's exclusion of employment contracts applied only to contracts of transportation workers).

86. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

87. *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2312 (2013).

cemented the Roberts Court's expansive view of the FAA.⁸⁸ Finally, in *CompuCredit Corp. v. Greenwood*, the Supreme Court analyzed the specificity of Congressional intent necessary to overcome the presumption of enforceability of an arbitration agreement.⁸⁹ Unsurprisingly, the bar was set quite high.

The NLRA's path to its conflict with the FAA originates in the expansive text of the former, but is buttressed by the Supreme Court and NLRA's broad interpretation of the protection afforded by section 7.⁹⁰ On this point, the Supreme Court and Board have long agreed that concerted activities aimed at "mutual aid and protection" include employees' efforts "to improve [the] terms and conditions of employment . . . through channels *outside* of the immediate employee–employer relationship."⁹¹ This elastic view of section 7 opened the door to consider reprieve to judicial and arbitral forums as protected conduct. A logical extension of the broad protection afforded under section 7 came in the Board's landmark decision of *D.R. Horton*.⁹² It is a dispute over the validity of the holdings of *D.R. Horton* that has created a circuit split and put the NLRA squarely in the path of the FAA.

A. THE FAA AND MANDATORY EMPLOYMENT ARBITRATION

Mandatory employment arbitration in the nonunion setting is a relatively new phenomenon.⁹³ While the FAA was passed in 1925, it was originally interpreted as a statute that narrowly applied to contractual disputes between businesses that were brought in federal court.⁹⁴ Indeed, for decades, courts⁹⁵ and commentators⁹⁶ believed that

88. See Fitzpatrick, *supra* note 75, at 173 (suggesting that his view after *Concepcion* and *Italian Colors* is that "the FAA is no ordinary statute; rather, it is some sort of super-statute").

89. 565 U.S. 95, 103–05 (2012).

90. See *infra* Part III.C.

91. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–66 (1978) (emphasis added).

92. *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), *enforcement denied in relevant part* 737 F.3d 344 (5th Cir. 2013), *petition for rehearing en banc denied* No. 12-60031, 2014 U.S. App. LEXIS 24994 (5th Cir. Apr. 16, 2014).

93. Commentators and the courts have divided employment arbitration into two distinct categories: "(1) independent employment contracts signed by individuals and (2) collective bargaining agreements (CBAs) bargained for by union members." See, e.g., Kelly Burton Beam, *Administering Last Rites to Employee Rights: Arbitration Enforcement and Employment Law in the Twenty-First Century*, 40 HOUS. L. REV. 499, 502 (2003). Unlike collectively bargained agreements, individual arbitration agreements are often drafted by employers and given to employees on a take-it-or-leave-it basis as a condition of their employment. *Id.* at 501.

94. See, e.g., *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 200–01 (1956); see also Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 944 (1999) ("[I]t was long believed that the FAA applied only to cases in admiralty or involving commerce that were brought in federal court on the basis of federal question or diversity jurisdiction.").

the FAA did not apply to nonunion employees.

While the 1950s saw the number of matters subject to arbitration increased,⁹⁷ it was the 1980s when the Supreme Court began to develop modern pro-arbitration jurisprudence. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Court first stated that there was a “liberal federal policy favoring arbitration.”⁹⁸ Pursuant to this policy, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”⁹⁹ In practice, this presumption has meant that courts often require parties to arbitrate disputes if there is even a possibility that the dispute is covered by the arbitration agreement.¹⁰⁰ From this point forward, the Supreme Court became increasingly pro-arbitration.¹⁰¹ Today, “it is difficult to overstate the strong federal policy in favor of arbitration.”¹⁰² Suffice to say, it is a policy that federal courts have emphatically applied.¹⁰³

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Supreme Court first held that a pre-dispute arbitration agreement not only applied to contractual disputes but statutory claims as well.¹⁰⁴ On this issue, the Court reasoned that “[t]here is no reason to depart from [the presumption in favor of arbitrability] where a party bound by an arbitration agreement raises claims founded on statutory rights.”¹⁰⁵ Critically, the Court tempered this holding by explaining that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute.”¹⁰⁶ The Court further noted

95. See, e.g., *Gatliff Coal Co. v. Cox*, 142 F.2d 876, 882 (6th Cir. 1944) (finding that the FAA did not apply to employment contracts).

96. See Meredith Goldich, *Throwing out the Threshold: Analyzing the Severability Conundrum Under Rent-A-Center, West, Inc. v. Jackson*, 60 AM. U. L. REV. 1673, 1688 (2011) (“The presumption that the FAA did not apply to employment contracts or statutory claims eroded following the Court’s 1991 opinion in *Gilmer v. Interstate/Johnson Lane Corp.*”).

97. See Angelito Remo Sevilla, *The End of Duffield and the Rise of Mandatory Arbitration: How Courts Misinterpreted the Civil Rights Act’s Arbitration Provision*, 93 CAL. L. REV. 323, 329–30 (2005) (noting that “[a]fter 1950, the trend shifted to encourage an expansion of matters subject to arbitration” and by “1953, a vast majority of circuits construed the exclusionary clause narrowly”).

98. 460 U.S. 1, 24 (1983).

99. *Id.* at 24–25.

100. See Stone, *supra* note 94, at 950 (following *Cone*, “courts will require parties to arbitrate disputes if there is any possibility that the dispute is subject to an arbitration agreement”).

101. See Maureen A. Weston, *The Supreme Court and Arbitration: The Other Avenues of Hall Street and Prospects for Judicial Review of Arbitral Awards*, 14 LEWIS & CLARK L. REV. 929, 930 (2010) (noting that over the past thirty years the Supreme Court has adopted a pro-arbitration policy).

102. *Arciniaga v. Gen. Motor Corp.*, 460 F.3d 231, 234 (2d Cir. 2006) (internal citations and quotations omitted).

103. *Id.*

104. 473 U.S. 614, 628–40 (1985).

105. *Id.* at 626.

106. *Id.* at 628; see also *Cange v. Stotler & Co.*, 826 F.2d 581, 594 n.11 (7th Cir. 1987) (under FAA “an arbitration clause which operated as a prospective waiver of a substantive statutory right”

that not all statutory claims were necessarily subject to arbitration, but that for a statutory claim to be protected from waiver of the right to a judicial forum the Court must find that Congress intended such.¹⁰⁷ Thus, courts were to “assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention w[ould] be deducible from text or legislative history.”¹⁰⁸

Subsequently, the Supreme Court opened the door to authorizing mandatory employment arbitration in *Gilmer v. Interstate/Johnson Lane Corp.*¹⁰⁹ The issue in *Gilmer* was whether a member (not an employee) of the stock exchange could be compelled to arbitrate his age discrimination claim against the brokerage.¹¹⁰ The Court reasoned that Congress did not intend to preclude arbitration of Age Discrimination in Employment Act (ADEA) claims and that as long as “the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,” arbitration is appropriate.¹¹¹ While *Gilmer* did not squarely decide whether arbitration agreements in employment contracts were enforceable under the FAA,¹¹² mandatory employee arbitration nonetheless became increasingly common post-*Gilmer*.¹¹³ Indeed, in the years following *Gilmer*, lower courts required arbitration of claims based on laws prohibiting discrimination on the basis of race, sex, religion, and national origin.¹¹⁴ At the same time, scholars began to describe the FAA as a “super-statute” because “the Supreme Court [had] construed the FAA broadly, with a breadth sweeping well beyond the statute’s plain meaning and probable expectations of its framers in 1925.”¹¹⁵

would be “contrary to public policy” and unenforceable).

107. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628.

108. *Id.*

109. 500 U.S. 20 (1991).

110. *Id.* at 23.

111. *Id.* at 26–29.

112. The majority in *Gilmer* did not address the issue because although the plaintiff signed the agreement as a condition of employment, the contract was a securities registration application, not an employment contract. *Id.* at 23, 25 n.2. However, the dissent found the application to be an employment contract and opined that the FAA excluded “arbitration clauses contained in employment agreements.” *Id.* at 36–37 (Stevens, J. dissenting).

113. See, e.g., Colvin, *supra* note 71, at 2 (“Employment arbitration grew dramatically in the wake of the 1991 *Gilmer* decision.”); Green, *supra* note 36, at 407 (“Due to the meteoric rise of the ADR movement, increasing distrust of the legal system by corporate leaders, and the Supreme Court’s 1991 endorsement of arbitration to resolve statutory employment discrimination disputes in *Gilmer*, a growing number of employers have started to use mandatory arbitration agreements.”); Stone, *supra* note 94, at 953–54 (“The *Gilmer* decision thus opened the door for extensive use of arbitration in nonunion employment settings.”).

