

# THE LEGALITY OF CLASS ACTION WAIVERS IN EMPLOYMENT CONTRACTS

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## INTRODUCTION

Imagine you are a new employee at a large corporation. As part of your orientation, you are instructed to sign a number of different documents in order to formally begin your employment. Among them is a waiver that says something like this:

All claims, disputes, or controversies arising out of, or in relation to this document or Employee's employment with Company shall be decided by arbitration. . . . Employee hereby agrees to arbitrate any such claims, disputes, or controversies only in an individual capacity and not as a plaintiff or class member in any purported class, collective action, or representative proceeding.<sup>1</sup>

Is such a waiver legally enforceable? And more importantly, *should* such a waiver be legally enforceable? The answer is far from clear, as the recent and widening circuit split on the issue demonstrates.<sup>2</sup> Moreover, the enforceability (or lack thereof) of these waivers can have an enormous impact on the relationship between employers and employees as well as the burden on the court system.

For example, assume such waivers are enforceable. Every company will have an incentive to include them in their employment contracts since they provide companies much more control over any potential litigation—the company, not the employee, gets to dictate the terms on which any disputes are to be resolved.<sup>3</sup> This would shift the balance of power between employer

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1 This language comes directly from the employment contract at issue in, and quoted in, *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772, 774 (8th Cir. 2016).

2 Compare *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016) (holding such waivers unenforceable), and *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016) (same), with *Cellular Sales of Mo.*, 824 F.3d at 776 (holding such waivers enforceable), *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015) (same), and *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) (per curiam) (same).

3 See, e.g., KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POLICY INST., EPI BRIEFING PAPER NO. 414, THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES

and employee in favor of the employer, as it would dissuade employees from bringing minor suits in which any possible recovery would be outweighed by the cost of arbitration<sup>4</sup> and force employees to bring actions against their employer through a specific type of legal action (arbitration) that might not be in their best interest.<sup>5</sup> As a result, employees' ability to hold their employers accountable for unfair actions could be severely limited, if not completely obliterated.

Conversely, if such waivers are unenforceable, then employees will be free to bring collective actions that are likely to be resolved through the court system.<sup>6</sup> Moreover, they may have large incentives to bring such actions: if each individual employee has only suffered a small amount of harm at the

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WORKERS AND CONSUMERS OF THEIR RIGHTS 23 (2015) (discussing advantages employers gain by including such waivers in their employment contracts and demonstrating how "[a]rbitration has become an important tool in the corporate arsenal to defend against legal claims"). For a brief list of some of the advantages and disadvantages of arbitration, see also Alysha A. Dotson, *The Supreme Court Speaks on Class Action Waivers in Arbitration Agreements*, ABA, [http://www.americanbar.org/publications/tyl/topics/labor-employment/the\\_supreme\\_court\\_speaks\\_class\\_action\\_waivers\\_arbitration\\_agreements.html](http://www.americanbar.org/publications/tyl/topics/labor-employment/the_supreme_court_speaks_class_action_waivers_arbitration_agreements.html) (last visited Nov. 28, 2016).

4 Take for instance the named employee in *Sutherland* who claimed that she was entitled to 151.5 hours of unpaid overtime wages (\$1867.02 in total). *Sutherland*, 726 F.3d at 294. While such a sum was significant to the plaintiff, individual arbitration would have been far more costly than the amount she could have recovered, a plight shared by her fellow employees. Consequently none of the employees had an incentive to bring a claim as an individual. Although the *Sutherland* court ultimately upheld the class-action waiver, the facts of the case provide an illustrative example of the potential economic obstacles faced by employees attempting to bring a claim in their individual capacities. See also DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 68 (2000) ("[I]f the loss is small, it is less likely to be recognized by those affected, and it is less likely that anyone will come forward to claim compensation even if many individuals . . . are affected by it."). This concern is alleviated when Fair Labor Standards Act (FLSA) claims are brought, since employees will also be awarded attorneys' fees if they prevail. See 29 U.S.C. § 216 (2012) ("The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and the costs of the action.").

5 See, e.g., STONE & COLVIN, *supra* note 3, at 19 ("Employee win rates in mandatory arbitration are much lower than in either federal court or state court, with employees in mandatory arbitration winning only just about a fifth of the time (21.4 percent), which is 59 percent as often as in the federal courts and only 38 percent as often as in state courts. Differences in damages awarded are even greater, with the median or typical award in mandatory arbitration being only 21 percent of the median award in the federal courts and 43 percent of the median award in the state courts. . . . [Thus,] mandatory arbitration is massively less favorable to employees than are the courts."); see also Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 418 (2007) ("Among the 836 employment arbitration awards in the sample I examined, the employee win rate was 19.7 percent. . . . This employee win rate is . . . substantially lower than the employee win rates in employment discrimination litigation of 36.4 percent for federal courts and 43.8 percent for state courts.").

6 This is not a guarantee, of course, as employees could still choose to sign away their rights to collective/class action in the absence of management pressure or choose to pro-

hands of his employer, it may not be worth his time to bring an individual claim<sup>7</sup>—and he will be unlikely to find an attorney willing to represent him.<sup>8</sup> Both issues are easily resolved once the employees can pool their claims, but this approach is not without its disadvantages. By allowing (and potentially creating an incentive for) employees to bring their claims collectively in court rather than through individual arbitration the already overtaxed court system<sup>9</sup> might see a rise in class action lawsuits that it is ill-equipped to handle.<sup>10</sup>

This Note attempts to bring clarity to this controversy by examining the two competing statutes at issue—the National Labor Relations Act (NLRA) and the Federal Arbitration Act (FAA)—the Supreme Court’s cases on the issue, and the arguments for and against such waivers advanced by the Second, Fifth, Seventh, Eighth, and Ninth Circuits, which have all directly addressed the question. Part I provides an overview of these two statutes, the

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ceed through collective/class arbitration out of court as opposed to collective/class litigation in court.

7 See *supra* note 4.

8 Attorneys are unlikely to agree to bring individual claims like that of Stephanie Sutherland since any contingent recovery will be much less than the cost of litigation (even if the lawyer had a 50% contingency fee, his recovery could only be \$933.51) and individuals are unlikely to want to pay an attorney an hourly fee that will quickly exceed their own recovery. See, e.g., STONE & COLVIN, *supra* note 3, at 21–22 (“The mandatory arbitration-litigation outcome gap has a significant and pernicious effect on the ability to obtain legal counsel under these contingency-fee arrangements. . . . Whereas on average plaintiffs’ attorneys accepted 15.8 percent of potential cases involving employees who could go to litigation, they accepted about half as many, 8.1 percent, of the potential cases of employees covered by mandatory arbitration.”). The same fact that alleviates footnote four’s concern in the FLSA context—the awarding of attorneys’ fees—alleviates this concern in the FLSA context. See *supra* note 4.

9 See, e.g., Jennifer Bendery, *Federal Judges Are Burned Out, Overworked and Wondering Where Congress Is*, HUFFINGTON POST (Sept. 30, 2015, 2:15 PM), [http://www.huffingtonpost.com/entry/judge-federal-courts-vacancies\\_us\\_55d77721e4b0a40aa3aaf14b](http://www.huffingtonpost.com/entry/judge-federal-courts-vacancies_us_55d77721e4b0a40aa3aaf14b) (“It would take six new judgeships on the Eastern District [of California] court to bring down the workload to an average level, according to a 2015 review of courts and their caseloads by the Judicial Conference, the federal courts’ policy-making organization.”); see also Jacob Gershman, *Federal Judge Says His Overworked Colleagues Bench Close to Burnout*, WALL ST. J. (Nov. 12, 2015), <http://blogs.wsj.com/law/2015/11/12/federal-judge-says-his-overworked-colleagues-bench-close-to-burnout/> (“Judges in federal trial courts have for some time expressed concern about the ever-growing backlog of civil cases.”).