114. Stone, *supra* note 44, at 1034.

115. See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1260

Even so, after *Gilmer*, federal appellate courts were not consistent as to whether the FAA applied generally to employment contracts.¹¹⁶ But, in 2001, the Supreme Court confirmed that mandatory employment arbitration agreements were enforceable in *Circuit City v. Adams*.¹¹⁷ There, the Court held that arbitration agreements between employees and employers were enforceable unless the employees were directly involved in interstate transportation.¹¹⁸ The Court reiterated the FAA's pro-arbitration mandate and proclaimed "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation."¹¹⁹ Focusing on the "efficacy of alternative dispute resolution procedures"¹²⁰ was a practice the Court would later repeat in *Concepcion*.¹²¹ Most importantly, the Court rejected the supposition that the advantages of arbitration process "somehow disappear when transferred to the employment context."¹²²

B. Aggregate Dispute Resolution Waivers Under the FAA

The NLRA is pro-arbitration.¹²³ Thus, if the Supreme Court had delivered its final word on the FAA in *Circuit City* it seems unlikely that the FAA and NLRA would have had much occasion to interact. But the story does not end with *Circuit City*. Rather, the Supreme Court has had an active FAA docket, beginning in 2011, issuing three sharply divided opinions addressing the enforceability of arbitration agreements and broadening the already-expansive scope of the FAA. Hence, while the Supreme Court has not addressed directly whether employers can use arbitration agreements that eliminate employees' ability to participate in aggregate dispute resolution, a majority view has developed amongst lower courts that such waivers are valid.¹²⁴

In 2011, the Court in *Concepcion* held that the FAA preempted a

(2001).

116. After *Gilmer*, but before *Circuit City*, the appellate courts did not provide a consistent answer as to whether the FAA applied to employment contracts. See Sharona Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?*, 17 BERKELEY J. EMP. & LAB. L. 131, 143 (1996) (noting that "[a] review of court of appeals cases . . . does not provide a consistent answer to whether employment contracts are excluded from coverage under the FAA or whether the exclusion applies to a narrower category of employment contracts").

117. 532 U.S. 105, 109 (2001) (finding that FAA's exclusion of employment contracts applied only to contracts of transportation workers).

118. *Id.* at 119.

119. *Id.* at 123.

120. *Id.* at 123.

121. *Id.*; see also *infra* note 136 and accompanying text.

122. *Circuit City*, 532 U.S. at 123.

123. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1158 (7th Cir. 2016).

124. See *infra* note 215 and accompanying text.

California state law that “classif[ied] most collective-arbitration waivers in consumer contracts as unconscionable.”¹²⁵ The plaintiffs in *Concepcion* sought to invalidate the arbitration agreement through the FAA’s saving clause that provided arbitration agreements “shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for revocation of any contract.”¹²⁶ In rejecting the plaintiffs’ saving clause argument, the Court explained that the saving clause does not apply to contract defenses that derive their meaning from the fact that an agreement to arbitrate is at issue.¹²⁷ Because the California law put arbitration agreements and other contracts on a different footing, it was preempted by the FAA.¹²⁸

It is important to note that the California law in *Concepcion* applied to all contracts, not just arbitration agreements. Even so, the Court found the law preempted because “the rule would have a disproportionate impact on arbitration agreements.”¹²⁹ Hence, following *Concepcion*, even a law not specifically directed at arbitration agreements can conflict with the FAA if it “[has] been applied in a fashion that disfavors arbitration.”¹³⁰ The Court also explained that the FAA preempts “state-law rules that stand as an obstacle to the accomplishment of the FAA’s objective”¹³¹ and outlined the numerous ways in which class-wide arbitration did just that: class arbitration is slower, more expensive, and it has more formal procedures.¹³² Furthering this point, the Court noted that Congress necessarily contemplated individual arbitration in enacting the FAA, as “class arbitration was not even envisioned by Congress when it passed the FAA in 1925.”¹³³ As a result, “[r]equiring the availability of classwide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”¹³⁴ This decision was consistent with the Court’s holding a year earlier that a party may not be mandated to submit to classwide arbitration unless it agreed to do so.¹³⁵

125. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 340 (2011).

126. *See* 9 U.S.C. § 2 (2012).

127. *Concepcion*, 563 U.S. at 343–44.

128. *Id.* at 340–43 (holding that a court may not find an agreement to arbitrate unconscionable based on attributes unique to arbitration)

129. *Id.* at 342.

130. *Id.* at 341.

131. *Id.* at 343.

132. *Id.* at 346–50.

133. *Concepcion*, 563 U.S. at 346, 349.

134. *Id.* at 344.

135. *See Stolt-Neilsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 682–84 (2010) (because the FAA requires courts to “give effect to the contractual rights and expectations of the parties, . . . it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a

The Court also furthered the tact used in *Circuit City* of touting the benefits of arbitration in connection with assessing the enforceability of the individual agreement.¹³⁶

Next, in *Italian Colors*, the Court heard a challenge from a class of plaintiffs that sought to avoid arbitration on the grounds that their individual antitrust claims would be prohibitively costly.¹³⁷ In particular, the plaintiffs offered evidence that the cost of prosecuting their antitrust claims individually would be at least several hundred thousand dollars, but that each plaintiff would recover only between \$12,000 and \$38,000.¹³⁸ It would thus be cost prohibitive to seek relief on an individual basis and potentially meritorious claims would go unvindicated. The Court held that pursuant to the FAA it had an obligation to enforce the terms of the FAA unless a “contrary congressional command” contained in the antitrust laws overrode the FAA.¹³⁹ According to the majority, the antitrust laws did not contain a “contrary congressional command” that required the rejection of the class action waiver.¹⁴⁰

The fight in *Italian Colors* largely centered on the vindicating rights doctrine. In a nutshell, the Court ruled that the vindicating rights doctrine¹⁴¹ may be used to invalidate an arbitration clause only when a party can show that the clause deprived the party of its right to prove its federal statutory claim in arbitration.¹⁴² The Court reasoned that an arbitration clause waiving the right to pursue a class or collective action did not remove a party’s right to bring the claim, only a method of doing so.¹⁴³ In her dissent, Justice Kagan laid out the importance of the doctrine that the plaintiffs had advocated for:

The effective-vindication rule [ensures that] arbitration remains a

contractual basis for concluding that the party agreed to do so”) (internal citations and quotations omitted).

136. See *supra* note 126 and accompanying text.

137. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013).

138. *Id.*

139. *Id.* at 2309.

140. *Id.*

141. Justice Scalia ostensibly recognized the validity of the effective vindication doctrine as a general matter: “As we have described, the [effective vindication] exception finds its origin in the desire to prevent ‘prospective waiver of a party’s right to pursue statutory remedies.’ That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.” *Italian Colors*, 133 S. Ct. at 2310–11.

142. See Gross, *supra* note 29, at 113–14 (“[T]he Court in *Italian Colors* ruled that—to the extent it exists at all—the vindicating rights doctrine precludes the enforcement of an arbitration clause only when a party can show that the clause deprived it of the *right* to prove its federal statutory claims in arbitration (as opposed to the *ability* to prove those claims).”).

143. *Id.* at 114.

real, not faux, method of dispute resolution. With the rule, companies have good reason to adopt arbitral procedures that facilitate efficient and accurate [settlement and] handling of complaints. Without it, companies have every incentive to draft their agreements to extract backdoor waivers of statutory rights¹⁴⁴

Lastly, in *CompuCredit Corp. v. Greenwood*, the Court analyzed the specificity of Congressional intent necessary to overcome the presumption of enforceability of an arbitration agreement.¹⁴⁵ The Court also reaffirmed that federal statutory claims are arbitrable absent a “contrary congressional command.”¹⁴⁶ Both the district court and the Ninth Circuit Court of Appeals had held the *CompuCredit* plaintiffs’ claims were not arbitrable because Congress intended to preclude arbitration of their claims arising under the Credit Repair Organizations Act (CROA) when it provided consumers the “right to sue” violators of the statute.¹⁴⁷ The Supreme Court disagreed, holding that this language does not reflect congressional intent to preclude arbitration under the CROA.¹⁴⁸ In doing so, the Court pointed to instances where Congress had restricted the use of arbitration in other contexts, and that it had done so with great specificity.¹⁴⁹ *CompuCredit* thus establishes the high bar necessary to overcome the FAA in a conflict analysis.

C. The NLRA and Concerted Activity

Congress passed the NLRA after determining that “disturbances in the area of labor relations led to undesirable burdens on[,] and obstructions of[,] interstate commerce.”¹⁵⁰ In Congress’s view, the “inequality of bargaining power between unorganized employees and corporate employers had adversely affected commerce.”¹⁵¹ Thus, the NLRA’s objective is to “restor[e] equality of bargaining power between employers and employees.”¹⁵² The NLRB has authority to implement

144. *Italian Colors*, 133 S. Ct. at 2315 (Kagan J., dissenting).

145. 565 U.S. 95, 96–97 (2012).

146. *Id.* at 98.

147. *Greenwood v. CompuCredit Corp.*, 615 F.3d 1204, 1206–07 (9th Cir. 2010).

148. *CompuCredit*, 565 U.S. at 97–99.