10 See *AT&T Mobility LLC v. Concepcion* for a list of the disadvantages of class actions and arbitration as opposed to individual arbitration. 563 U.S. 333 (2011). For example, the Court explained how “[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. . . . And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.” *Id.* at 344–45 (first citing *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 249–50 (2009); and then citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). The Court also pointed out that “the switch from bilateral to class arbitration [or class action] sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.” *Id.* at 348.

agency that administers the NLRA,<sup>11</sup> and the evolution of the Supreme Court's jurisprudence on the topic. Part II discusses the Supreme Court's most recent<sup>12</sup> cases addressing mandatory class action waivers. Part III elaborates the current circuit split on the issue, examining the main cases from the five circuits that have directly addressed the issue. Finally, Part IV analyzes the issue in light of the statutes, Supreme Court precedent, the circuit courts' reasoning, and competing policy arguments, and argues that collective action<sup>13</sup> waivers in employment contracts should be unenforceable.

## I. BACKGROUND

Before discussing the enforceability of collective action waivers, it is important to understand the context that gives rise to the debate in the first place. At the heart of the issue are the two aforementioned federal statutes and the Supreme Court's evolving interpretation of them. Consequently, this Part begins by examining the statutes and concludes by giving an overview of the Supreme Court's general arbitration jurisprudence. It also gives a brief account of the federal agency responsible for dealing with labor and employment questions, the National Labor Relations Board (NLRB), in the Section describing the NLRA.

### A. *The Statutes*

There are two main statutes—the FAA and the NLRA—that have a major impact on the legality of class action waivers in employment contracts.<sup>14</sup> This Section gives a brief overview of these two statutes, focusing on their text.

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11 The NLRA established the National Labor Relations Board (NLRB) and conferred on it the power to enforce and interpret the statute. *See* 29 U.S.C. § 153 (2012). The FAA is a general statute addressed to courts which mandates the enforceability of certain arbitration agreements. *See* 9 U.S.C. §§ 1–16 (2012). Although the language of the latter statute states that it applies to “a contract evidencing a transaction involving commerce to settle by arbitration,” 9 U.S.C. § 2, the Supreme Court has read the statute broadly to be a “congressional declaration of a liberal federal policy favoring arbitration agreements,” which includes both public and private arbitration agreements, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see infra* subsection I.A.1; *see also Concepcion*, 563 U.S. at 344 (“The ‘principal purpose’ of the FAA is to ‘ensur[e] that private arbitration agreements are enforced according to their terms.’” (alteration in original) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989))).

12 “Most recent” here means the most important cases of the last six years, namely *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), and *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015).

13 While class actions and collective actions are technically distinct forms of litigation, this Note uses the terms interchangeably, as its focus is on employment contracts that mandate *individual* arbitration to the exclusion of all forms of group legal action.

14 As Part IV demonstrates, the extent to which these two statutes apply to class action waivers and are compatible with each other plays a large role in deciding whether or not such waivers should be enforceable.

## 1. The FAA

The Federal Arbitration Act was initially passed in 1925 in response to a number of court decisions that had held arbitration agreements unenforceable.<sup>15</sup> Consequently, its main goal was “to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce.”<sup>16</sup> The statute mandates by its terms that:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>17</sup>

While it might seem clear, given this language, that the FAA is meant to apply only to contracts involving transactions in commerce, such as contracts between companies or between producers and consumers, the Supreme Court has read the statute more broadly, gradually expanding the statute to encompass consumers and employees.<sup>18</sup> Moreover, despite the fact that the statute explicitly states that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,”<sup>19</sup> the Court has interpreted it to only exclude employment contracts that involve transportation workers.<sup>20</sup> As a result, the FAA has come to take on a life of its own, becoming the embodiment of the “liberal federal policy favoring arbitration agreements”<sup>21</sup> to the exclusion of both state and federal laws.<sup>22</sup>

15 See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219–20 (1985) (“The House Report accompanying the Act makes clear that its purpose was to place an arbitration agreement ‘upon the same footing as other contracts, where it belongs,’ and *to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate.*” (emphasis added) (citation omitted) (quoting H.R. REP. NO. 68-96, at 1 (1924))); see also H.R. REP. NO. 68-96, at 1–2 (“The need for the law arises from an anachronism of our American law. . . . [This] bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.”).

16 H.R. REP. NO. 68-96, at 1.

17 9 U.S.C. § 2 (2012). The last part of this section (“save upon such grounds as exist at law or in equity for the revocation of any contract”) is known as the saving clause. See, e.g., *Concepcion*, 563 U.S. at 339.