149. *Id.* at 103 (citing to other federal statutes and noting that when Congress “has restricted the use of arbitration in other contexts, it has done so with a clarity that far exceeds the claimed indications in the CROA”).

150. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102–03 (1970).

151. *American Hosp. Ass’n v. NLRB*, 499 U.S. 606, 609 (1991) (internal quotations omitted).

152. *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, at *1 (Oct. 28, 2014) (quoting 29 U.S.C. § 151).

the provisions of the NLRA.¹⁵³

Section 7 of the NLRA protects the rights of individuals to engage in union activity and “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”¹⁵⁴ Enforcement is set forth in section 8 where it is deemed an “unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.”¹⁵⁵ The right to engage in concerted activities has long been considered a “fundamental right” afforded by the NLRA,¹⁵⁶ and individual employee contracts eliminating rights guaranteed by the NLRA are unlawful and unenforceable.¹⁵⁷

The NLRA does not define two of its prominent phrases: “other concerted activity” and “mutual aid or protection.”¹⁵⁸ But the Board and the Supreme Court have analyzed these phrases’ limits and defined them broadly.¹⁵⁹ As a result, section 7 protection goes well beyond joining or assisting labor organizations, covering a broad range of activities carried out for employees’ “mutual aid or protection.”¹⁶⁰ For example, in *Eastex, Inc. v. NLRB*, the Supreme Court addressed the contours of the protection afforded to “other concerted activities for mutual aid and protection.”¹⁶¹ The employer in *Eastex* denied the union permission to distribute a leaflet to employees, and the union claimed that this denial interfered with the employees’ section 7 rights.¹⁶² The employer countered that protection afforded under section 7 was limited to concerted activities related to the employment relationship and that “channels outside the immediate employer-employee relationship” were not protected under section 7.¹⁶³ Both of the employer’s arguments were rejected. The Court explained:

153. See 29 U.S.C. § 153(a) (2012) (providing for “creation, composition, appointment, and tenure” of NLRB).

154. 29 U.S.C. § 157 (2012).

155. 29 U.S.C. § 158(a)(1) (2012).

156. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

157. See *Nat’l Licorice Co. v. NLRB*, 309 U.S. 350, 365 (1940) (“[I]t will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them, would violate the Board’s order or be inconsistent with any part of it.”).

158. 29 U.S.C. § 157.

159. See *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984) (explaining that “[t]here is no indication that Congress intended to limit this protection to situations in which an employee’s activity and that of his fellow employees combine with one another in any particular way”).

160. See JOHN E. HIGGINS, JR., *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 83* (H. Victoria Hedian et al. eds., 6th ed. 2012).

161. 437 U.S. 556, 558 (1978).

162. *Id.* at 560–61.

163. *Id.* at 564–65.

[I]t has been held that the “mutual aid or protection” clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums, and that employees’ appeals to legislators to protect their interests as employees are within the scope of this clause. To hold that activity of this nature is entirely unprotected—irrespective of location or the means employed—would leave employees open to retaliation for much legitimate activity that could improve their lot as employees.¹⁶⁴

Following *Eastex*, the Board has held that actions in judicial and administrative forums that relate to terms and conditions of employment are protected under section 7.¹⁶⁵ Lower courts have likewise held that filing a collective lawsuit contesting working conditions on a group basis is protected by section 7.¹⁶⁶ This is true even when an employee acts alone but intends to induce group activity.¹⁶⁷ The Board’s decision in *D.R. Horton* was a logical extension of these holdings, albeit one the courts have been hesitant to embrace.

IV. THE SPLIT OVER THE ENFORCEABILITY OF AGGREGATE DISPUTE RESOLUTION WAIVERS

A. The NLRB Holds That Aggregate Dispute Resolution Waivers Violate the NLRA

In 2012, the Board issued the watershed decision of *D.R. Horton*¹⁶⁸ in which it found that the “right to engage in collective action—including collective legal action—is the core substantive right protected by the NLRA.”¹⁶⁹ Thus, according to the Board, the right to pursue joint, class,

164. *Id.* at 565–67 (quoting *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962)).

165. *See, e.g.*, *Franklin Iron & Metal Corp.*, 315 N.L.R.B. 819 (Dec. 16, 1994) (employees who separately approached employer about racially discriminatory wages and then went together to file separate charges with state anti-discrimination agency engaged in protected activity).

166. *See, e.g.*, *Brady v. NFL*, 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].”); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (“[T]he filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7, unless the employees acted in bad faith.”).

167. *See NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 831 (1984) (individual activity may be concerted where employee “intends to induce group activity” or “acts as a representative of at least one other employee”).

168. As of 2003, the NLRA’s protection of concerted activity had “been virtually ignored in the debate about the enforceability of arbitration agreements imposed as a condition of employment.” *Hodges, supra* note 66, at 175.

169. *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, at *1 (Oct. 28, 2014).

or collective claims, if and as available, is a substantive right that cannot be waived via an arbitration agreement. Therefore, an employer violates the NLRA when it requires its employees to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial.¹⁷⁰ To be clear, the Board reasoned that the NLRA does not create a right to class certification or the equivalent, but instead, the right to pursue joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint.¹⁷¹

In *D.R. Horton*, a group of employees challenged the legality of an arbitration agreement that required employees to agree, as a condition of employment, that they would not *pursue* class or collective dispute resolution of claims in any forum, arbitral or judicial.¹⁷² The Board began its analysis by noting that the Board has long held (with judicial approval) that the NLRA protects employees' ability to pursue workplace grievances collectively, including through litigation.¹⁷³ In making this point, it pointed to the Supreme Court's decision in *Eastex* and its pronouncement that "'mutual aid or protection' includes employees' efforts to 'improve [the] terms and conditions of employment . . . through channels outside of the immediate employee–employer relationship,'" including through litigation.¹⁷⁴ The Board found that collective arbitration is equally protected by the NLRA.¹⁷⁵ From here, it surmised that "employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by section 7 of the NLRA."¹⁷⁶ Indeed, employees are more likely to assert their legal rights (and more likely do so effectively) when they do so collectively.¹⁷⁷

Next, the Board explained that the agreement was illegal because the Supreme Court (in *National Licorice Co. v. NLRB*¹⁷⁸ and *J.I. Case v. NLRB*¹⁷⁹) had long held that employers cannot enter into individual agreements with employees that cede their statutory rights to act

170. *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012) *enf. denied in relevant part* 737 F.3d 344 (5th Cir. 2013), *petition for rehearing en banc denied* No. 12-60031, 2014 U.S. App. LEXIS 24994 (5th Cir., Apr. 16, 2014).

171. *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, at *2.

172. *D.R. Horton, Inc.*, 357 N.L.R.B. at 2277–78.

173. *Id.* at 2278.

174. *Id.* (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–66 (1978)).

175. *Id.* at 2278–79 (citing *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 882, 836 (1984)).

176. *Id.* at 2279.

177. *Id.*

178. 309 U.S. 350, 360 (1940) (individual employment contracts with language discouraging employee from presenting grievance through union was unlawful).

179. 321 U.S. 332, 337 (1944) (individual employment agreements entered prior to union certification cannot limit scope of employer's duty to bargain with union).

collectively.¹⁸⁰ Because the arbitration agreement restricted employees' section 7 rights, it constituted an unfair labor practice under section 8(a)(1).¹⁸¹ The Board emphasized invalidating individual employment agreements that waive the right to engage in concerted activity represented the core of section 7, which had expanded the Norris-LaGuardia Act's ban on "yellow dog" contracts which barred employees from joining unions.¹⁸²

Thereafter, the Board turned to the employer's argument that finding the arbitration agreement illegal under the NLRA conflicted with the FAA. The Board was not persuaded for several reasons. "First, the purpose of the FAA was to prevent courts from treating arbitration agreements less favorably than other private contracts."¹⁸³ But here, the arbitration agreement was treated no worse than any other private contract that conflicts with federal labor law.¹⁸⁴ To illustrate this point, the Board noted that the agreement would be equally violative of the NLRA if it mentioned nothing about arbitration but required all claims to be pursued in court on an individual basis.¹⁸⁵

The Board next noted the Supreme Court has made clear that, under the FAA, a party is not required to forgo substantive statutory rights afforded by federal statute.¹⁸⁶ Drawing on its first holding, the Board determined that the right to engage in collective legal action is a core substantive right protected by the NLRA and, therefore, cannot be waived.¹⁸⁷ It further explained that nothing in the text of the FAA suggests that an arbitration agreement inconsistent with the NLRA is enforceable.¹⁸⁸ Rather, the saving clause makes clear that arbitration agreements may be invalidated on any grounds that exist at law or in equity for the revocation of any contract.¹⁸⁹ Thus, according to the Board, there was no conflict between the statutes, just an instance where the FAA's saving clause applied.

After making its case that the FAA and NLRA did not conflict, the Board sought to distinguish recent Supreme Court precedent that muddied the waters. In particular, the Board addressed the Supreme Court's holdings in *Stolt-Nielsen S.A. v. Animal Feeds International*

180. *D.R. Horton, Inc.*, 357 N.L.R.B. at 2280.