18 See *infra* Section I.B; Part II. For a brief history of the FAA from 1925 to the present, including some of the Court’s major decisions, see *STONE & COLVIN, supra* note 3, at 6–10.

19 9 U.S.C. § 1.

20 See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (holding that the “nothing herein” exemption in the FAA only applies to transportation workers); cf. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991); see also *infra* Section I.B; Part II.

21 *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

22 See, e.g., *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015) (confirming the FAA’s preemption of the *Discover Bank* rule); *Concepcion*, 563 U.S. at 333 (striking down the Cali-

## 2. The NLRA

Ten years after the passage of the FAA, Congress passed the Wagner Act, better known as the National Labor Relations Act.<sup>23</sup> This Act, which was intended to deal with many of the labor issues affecting a nation stuck in the rut of a depression,<sup>24</sup> addresses a variety of different labor problems including unions, union formation and bargaining, and employees' rights more generally.<sup>25</sup> In the sections most relevant to this Note, the statute states, *inter alia*, that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"<sup>26</sup> and that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 [including the right to engage in concerted activities]."<sup>27</sup> This language, although arguably limited to protecting employees' union rights,<sup>28</sup> has been expansively interpreted, most notably in the context of the phrase "concerted activities," which is not explicitly defined by the statute.<sup>29</sup>

For example, in *Guernsey-Muskingum Electric Cooperative, Inc.* the NLRB adopted the analysis of the trial examiner who concluded that a formal organization is not required and that concerted activity exists as long as "the

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fornia law embodied in the *Discover Bank* rule); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) (holding that the FAA trumps the federal NLRA); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) (*per curiam*) (holding that the FAA trumps the FLSA); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013) (holding that the FAA trumps the federal FLSA).

23 See *The 1935 Passage of the Wagner Act*, NLRB, <https://www.nlr.gov/who-we-are/our-history/1935-passage-wagner-act> (last visited Nov. 29, 2016).

24 See 78 CONG. REC. 3443 (1934) (statement of Sen. Wagner introducing the NLRA bill) ("The bill which I am introducing is designed to clarify and fortify the provisions of section 7(a) of the National Industrial Recovery Act, and to provide means of administering them through the legislative establishment of a national labor board with adequate enforcement powers."). See generally NAT'L LABOR RELATIONS Bd., LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 (reprint 1985).

25 See 29 U.S.C. §§ 157–69 (2012).

26 *Id.* § 157.

27 *Id.* § 158.

28 The statute's multiple references to the right to collective bargaining—as opposed to other forms of collective action—support this understanding, as does the declaration of policy section of the statute which states that "[i]t is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." *Id.* § 151. There is also some support for this interpretation in the legislative history. See, e.g., 78 CONG. REC. 4230 (1934) (article by Sen. Wagner) ("The new bill forbids any employer to influence any organization which deals with problems such as wages, grievances, and hours. They should be covered by a genuine labor union.").

29 Neither the definitions section in 29 U.S.C. § 152 nor the rest of the statute defines this pivotal phrase.

matter at issue is of moment to [a] group of employees complaining and . . . that matter is brought to the attention of management by a spokesman . . . speaking for the benefit of the interested group.”<sup>30</sup> Similarly, in *Meyers Industries, Inc.* the Board determined that concerted activity “encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.”<sup>31</sup> Moreover, the Board recently held that “an individual who files a class or collective action . . . [clearly] seeks to initiate or induce group action.”<sup>32</sup> Thus, the NLRB has understood the right to concerted activity to include the right to collective and class action lawsuits.<sup>33</sup> And although the NLRA has undergone multiple amendments since its adoption in 1935,<sup>34</sup> the aforementioned provisions have remained unchanged<sup>35</sup> and continue to play an important role in the ongoing debate over the enforceability of collective action waivers.<sup>36</sup>

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30 124 N.L.R.B. 618, 624 (1959), *enforced sub nom.* NLRB v. Guernsey-Muskingum Elec. Coop., Inc., 285 F.2d 8 (6th Cir. 1960). The fact that three employees brought the same complaints was sufficient to establish concerted activity even though all three individually complained to their supervisor without explicitly agreeing that one of them would be a spokesman for the others. *See id.* at 621. For an in depth summary of much of the NLRB’s early expansion of the phrase “concerted activities,” see generally Robert A. Gorman & Matthew W. Finkin, *The Individual and the Requirement of “Concert” Under the National Labor Relations Act*, 130 U. PA. L. REV. 286 (1981).