181. *Id.* at 2281.

182. *Id.* Scholars have argued that mandatory employment arbitration agreements are akin to contemporary "yellow dog contracts." See, e.g., Van Wezel Stone, *supra* note 44, at 1020.

183. *D.R. Horton, Inc.*, 357 N.L.R.B. at 2285.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 2286.

188. *Id.* at 2287.

189. *D.R. Horton, Inc.*, 357 N.L.R.B. at 2287.

*Corp.*¹⁹⁰ and *Concepcion*,¹⁹¹ that, absent contract language to the contrary, “arbitration” means “bilateral arbitration.” Under this precedent, a court is not authorized under the FAA to graft the availability of aggregate dispute resolution into arbitration agreements that only provide for individual arbitration, or are silent as to the availability of aggregate arbitration. On this point, the Board sought to distinguish *Concepcion* on the grounds that it dealt with consumer arbitration contracts, not employment arbitration agreements. Thus, according to the Board, the intrusions underlying the FAA were more limited because the “average number of employees” joining together would be, on average, far smaller than the consumer context.¹⁹² Consequently, to the extent that arbitration is best suited for two parties, aggregate employment arbitration would only result in minimal disruption.¹⁹³

D.R. Horton caused quite a stir,¹⁹⁴ but it was rejected by the Fifth Circuit on appeal and by the majority of other federal courts that have considered its reasoning.¹⁹⁵ Nevertheless, in *Murphy Oil*, the Board reaffirmed and provided further explanation for its decision in *D.R. Horton*. It recounted that the “substantive nature of the right to group legal redress is what distinguishes the NLRA from every other statute the Supreme Court has addressed in its FAA jurisprudence.”¹⁹⁶ It further noted that while the ADEA and FLSA “provide additional legal rights and remedies in the workplace,” these laws in “no way supplant, or serve as a substitute for, workers’ basic rights under section 7 to engage in concerted activity.”¹⁹⁷ As a result, the Board made clear that FAA decisions addressing the FLSA and ADEA are not controlling and that the Board would press on in its view that aggregate dispute resolution waivers violate the NLRA. The Board went on to reiterate that the FAA requires that arbitration agreements be enforced with two exceptions, and that both exceptions apply.¹⁹⁸ First, the mandatory

190. 559 U.S. 662, 684–87 (2010).

191. 563 U.S. 333, 347 (2011).

192. *D.R. Horton, Inc.*, 357 N.L.R.B. at 2287.

193. The Board surmised that even if a conflict existed between the NLRA and FAA, it is likely that the FAA would have to yield to the terms of the NLRA, which was enacted after the FAA. *Id.*

194. See, e.g., Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Activity Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013, 1015 (2013) (noting that the Board’s decision in *D.R. Horton* “has generated an enormous amount of litigation and raises profoundly important issues”).

195. See *infra* notes 215–219 and accompanying text.

196. *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, at *2 (Oct. 28, 2014) (quoting Catherine L. Fisk, *Collective Action and Joinder of Parties in Arbitration: Implications of D.R. Horton and Concepcion*, 35 BERKELEY J. EMP. & LAB. L. 175, 186 (2014)).

197. *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, at *10.

198. *Id.* at *11.

arbitration agreement was invalid under the FAA's saving clause, which provides for revocation "upon such grounds as exist at law or in equity for the revocation of any contract."¹⁹⁹ Second, section 7 of the NLRA amounts to a "contrary congressional command" overriding the FAA.²⁰⁰ In short, the Board doubled down on its analysis in *D.R. Horton* and will continue to do so until the Supreme Court weighs in.

B. The Fifth Circuit Rejects the Board's Reasoning in D.R. Horton

Aside from scholarly approval,²⁰¹ the Board's reasoning in *D.R. Horton* has been largely rejected.²⁰² Most notably, the Fifth Circuit declined to follow *D.R. Horton* on appeal, finding that the Board failed to give proper weight to the FAA,²⁰³ and that the Court's decision in *Concepcion* made clear that the saving clause did not apply.²⁰⁴ The Fifth Circuit concluded that, just as the facially neutral California law in *Concepcion* had a disproportionate impact on arbitration, the Board's interpretation that section 7 mandates employees have access to collective procedures in an arbitral or judicial forum has the effect of disfavoring arbitration.²⁰⁵ Put differently, the availability of class dispute resolution, whether in arbitration or litigation, discouraged the use of bilateral arbitration.²⁰⁶ Therefore, the Board's decision served as an impediment to the FAA.²⁰⁷ Consequently, the Fifth Circuit ruled that the saving clause is not a basis for invalidating the waiver of class procedures in the arbitration agreement.²⁰⁸

The Fifth Circuit also held the NLRA does not contain a contrary congressional command that forecloses arbitration.²⁰⁹ The court surmised neither the NLRA's statutory text nor its legislative history are averse to the FAA.²¹⁰ Likewise, it held that there was no inherent conflict between the FAA and the NLRA's purpose.²¹¹ In fact, the

199. 9 U.S.C. § 2 (2012).

200. *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, at *12.

201. *See, e.g., Sullivan & Glynn, supra* note 194, at 1017 (making the case that "the Board is clearly correct as a matter of interpreting the labor statutes").

202. *See infra* notes 215–219 and accompanying text.

203. *D.R. Horton, Inc. v. NLRB.*, 737 F.3d 344, 348 (5th Cir. 2013).

204. *Id.* at 359–60.

205. *Id.* at 360.

206. *Id.*

207. *Id.*

208. *Id.*

209. *D.R. Horton, Inc.*, 737 F.3d at 360.

210. *Id.* at 361.

211. *Id.*

NLRA has long been understood to permit and require arbitration.²¹²

The Fifth Circuit found support for its holdings in the Supreme Court decisions that held the right to proceed collectively cannot protect vindication of employees' statutory rights under the ADEA or FLSA.²¹³ In particular, the court recounted that the NLRA's reasoning had already been considered by the Supreme Court. Specifically, the Supreme Court had already rejected the argument that inequality of bargaining power is a sufficient reason to vitiate a mandatory arbitration agreement in the employment context.²¹⁴ Thus, according to the Fifth Circuit, the Supreme Court had already rejected the justifications underlying the Board's finding that the right to proceed collectively was statutory rather than procedural.²¹⁵

The Fifth Circuit's rejection of *D.R. Horton* represents the majority view.²¹⁶ Two other federal circuit courts and scores of federal district courts have likewise declined to follow *D.R. Horton*.²¹⁷ In *Owen v. Bristol Care, Inc.*, the Eighth Circuit explicitly rejected the plaintiff's invitation to follow the Board's rationale in *D.R. Horton* and held that arbitration agreements containing class waivers of FLSA claims are enforceable.²¹⁸ Likewise, in *Sutherland v. Ernst & Young*, the Second Circuit declined to follow the Board's reasoning.²¹⁹ But as noted by the Board in *Murphy Oil*, neither the Eighth nor the Second Circuit devoted significant analysis to the issue.²²⁰ In contrast, as is explained below, the Seventh Circuit engaged in an in-depth analysis of the Board's decision and made a compelling case that the Second, Fifth, and Eighth Circuits got it wrong.

212. *See id.*

213. *D.R. Horton, Inc.*, 737 F.3d at 361 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (ADEA)); *Carter v. Countrywide Credit Indus.*, 362 F.3d 294, 298 (2004) (FLSA)).

214. *Id.*

215. *Id.*

216. *See, e.g.,* *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013) (noting that the two courts of appeals and "overwhelming majority of the district courts" that have considered *D.R. Horton* have found that it "conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding" the FAA).

217. *Id.*

218. 702 F.3d 1050, 1055 (8th Cir. 2013) ("[G]iven the absence of any 'contrary congressional command' from the FLSA that a right to engage in class actions overrides the mandate of the FAA in favor of arbitration, we reject Owen's invitation to follow the NLRB's rationale in *D.R. Horton* . . .") (quoting *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012)).

219. 726 F.3d 290, 297 n.8 (2d. Cir. 2013).

220. *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, at *14 (Oct. 28, 2014) (noting that the Eighth Circuit's decision in *Owen* and the Second Circuit's decision in *Sutherland* "add little to the equation here, given their limited analysis of the issue").