31 *Meyers Indus., Inc. (Meyers Industries II)*, 281 N.L.R.B. 882, 887 (1986), *aff’d sub nom.* Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987).

32 D.R. Horton, Inc., 357 N.L.R.B. 2277, 2279 (2012), *enforced in part, rev’d in part sub nom.* D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013).

33 *See, e.g., id.*; *see also infra* Section III.B. The Supreme Court has somewhat endorsed this view insofar as it has held that the protections of the NLRA can be enforced “through channels outside the immediate employee-employer relationship.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978); *see also id.* at 565–67 (“The 74th Congress [that passed the NLRA] knew well enough that labor’s cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context. . . . Thus, it 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. . . . 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.” (emphasis added) (footnotes omitted)).

34 The most notable amendments have been the Taft-Hartley Act of 1947, which expanded the number of Board members and reined in the power of unions, and the Landrum-Griffin Act of 1959, which put even more restrictions on unions. *See 1947 Taft-Hartley Passage and NLRB Structural Changes*, NLRB, <https://www.nlr.gov/who-we-are/our-history/1947-taft-hartley-passage-and-nlr-structural-changes> (last visited Nov. 29, 2016); *1959 Landrum-Griffin Act*, NLRB, <https://www.nlr.gov/who-we-are/our-history/1959-landrum-griffin-act> (last visited Nov. 29, 2016).

35 Most importantly, the language involving “concerted activity” appears exactly as quoted in the previous paragraph.

36 For example, both the Seventh Circuit in *Lewis v. Epic Systems* and the Ninth Circuit in *Morris v. Ernst & Young* have used the NLRA to justify their determinations that collective action waivers are unenforceable. *See Morris v. Ernst & Young, LLP*, 834 F.3d 975, 979

The NLRA also established the National Labor Relations Board,<sup>37</sup> which is given the power to “make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of [the NLRA].”<sup>38</sup> This gives the NLRB broad authority to manage labor affairs, especially the relationship between employers and employees.<sup>39</sup> Indeed, one of the NLRB’s two main functions is “to prevent employers and unions from engaging in unfair labor practices.”<sup>40</sup> In order to accomplish this function the NLRB has also been given the power to investigate charges alleging unfair labor practices and to fashion remedies if the charges are found to be meritorious.<sup>41</sup> In the event that an employer refuses to abide by the NLRB’s remedy, the NLRB can then petition a U.S. court of appeals for a decree enforcing the NLRB’s order.<sup>42</sup> Moreover, the NLRB has great discretion when interpreting the NLRA.<sup>43</sup> Thus, there are many circumstances in which the meaning of an NLRA provision takes its guidance from the NLRB’s interpretation of that provision.<sup>44</sup>

### B. *The Supreme Court’s General Arbitration Jurisprudence*

Since the passage of the FAA the Supreme Court has had many opportunities to address the contours of the statute but did little to expand its scope until the 1980s.<sup>45</sup> Cases prior to this point tended to interpret the FAA nar-

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(9th Cir. 2016) (“In this case, we consider whether an employer violates the National Labor Relations Act by requiring employees to sign [a collective action waiver] agreement . . . . We conclude that it does.”); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1151 (7th Cir. 2016) (“We conclude that this [collective action waiver] agreement violates the National Labor Relations Act . . . .”).

37 See 29 U.S.C. § 153 (2012).

38 *Id.* § 156.

39 See, e.g., NAT’L LABOR RELATIONS BD., BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT: GENERAL PRINCIPLES OF LAW UNDER THE STATUTE AND PROCEDURES OF THE NATIONAL LABOR RELATIONS BOARD (rev. ed. 1997).

40 *Id.* at 33.

41 *Id.* at 36–37; see also 29 U.S.C. §§ 160–61.

42 29 U.S.C. § 160(e).

43 See, e.g., *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992) (“[T]he NLRB is entitled to judicial deference when it interprets an ambiguous provision of a statute that it administers.” (citing *NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112, 123 (1987))).

44 See, e.g., *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (“[T]he task of defining the scope of [the NLRA] ‘is for the Board to perform in the first instance as it considers the wide variety of cases that come before it.’” (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978))). For an example of this in action see *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), *enforced in part, rev’d in part sub nom.* *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).

45 See, e.g., *STONE & COLVIN*, *supra* note 3, at 7 (“[B]etween 1925 and the 1980s, courts interpreted the FAA as applying to a narrow set of cases . . . . But in the 1980s the U.S. Supreme Court turned the FAA upside-down through a series of surprising decisions. These decisions set in motion a major overhaul of the civil justice system.”).



rowly, and arbitration agreements were struck down for a variety of reasons.<sup>46</sup> Then in 1983, the Supreme Court decided *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, in which it created the now famous language about how the FAA embodies a “liberal federal policy favoring arbitration agreements,” on its way to holding that courts should resolve all doubts “in favor of arbitration” when it is ambiguous whether a dispute is governed by an arbitration agreement.<sup>47</sup> The next year the Court greatly expanded this “liberal policy” in *Southland Corp. v. Keating* where it held that not only does the FAA apply to state courts as well as federal courts, it also preempts state laws that conflict with the FAA.<sup>48</sup> The rapid expansion continued in 1985 when the Court decided in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* that the FAA can compel the arbitration of statutory claims as well as contractual claims.<sup>49</sup> Finally, in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University* the Court held that arbitration agreements are to be enforced “according to their terms,” implying that reasonable restrictions which arbitration agreements impose should be followed.<sup>50</sup>

Perhaps the two most important arbitration cases of this era in the employment context are *Gilmer v. Interstate/Johnson Lane Corp.* and *Circuit City Stores v. Adams*, as they address the reach of the FAA in relation to mandatory employment dispute arbitration agreements.<sup>51</sup> In *Gilmer*, a man was required to register as a securities representative with the New York Stock Exchange (NYSE) as a condition of his employment.<sup>52</sup> Part of his registration application to the NYSE included a provision which stated, *inter alia*, that he “‘agree[d] to arbitrate any dispute, claim or controversy’ arising between

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46 See, e.g., *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956) (holding that an arbitration agreement in an employment contract was unenforceable since it did not involve a maritime transaction or a transaction in commerce); *Wilko v. Swan*, 346 U.S. 427 (1953) (holding that an arbitration agreement involving a sale of securities was unenforceable on the grounds that the Securities Act of 1933 trumped the FAA), *overruled by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); see also Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 644–60 (1996) (tracing the limitations of pre-1980s FAA caselaw).

47 *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 25 (1983).

48 *Southland Corp. v. Keating*, 465 U.S. 1, 12, 16 (1984).

49 See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625, 627 (1985).

50 See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

51 While these are the most important arbitration cases involving employees in their individual capacities, another line of cases has addressed the issue of arbitration with regards to unions. See, e.g., *McDonald v. City of W. Branch*, 466 U.S. 284 (1984) (holding that a mandatory arbitration clause in a union’s collective bargaining agreement did not preclude union members from bringing section 1983 claims in court); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (holding the same with regards to FLSA claims); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (holding the same with regards to Title VII claims).

52 *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

him and [his company]” that his company required to be arbitrated.<sup>53</sup> In enforcing this waiver, the Supreme Court held that “it is . . . clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA,” and that a valid contract that requires arbitration must be enforced according to its terms “unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”<sup>54</sup> The Court also noted that the case only tangentially addressed waivers in the employment context, however, insofar as the relevant contract was between the plaintiff and the NYSE, not the plaintiff and his employer.<sup>55</sup>

The Court in *Adams* directly addressed this fact, holding that even though *Gilmer* did not involve an employment contract, its holding was at least potentially valid in the employment context.<sup>56</sup> In *Adams*, Circuit City employees were required to sign an arbitration agreement that stated that “[employees] agree that [they] will settle any and all . . . claims, disputes or controversies arising out of . . . [their] employment and/or cessation of employment with Circuit City, *exclusively* by final and binding *arbitration*.”<sup>57</sup> Finding this arbitration agreement to be enforceable, the Court concluded that the only employment contracts that are categorically excluded from the FAA are contracts involving transportation workers.<sup>58</sup> Thus, the Supreme Court has held that the FAA’s reach is broad enough to govern arbitration agreements in the employment context as well as the company-company context, and that such agreements are enforceable even when statutory claims are at issue.