C. The Seventh Circuit Sides with the Board, Creating a Circuit Split.

In *Lewis v. Epic Systems Corp.*, the Seventh Circuit became the first circuit court to hold that an arbitration agreement that precluded collective action in any forum violated the NLRA.²²¹ At issue in *Epic* was an agreement that stated wage-and-hour claims could be brought only through individual arbitration and that employees waived “the right to participate in or receive money or any other relief from any class, collective, or representative proceeding.”²²² Despite “agreeing”²²³ to the above terms, Jacob Lewis filed suit in federal court contending that Epic had violated the FLSA by misclassifying him and his fellow workers, thereby depriving them of overtime pay.²²⁴

The Seventh Circuit first turned to the dictionary to explain why the ordinary meaning of the undefined term “concerted activities” encompasses collective or class legal proceedings.²²⁵ The word “concerted” means “jointly arranged, planned, or carried out.”²²⁶ “Activities,” in turn, is defined as “actions taken by a group in order to achieve their aims.”²²⁷ Taken together, the court concluded that “[c]ollective or class legal proceedings fit well within the ordinary understanding of ‘concerted activities.’”²²⁸

Moving beyond the text of section 7, the court outlined why the NLRA’s history and purpose reveal that the phrase “concerted activities” includes representative, joint, collective, or class remedies.²²⁹ In essence, the NLRA is aimed at leveling the playing field in the workplace. The Seventh Circuit noted how, before the NLRA was passed, a single employee was often helpless in dealing with an employer.²³⁰ Thus, Congress sought through the NLRA to allow employees to band together to equalize bargaining power, and aggregate legal remedies allow just that.²³¹ Aggregate employment actions allow plaintiffs “who would otherwise ‘have no realistic day in court’ to enforce their rights.”²³² It follows that collective remedies fall within

221. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016).

222. *Id.* at 1151 (internal quotations omitted).

223. Epic sent its employees an email with the above arbitration agreement notifying the employees they would be deemed to have accepted the agreement if they continued to work with the company. *Id.* at 1151.

224. *Id.*

225. *Id.* at 1153.

226. *Id.*

227. *Epic Sys. Corp.*, 823 F.3d at 1153.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* (quoting *Phillips Petrol Co. v. Shutts*, 472 U.S. 797, 809 (1985)).

section 7's "intentionally broad sweep."²³³

Finally, the court noted that even if the phrase "concerted activities" was ambiguous, the Board's interpretation in *D.R. Horton* was entitled to *Chevron* deference.²³⁴ In the Seventh Circuit's view, the Board's interpretation, at minimum, was "a sensible way to understand the statutory language."²³⁵ For this additional reason, the Seventh Circuit had little trouble siding with the Board and holding that aggregate dispute resolution waivers violated the NLRA.

The Seventh Circuit next addressed Epic's argument that Congress could not have intended section 7 to include class dispute resolution because Rule 23 did not exist in 1935 (the year the NLRA was passed).²³⁶ Unmoved, the Seventh Circuit rejected the factual accuracy of Epic's argument by pointing out that all collective or representative procedures and remedies were prohibited by the contract, not just Rule 23 actions.²³⁷ This, coupled with the fact that other class or collective procedures existed long before the NLRA was passed, defeated Epic's temporal argument.²³⁸ Perhaps more importantly, the Seventh Circuit rejected the premise of Epic's argument in explaining that the broad language used in section 7 leaves no reason to think Congress intended to limit protection afforded by the NLRA to only "concerted activities" that were available at the time the NLRA was enacted.²³⁹

After holding that the collective action waiver violated the NLRA, the court went on to address Epic's argument that the FAA overrides the NLRA and mandates enforcement of the agreement. Epic argued that, because the NLRA does not contain a "contrary congressional command" against arbitration, it is trumped by the FAA.²⁴⁰ But, according to the Seventh Circuit, this question put the "cart before the horse" because the court must initially assess whether there is in fact a conflict between the NLRA and the FAA.²⁴¹ Finding no such conflict, the court concluded that it was unnecessary to analyze whether the NLRA contained a "contrary congressional command."

Instead, because the arbitration agreement was illegal under the

233. *Epic Sys. Corp.*, 823 F.3d at 1153.

234. *Id.* (noting that the "Supreme Court has repeatedly cited *Chevron* in describing its deference to the NLRB's interpretation of the NLRA").

235. *Id.*

236. *Id.* at 1154.

237. *Id.*

238. *Id.* (explaining that "Congress was aware of class, representative, and collective legal proceedings when it enacted the NLRA" and "there is no evidence that Congress intended them to be excluded").

239. *Epic Sys. Corp.*, 823 F.3d at 1154.

240. *Id.* at 1156.

241. *Id.*

NLRA, it fell squarely within the FAA's saving clause.²⁴² Thus, the NLRA and FAA are not at odds but instead "work hand in glove."²⁴³ Critiquing its sister circuit, the Seventh Circuit lamented that the Fifth Circuit made no effort to harmonize the FAA and the NLRA and ignored the strong presumption that both statutes may be given effect.²⁴⁴ Dismissing the Fifth Circuit's reliance on what the Seventh Circuit coined Supreme Court dicta, the Seventh Circuit opined that neither "*Concepcion* nor *Italian Colors* goes so far as to say that *anything* that conceivably makes arbitration less attractive automatically conflicts with the FAA."²⁴⁵ In fact, the court claimed that this case was the "inverse" of the effective vindication scenario in *Italian Colors*.²⁴⁶ Namely, just as the antitrust laws do not guarantee an affordable procedural path in every instance, the FAA does not "pursue its purposes at all costs."²⁴⁷ Lastly, the court explained that finding the NLRA in conflict with the FAA would leave the FAA's saving clause without meaning.²⁴⁸

In August 2016, the Ninth Circuit, in a divided opinion, sided with the Board and Seventh Circuit in *Morris v. Ernst & Young, LLC*.²⁴⁹ The *Morris* majority echoed and expanded on the reasoning set forth by the Seventh Circuit in *Lewis*. The majority began its analysis by explaining that the enforceability of the waiver at issue turns on a well-established principle: "employees have the right to pursue work-related legal claims together."²⁵⁰ Expanding on this point, the court stated that the NLRA establishes a substantive right of "employees to pursue work-related legal claims, and to do so together."²⁵¹ Thus, like the Seventh Circuit, the Ninth Circuit adopted the Board's interpretation of section 7.²⁵²

The *Morris* majority also agreed with the Seventh Circuit and held that the FAA did not conflict with the NLRA, thus avoiding a statutory-conflict analysis.²⁵³ On this point, the majority reasoned that the "NLRA obstacle is a ban on initiating, in any forum, concerted legal claims—not a ban on arbitration."²⁵⁴ Thus, the majority concluded that

242. *Id.* at 1157.

243. *Id.*

244. *Id.* at 1158.

245. *Epic Sys. Corp.*, 823 F.3d at 1158.

246. *Id.*

247. *Id.* at 1159.

248. *Id.*

249. 834 F.3d 975 (9th Cir. 2016).

250. *Id.* at 980.

251. *Id.* at 982.

252. *Id.* at 982–84.

253. *Id.* at 984.

254. *Id.*

the contract defense of illegality did not run afoul of *Concepcion* because the defense did not derive its meaning from the fact that the illegal agreement was an arbitration agreement.²⁵⁵ Accordingly, like the Seventh Circuit, the Ninth Circuit held that the FAA's savings clause applied.²⁵⁶ In explaining this holding, the court explained that "[a]t its heart, this is a labor law case, not an arbitration case."²⁵⁷

Judge Ikuta did not mince words in her dissent in *Morris*, writing that the majority's decision was "directly contrary to Supreme Court precedent and join[ed] the wrong side of a circuit split."²⁵⁸ Judge Ikuta explained that the Court in *Concepcion* had already held that class procedures are "incompatible with arbitration" and that the FAA's savings clause does not "preserve [defenses] that stand as an obstacle to the accomplishment of the FAA's objectives."²⁵⁹ Thus, according to Judge Ikuta, the *Morris* majority's contention that the non-waivable right to aggregate legal redress applies equally to arbitration and litigation was already considered and rejected in *Concepcion*.²⁶⁰

The Seventh and Ninth Circuits' view is "firmly in the minority."²⁶¹ But that does not mean they got it wrong. Part V of this article makes the case that the Supreme Court should adopt the minority view and declare that aggregate dispute resolution waivers violate the NLRA. In doing so, however, the Court will be compelled to engage in a conflict analysis between the FAA and NLRA that the Seventh and Ninth Circuits sought to avoid. While the Seventh Circuit sets forth a persuasive argument that illegality of aggregate dispute resolution waivers under the NLRA fits within the FAA's saving clause, it understated the holdings of *Concepcion* and *Italian Colors*. The Ninth Circuit's attempts to distinguish this authority were similarly unavailing. Unless the Supreme Court is willing to substantially reign in its holdings in these two cases (a possible outcome depending on the makeup of the Court), it will be required to undergo a statutory-conflict analysis to determine whether the NLRA trumps the FAA, or vice versa.

V. THE NLRA V. THE FAA: WHICH PREVAILS?

It is only a matter of time before the Supreme Court weighs in on the

255. *Morris*, 834 F.3d at 984.

256. *Id.* at 985–87.

257. *Id.* at 989.

258. *Id.* at 990 (Ikuta, J., Dissenting).

259. *Id.* at 997 (quoting *Concepcion*, 563 U.S. at 343).

260. *Id.*

261. See *Thomas v. Port II Seafood & Oyster Bar, Inc.*, No. 16-0115-WS-N, 2016 U.S. Dist. LEXIS 89589, at *8 (S.D. Ala. July 8, 2016) (stating that the "Seventh Circuit's treatment of this issue appears to be anomalous, or at least firmly in the minority").

split outlined in Part IV. In the interim, plaintiffs' attorneys will likely flock to the Seventh and Ninth Circuits (when possible) to file class employment actions and national employers will have to consider carefully whether to continue mandating arbitration. Given the uncertainty that currently exists and the importance of the issue at stake, the Court will likely take this issue on sooner, rather than later. It is too important not to. The remainder of Part V outlines how the Supreme Court should resolve this split in authority. It concludes that the Supreme Court should ultimately side with the minority position taken by the Seventh and Ninth Circuits and hold that aggregate dispute resolution waivers violate the NLRA.

A. Aggregate Dispute Resolution Waivers Violate Section 7 of the NLRA

The Seventh and Ninth Circuits and Board got it (mostly) right. Section 7 protects employees' right to engage in aggregate dispute resolution, if otherwise available, whether in litigation or arbitration. As is explained below, section 7's text, Board and judicial decisions interpreting the same, and the purpose and history of the NLRA overwhelmingly support this view.

Textually, it is difficult to construct broader protection than the relevant language of section 7: "to engage in other concerted activities . . . and other mutual aid or protection" ²⁶² The defining characteristic of aggregate litigation and arbitration is that it involves (or seeks to involve) more than one employee. By definition, a class or collective lawsuit or arbitration is an action "undertaken together by two or more employees," or one "undertaken by one on behalf of others." ²⁶³ In pursuing a collective action, employees initially seek to "induce group activity" of other participants and, if successful, "join[] together in order to achieve common goals." ²⁶⁴

The importance of the group dynamics in this context is paramount. In seeking collective remedies, employees have pooled their resources and seek to resolve a common issue that impacts numerous workers. ²⁶⁵ And oftentimes, they have come together to pursue a remedy that is not economically feasible on an individual basis. ²⁶⁶ In this sense, these employees are able to achieve collectively what is impossible individually. This conduct also fits within the phrase "mutual aid and

262. 29 U.S.C. § 157 (2012).

263. Michael D. Schwartz, *A Substantive Right to Class Proceedings: The False Conflict Between the FAA and NLRA*, 81 FORDHAM L. REV. 2945, 2963 (2013).

264. NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 830–31 (1984).

265. Hodges, *supra* note 66, at 204.

266. *Id.*

protection” as it is conduct taken to “improve terms and conditions of employment or otherwise improve their lot as employees.”²⁶⁷ Moreover, it is immaterial whether the activity takes place within the immediate employee–employer relationship;²⁶⁸ “Mutual aid and protection” extends much further than disputes of current employees in the workplace. Thus, aggregate dispute resolution fits well within the ordinary meaning of the expansive language set forth in section 7.

Prior Board decisions support this result and are entitled to deference. The Board has repeatedly held that the NLRA protects employees’ right to engage in aggregate dispute resolution through either litigation or arbitration.²⁶⁹ The filing of a class or collective action by an individual employee “is predicated on a statute that grants rights to the employee’s coworkers, and it seeks to make the employee the representative of his colleagues for the purpose of asserting their claims, in addition to his own.”²⁷⁰ That is, “the filing of the action contemplates—and may well lead to—active or effective *group* participation by employees in the suit, whether by opting in, by not opting out, or otherwise permitting the individual employee to serve as a representative of his coworkers.”²⁷¹ The Board has further explained that “[i]t is this potential to initiate or to induce or to prepare for group action . . . that satisfies the concert requirement of Section 7.”²⁷² Therefore, the Board’s view that this conduct is protected by section 7 is well supported.

Supreme Court and lower federal court decisions support the Board’s interpretation of section 7. In particular, the Supreme Court has made clear that section 7 does not narrowly apply only to particular forms of group activity within the employee–employer relationship. Indeed, in *City Disposal*, the Supreme Court outlined the breadth of section 7 in noting that “there is no indication that Congress intended to limit [section 7] protection to situations in which an employee’s activity and that of his fellow employees combine with one another in any particular way.”²⁷³ As a result, the Fifth Circuit’s contention that the protection afforded by section 7 is limited to “particular” forms of group activity

267. *Eastex Inc. v. NLRB*, 437 U.S. 556, 565–67 (1978); *see also* Hodges, *supra* note 66, at 204 (arguing that “[a] class action lawsuit easily comes within the existing interpretation of concerted activity.”).

268. *Eastex Inc.*, 437 U.S. at 565–67.

269. *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2286 (2012) (listing cases and holding 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 [NLRA] and Federal labor policy rest”).

270. *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, at *17 (Oct. 28, 2014).

271. *Id.*

272. *Id.* (internal quotations omitted).

273. *See NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984).

that existed at the time the NLRA was passed is misplaced.²⁷⁴

Further, in *Eastex*, the Supreme Court made clear that activity protected by section 7 is not cabined to conduct occurring in the context of the immediate employee–employer relationship.²⁷⁵ Adopting this broad view of section 7, lower courts have correctly held that section 7 covers filing a collective lawsuit or arbitration contesting working conditions on a group basis.²⁷⁶ This makes sense because aggregate litigation is often aimed at securing improved wages and working conditions, even if it occurs on the back end. Thus, to hold that this conduct is not protected by section 7 would “frustrate the policy of the [NLRA] to protect the right of workers to act together to better their working conditions.”²⁷⁷

Even if Supreme Court precedent did not support the Board’s view (which it does), the Board’s construction is entitled to deference. Simply put, the interpretation of section 7 articulated in *D.R. Horton* is a “defensible construction” of the NLRA.²⁷⁸ In fact, it is difficult to conceive of an alternative construction that has not already been rejected by the Supreme Court. Thus, federal courts should defer to the Board’s construction, as the Supreme Court has previously done in this context.²⁷⁹

Finally, the Seventh and Ninth Circuits’ and the Board’s holdings are consistent with the purposes underlying the NLRA. As stated in *Murphy Oil*, the elimination of aggregate litigation and arbitration “reflects and perpetuates precisely the inequality of bargaining power that the Act was intended to redress.”²⁸⁰ The power and threat of class litigation or arbitration serves to help level the playing field in an otherwise unequal relationship.²⁸¹ Thus, “[p]recluding employees from joining together to press their workplace claims strips them of the collective, equalizing power that Section 7 envisions.”²⁸² It was this

274. See *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 361 (5th Cir. 2013). Indeed, such a cramped view of section 7 would preclude all forms of group activity that take place over an electronic medium, as such forms of group activity did not exist when the NLRA was passed.

275. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

276. See *supra* note 166 and accompanying text.

277. *Eastex*, 437 U.S. at 567 (quoting *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962)).

278. See *NLRB v. Int’l Ass’n of Bridge*, 434 U.S. 335, 350 (1978) (giving “considerable deference” to the NLRA’s “defensible construction of the statute”).

279. See, e.g., *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829–30 (1984) (“[W]e have often reaffirmed that the task of defining the scope of § 7 ‘is for the Board to perform in the first instance as it considers the wide variety of cases that come before it.’”) (quoting *Eastex*, 437 U.S. at 568).

280. *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, at *18 (Oct. 28, 2014).

281. See *Hawkins v. Budd Co.*, No. 86-674, 1987 U.S. Dist. LEXIS 3063, at *3 (E.D. Pa. Apr. 15, 1987) (noting that in employment cases “class certification tends to provide a level playing field, given economic disparities”).

282. *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, at *18.

precise inequality in the employee–employer relationship with which Congress was particularly concerned when it passed the NLRA.²⁸³ Through the NLRA, Congress sought to allow employees to band together to equalize bargaining power; aggregate legal remedies allow just that.²⁸⁴ After all, the right to engage in concerted action “is the basic tenet of federal labor policy.”²⁸⁵

The Fifth Circuit is the only federal circuit court to substantively engage the reasoning set forth by the Board, but its arguments are ineffectual. The Fifth Circuit correctly noted that the Supreme Court has concluded that “inequality in bargaining power” alone is not sufficient to justify invalidating an arbitration agreement.²⁸⁶ But this observation misses the mark. At issue is not unequal bargaining power in the abstract. Rather, the Board addressed conduct that violates the NLRA and eliminates one of the most powerful concerted activities in which an employee can engage. That aggregate dispute resolution helps equalize bargaining between employers and employees supports the conclusion that this conduct is protected by section 7, not that it violates the FAA under an unconscionability analysis. These are separate considerations.

The Fifth Circuit’s remaining arguments fare no better. Contrary to the Fifth Circuit’s view, the Board’s (and now Seventh and Ninth Circuits’) reasoning has little to do with specific “class action procedures.”²⁸⁷ It is not tied to any specific aggregate dispute resolution mechanism, simply the ability to resort to aggregate dispute resolution when available. Thus, argument pertaining to prior FAA decisions on the ADEA and FLSA is a red herring; those decisions address the wrong issue. That is, the issue before the Fifth Circuit was *not* whether the collective procedures set forth under the ADEA or FLSA are substantive. As the Seventh Circuit succinctly put it, the “NLRA is not Rule 23, it is not the ADEA [and it is not] the FLSA.”²⁸⁸ Thus, the Board’s view does not “create[] . . . a right that is hollow” as the Fifth Circuit posited, as this right originates from the NLRA, not the ADEA

283. See *To Create a National Labor Board: Hearings on S. 2926 Before the Senate Comm. on Education and Labor*, 73d Cong. 9 (1934), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935, at 47 (1949) (statement of Sen. Robert F. Wagner) (“[I]t is simply absurd to say that an individual, one of 10,000 workers, is on an equality with his employer in bargaining for his wages.”).

284. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1153 (7th Cir. 2016).

285. *Morris v. Ernst & Young*, 834 F.3d 975, 982 (9th Cir. 2016).

286. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 361 (5th Cir. 2013) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991)).

287. *Id.* at 357.

288. *Epic Sys. Corp.*, 823 F.3d at 1161.

or FLSA.²⁸⁹ And as outlined *supra*, the text of the NLRA, Supreme Court and Board precedent interpreting the same, and the purpose of the NLRA support a determination that aggregate dispute resolution waivers violate the NLRA.

B. The NLRA and FAA Conflict

But the analysis does not end with a finding that aggregate dispute resolution waivers violate the NLRA. The second part of the analysis is where the Fifth Circuit and Judge Ikuta's dissenting opinion in *Morris* got it right. Mandating access to aggregate arbitration or litigation (when otherwise available) creates a conflict with the FAA, as interpreted by the Supreme Court. This result is ineluctable due to the Supreme Court's interpretation of arbitration as being synonymous with bilateral arbitration. Indeed, even before any federal court of appeals had the occasion to weigh in on the Board's decision in *D.R. Horton*, Professors Sullivan and Glynn identified this palpable conflict.²⁹⁰ Neither the Seventh nor the Ninth Circuit held the FAA and NLRA conflict, but both courts have given short shrift to the Supreme Court's FAA precedent that mandates a conflict analysis.

Contrary to the Seventh Circuit's, Ninth Circuit's, and Board's view, the FAA and the NLRA conflict, and the Supreme Court will be charged with determining which prevails. It is true that the actual text of the FAA and the NLRA are not in conflict. It is also true that when construing two federal statutes, a court should first endeavor to read the statute in a way that does not conflict. Or, as the Seventh Circuit correctly put it, courts should not "go out *looking* for trouble."²⁹¹ Nonetheless, the Supreme Court's interpretation of the FAA in *Concepcion* and *Stolt-Nielson*—mandating bilateral arbitration in the absence of explicit language to the contrary in an arbitration agreement—conflicts with holding that an aggregate dispute resolution waiver in an arbitration agreement violates the NLRA. *Concepcion* also forecloses the argument that the FAA's saving clause applies.

Like the California law in *Concepcion*, the interpretation of section 7 in *Epic* and *Morris* "interferes with arbitration" as defined by the Supreme Court.²⁹² Just as in *Concepcion*, under *Epic* and *Morris*,

289. *D.R. Horton*, 737 F.3d at 361.

290. See Sullivan & Glynn, *supra* note 194, at 1037 (arguing that the "[t]he Court's redefinition of arbitration in *Stolt-Nielson* and *Concepcion* compels the collision with the sphere of federal labor law"). Since the publication of Professors Sullivan and Glynn's article, the Second, Fifth, Seventh, Eighth, and Ninth Circuits have weighed in on *D.R. Horton*, creating the circuit split described in this article. Further, the Board issued its decision in *Murphy Oil*.

291. *Epic Sys. Corp.*, 823 F.3d at 1158 (emphasis original).

292. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011).

employees remain free to resolve their disputes through arbitration on a bilateral basis, but there is less incentive to do so.²⁹³ Lawyers will inevitably prefer class arbitration, and companies will have less incentive to arbitrate potentially duplicative claims on an individual basis,²⁹⁴ or to enter into arbitration agreements at all. Thus, mandating access to aggregate dispute resolution (when otherwise available) will provide lawyers and companies a disincentive to engage in bilateral arbitration. This is true regardless of whether “employees resorted to class procedures in an arbitral or in a judicial forum.”²⁹⁵ This is simply irreconcilable with the teachings of *Concepcion* and the Court’s interpretation of arbitration as synonymous with bilateral arbitration.

Contrary to the Board’s argument in *D.R. Horton*, the same elimination of benefits associated with bilateral arbitration outlined by the Supreme Court in *Concepcion* apply in the employment context.²⁹⁶ First, requiring access to aggregate dispute resolution in employment cases eliminates two of bilateral arbitration’s principal advantages: cost savings and speed.²⁹⁷ Second, class arbitration requires a level of formality that the Supreme Court stated Congress did not likely envision an arbitrator to manage.²⁹⁸ Third, “class arbitration greatly increases risks to defendants” because it is “poorly suited to the higher stakes of class litigation.”²⁹⁹ That is, the risks associated with error go up substantially in class actions, both in the consumer arena and the employment context. In both contexts, absent the multi-layered review process associated with litigation, businesses will be less likely to bet the farm in arbitration.³⁰⁰ The end result of the Board and the Seventh and Ninth Circuits’ holding with respect to section 7 is that companies will be less inclined to engage in arbitration. This was the core of the Supreme Court’s problem with the California law in *Concepcion*.

The FAA’s saving clause does not alter this result. Section 7, as interpreted by the Board and the Seventh and Ninth Circuits, would have a “disproportionate impact on arbitration agreements.”³⁰¹ Or, as the Fifth Circuit stated: the Board’s rule serves “[a]n actual impediment to arbitration.”³⁰² Thus, the Seventh and Ninth Circuits miss the mark

293. *Id.* at 347.

294. *Id.*

295. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 359 (5th Cir. 2013).

296. The Supreme Court has rejected the notion that the benefits associated with arbitration disappear in the employment context. *See supra* note 122 and accompanying text.

297. *Concepcion*, 563 U.S. at 348.

298. *Id.* at 349–50.

299. *Id.* at 350.

300. *Id.* at 350–51.

301. *Id.* at 342.

302. *D.R. Horton Inc. v. NLRB*, 737 F.3d 344, 360 (5th Cir. 2013).

due to their reliance on the fact that the illegality of the waivers was unrelated to their presence in arbitration agreement. Judge Ikuta's dissenting opinion in *Morris* correctly noted that the Supreme Court has already rejected that argument.³⁰³ Therefore, just as in *Concepcion*, the saving clause does not eliminate the necessity of a conflict analysis.

The Board and Seventh Circuit presented compelling arguments that no conflict exists, but none prevail. For its part, the Seventh Circuit criticized the Fifth Circuit for relying on Supreme Court dicta and argued that Supreme Court jurisprudence does not go “so far as to say that *anything* that conceivably makes arbitration less attractive automatically conflicts with the FAA.”³⁰⁴ True enough. But the Supreme Court did state that “class arbitration, to the extent it is manufactured . . . rather than consensual, is inconsistent with the FAA.”³⁰⁵ Thus, it is not that section 7 (as correctly interpreted) simply makes arbitration less attractive, but that it mandates the availability of class arbitration (if otherwise available) even when the parties did not agree to aggregate arbitration in their respective arbitration agreements. And that will provide companies less incentive to arbitrate. Hence, the Board and the Seventh and Ninth Circuits' interpretation of section 7 falls squarely within the ambit of what the Supreme Court has already held is “inconsistent with the FAA.”³⁰⁶

The Seventh Circuit also astutely noted that this case is the “inverse” of *Italian Colors*, in that, just as the antitrust laws do not guarantee an affordable procedural path in every instance, the FAA does not “pursue its purposes at all costs.”³⁰⁷ This observation is logical and is seemingly faithful to the narrow view of the effective vindication doctrine articulated in *Italian Colors*.³⁰⁸ But the Supreme Court in *Concepcion* has already made clear that the FAA will indeed pursue its purposes at the cost of usurping laws that provide for aggregate dispute resolution in the absence of an explicit allowance for such an arbitration agreement.³⁰⁹ Thus, while forceful, this argument is foreclosed by *Concepcion*.

The Board's reasoning that the FAA and NLRA do not conflict fares

303. *Morris v. Ernst & Young*, 834 F.3d 975, 997 (9th Cir. 2016) (Ikuta, J. Dissenting) (“The majority's argument that the nonwaivable right to class-wide procedures it has discerned in § 7 applies equally to arbitration and litigation and so is saved by the § 2 savings clause . . . was expressly rejected in *Concepcion*”) (internal quotations omitted).

304. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1158 (7th Cir. 2016) (emphasis original).

305. *Concepcion*, 563 U.S. at 348.

306. *Id.*

307. *Epic Sys. Corp.*, 823 F.3d at 1159 (quoting *American Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304 (2013)).

308. *Italian Colors*, 133 S. Ct. at 2310–11.

309. *Concepcion*, 563 U.S. at 346–50.

no better. In *Murphy Oil*, the Board argued that the Fifth Circuit had treated the FAA and its policies “as sweeping far more broadly than that statute or the Supreme Court’s decisions warrant.”³¹⁰ The Board is likely correct with respect to the text of the FAA. It is difficult, however, to overstate the sweeping breadth of the Supreme Court’s FAA decisions. Critiquing the Supreme Court’s FAA jurisprudence makes it no less binding. A fair reading of this precedent simply mandates a conflict analysis.

C. *The NLRA Trumps the FAA in a Conflict Analysis*

The NLRA and FAA (as interpreted in *Concepcion*) conflict, so further analysis is required. But unlike *Concepcion*, this conflict does not match a state law up against the FAA.³¹¹ Thus, a simple federal/state preemption analysis will not suffice. Rather, the Supreme Court will be required to pit the FAA and NLRA against one another to determine which prevails.

A court analyzing the intersection between federal statutes must first assess if they “are capable of co-existence” as “courts are not at liberty to pick and choose among congressional enactments.”³¹² Again, the FAA, as interpreted in *Concepcion*, is at odds with a proper reading of the NLRA.³¹³ This is so despite the fact that the NLRA does not contain an express repealer of prior-existing federal statutes. Rather, a conflict exists because the NLRA contains “the necessary indicia of congressional intent” that conflicts with the Supreme Court’s interpretation of the FAA.³¹⁴ That is, if the FAA mandates enforcement of aggregate dispute resolution waivers as written, then by “necessary implication” it conflicts with the fact that they are unenforceable under the NLRA.³¹⁵

The Supreme Court has held that when two federal statutes conflict, the later enacted statute “must be understood to have impliedly repealed inconsistent provisions in the earlier enacted statute.”³¹⁶ The premise behind this rule is that “statutes enacted by one Congress cannot bind a

310. *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, at *9 (Oct. 28, 2014).

311. *Concepcion*, 563 U.S. at 341.

312. *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

313. *See supra* Part III.B.

314. *Dorsey v. United States*, 567 U.S. 260, 274 (2012).

315. *Id.*

316. *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2288 n. 26 (2012) (citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976)); *see also* NORMAN J. SINGER, 2B SUTHERLAND STATUTORY CONSTRUCTION § 51.02 (5th ed. 1992) (“Where two statutes are involved each of which by its terms applies to the facts before the court, the statute which is the more recent of the two irreconcilably conflicting statutes prevails.”).

later Congress.”³¹⁷ Given this analytical framework, four key enactment dates are relevant: (1) 1925, when the FAA was first enacted,³¹⁸ (2) 1932, when the NLRA’s predecessor, the Norris-LaGuardia Act was passed,³¹⁹ (3) 1935, when the NLRA was then enacted,³²⁰ and (4) 1947, when the FAA was recodified.³²¹ The critical issue thus becomes whether the FAA is a prior enacted statute because it was first passed in 1925 or a later enacted statute because it was recodified in 1947.

The Fifth Circuit found that it was unclear whether the presumption that the later passed statute controls “has the same force for a recodification.”³²² But regardless, the Fifth Circuit claimed that the dates of enactment did not impact its decision.³²³ In contrast, in *Owen*, the Eighth Circuit found that the 1947 “decision to reenact the FAA suggests that Congress intended its arbitration protections to remain intact even in light of the earlier passage of three major labor relations statutes.”³²⁴ Thus, the Fifth Circuit found that it was unclear which statute should be treated as later enacted, and the Eighth Circuit found that the FAA’s recodification date made it the later enacted statute.

The Fifth and Eighth Circuits got it wrong. The FAA’s recodification in 1947 does not serve to repeal the NLRA or the Norris-LaGuardia Act. The Board in *Murphy Oil* explained the error of these two decisions in succinctly stating:

“Under established canons of statutory construction, ‘it will not be inferred that Congress, in reversing and consolidating the laws, intended to change their effect unless such intention is clearly expressed.’” There is no such clearly expressed Congressional intention either in the statute codifying the FAA, *see* 61 Stat. 669, or in its legislative history.³²⁵

The FAA’s 1947 recodification did not change the statute substantively. Thus, under established canons of statutory construction, it should not be inferred that Congress sought to change the FAA’s effect in 1947. Further, because the FAA remained the same, Congress did not intend to impliedly repeal all inconsistent laws that were enacted between 1925

317. *Dorsey*, 567 U.S. at 274.

318. The Federal Arbitration Act of Feb. 12, 1925, Pub. L. No. 68-401, 43 Stat. 883 (1925).

319. Norris-LaGuardia Act of Mar. 23, 1932, Pub. L. No. 72-65, 47 Stat. 70 (1932).

320. National Labor Relations Act of July 5, 1935, Pub. L. 74-198, 49 Stat. 449 (1935).

321. 9 U.S.C. §§ 1–14 (2012).

322. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013).

323. *Id.*

324. *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053 (8th Cir. 2013).

325. *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, at *15 (Oct. 28, 2014) (quoting *Finley v. U.S.*, 490 U.S. 545, 554 (1989)).

and 1947. Indeed, part of the rationale behind the later-enacted-statute principle is that courts are to assume that Congress is aware of the later-enacted-statute principle when it enacts a new statute.³²⁶ But this is not true when a recodification takes place and no substantive changes are made to the statute. It is simply “inconceivable” that Congress sought to restrict the scope of the Norris-LaGuardia Act and the NLRA without any debate or notice when the FAA was recodified.³²⁷ Accordingly, the NLRA, not the FAA, should be treated as the later enacted statute.

Given the relevant dates of the FAA and NLRA’s enactment, this analysis is straightforward. The NLRA’s protection against aggregate dispute resolution waivers stands in direct opposition to the Supreme Court’s interpretation of the FAA.³²⁸ As the later enacted statute, the NLRA prevails over the FAA.³²⁹

VI. CONCLUSION

The FAA and NLRA’s rendezvous at the Supreme Court is imminent. Undeniably, the FAA has proven a worthy adversary at the Supreme Court, but it has finally met its match. Although novel, the Board’s decision in *D.R. Horton* was deceptively simple. The NLRA protects group activity, and it does so broadly enough to cover employees’ power to resort to aggregate legal redress. The Board’s reasoning lies at the very foundation of federal labor law. More than eighty years ago, Congress recognized the gross power discrepancy that exists in the workplace between employees and employers. With more resources and influence, employers invariably have the upper hand. Congress sought to give employees a fighting chance to improve their lot as employees by giving them the right to band together without interference.

With employment class actions under attack on numerous fronts, it is particularly fitting that the NLRA’s core protections that were designed decades ago provide a modern solution. The power of aggregate legal redress is vastly important in today’s workplace. The economics of

326. *Dorsey v. United States*, 567 U.S. 260, 274–76 (2012).

327. *Murphy Oil USA Inc.*, 361 N.L.R.B. No. 72, at *15.

328. *See supra* Part III.B.

329. Likewise, the Norris-LaGuardia Act trumps the FAA as it expressly repealed “[a]ll acts and parts of acts in conflict.” 29 U.S.C. § 115 (2012). As the Board in *D.R. Horton* explained, “there are strong indications that the FAA would have to yield under the terms of the Norris-LaGuardia Act.” *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2288 (2012). Namely, Norris-LaGuardia also forbids agreements that quell concerted activity, and thus, an arbitration agreement containing an aggregate dispute resolution waiver is unenforceable. *Id.* Alternatively, the Supreme Court could avoid an NLRA/FAA conflict analysis by applying the FAA’s saving clause (as outlined in *Epic*). Indeed, this provides the Court with a more palatable way of reigning in the FAA than holding that it conflicts, and is trumped, by the NLRA. Either way, the result is the same: aggregate dispute resolution waivers contained in arbitration agreements are not enforceable.

employment litigation and arbitration are such that many individual claims are simply not worth pursuing and no lawyer will take them. Thus, potentially meritorious claims are frequently not vindicated, and unlawful practices continue unimpeded. This is particularly true with respect to low-wage earners, where the power imbalance is even more palpable.

Group power has the ability to equal the playing field. By combining their resources, employees are better able to combat unlawful actions of the employer. This is no less so in aggregate dispute resolution than in collective bargaining over wages and working conditions; they are two sides of the same coin. The Board and Seventh and Ninth Circuits properly interpreted the NLRA with this truth in mind.

The FAA must yield. Without the expansive pro-arbitration jurisprudence of the Roberts Court an easy solution exists: the FAA's saving clause. An arbitration agreement containing an aggregate dispute resolution waiver is illegal under the NLRA, and thus, ostensibly within the FAA's saving clause. But a forthright reading of *Concepcion* likely forecloses this option. Consequently, the Court will be tasked with performing a statutory-conflict analysis and deciding whether the FAA or the NLRA prevails. Plainly, the later enacted NLRA (and, also, the Norris-LaGuardia Act) wins out. This is good news for employees who cannot afford for the NLRA to lose this battle.