## II. MODERN SUPREME COURT DOCTRINE

The Supreme Court’s recent twenty-first-century jurisprudence continues the trend of interpreting the FAA more and more expansively, overruling legislative and judicial attempts to limit its reach.<sup>59</sup> To illustrate this fact, the next Section gives an account of the most significant Court cases (in terms of mandatory arbitration waivers) of the last five years in chronological order.

### A. AT&T Mobility LLC v. Concepcion

Not only is *AT&T Mobility LLC v. Concepcion*<sup>60</sup> perhaps the most important Court case to address mandatory arbitration waivers like the one

53 *Id.*

54 *Id.* at 26 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

55 *See id.* at 25 n.2 (“[T]he arbitration clause being enforced here is not contained in a contract of employment.”).

56 *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001).

57 *Id.* at 109–10 (quoting the arbitration agreement).

58 *Id.* at 119.

59 *See supra* Section I.B.

60 563 U.S. 333 (2011).

described in the opening paragraph,<sup>61</sup> it is also one of the most cited recent Supreme Court cases generally.<sup>62</sup> In *Concepcion* the Supreme Court was faced with the question of whether the FAA trumps state laws that prohibit companies from forcing their consumers into individual arbitration.<sup>63</sup> Specifically, as part of their cellphone contract with AT&T the Concepcions agreed to a waiver provision that mandated that “all disputes between the [Concepcions and AT&T] . . . be brought in the [Concepcions] ‘individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.’”<sup>64</sup> Four years later, the Concepcions filed a lawsuit against AT&T that was consolidated with a pending class action, and the company moved to enforce the waiver provision.<sup>65</sup> Relying on the California Supreme Court’s common law holding in *Discover Bank v. Superior Court* that class action waivers in consumer adhesion contracts are unenforceable,<sup>66</sup> the district court refused to enforce the waiver and denied AT&T’s motion.<sup>67</sup> On appeal the Ninth Circuit affirmed, holding that the *Discover Bank* rule was not preempted by the FAA.<sup>68</sup>

After laying out the *Discover Bank* rule, the Supreme Court came to the exact opposite conclusion, opining that “nothing in [the FAA] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”<sup>69</sup> Finding that “[t]he ‘principal purpose’ of the FAA is to ‘ensur[e] that private arbitration agreements are enforced according to their terms,’”<sup>70</sup> and that the *Discover Bank* rule precludes this by preventing companies from enforcing agreements which mandate individual arbitration,<sup>71</sup> the Court held that the *Discover Bank* rule was preempted by

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61 See, e.g., Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704 (2012) (“The U.S. Supreme Court’s five-to-four decision in *AT&T Mobility LLC v. Concepcion* is proving to be a tsunami that is wiping out existing and potential consumer and employment class actions.”).

62 As of March 5, 2017, the Westlaw page for *Concepcion* lists over 10,000 citing references. By way of comparison, other highly recognizable twenty-first-century Court cases such as *District of Columbia v. Heller* (7853), *National Federation of Independent Business v. Sebelius* (5079), *Bush v. Gore* (4995), and *Citizens United v. Federal Election Commission* (8247) have far fewer references. Even *Brown v. Board of Education of Topeka, Shawnee County, Kansas*, perhaps the most famous case of the twentieth century, only has 22,939 citing references, despite being decided over half a century ago (rather than half a decade ago).

63 *Concepcion*, 563 U.S. at 336.

64 *Id.*

65 *Id.*

66 See *Discover Bank v. Superior Court*, 113 P.3d 1100, 1103 (Cal. 2005), *abrogated by Concepcion*, 563 U.S. at 333.

67 *Concepcion*, 563 U.S. at 337–38.

68 *Id.* at 338; see also *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 852 (9th Cir. 2009), *rev’d*, *Concepcion*, 563 U.S. at 333.

69 *Concepcion*, 563 U.S. at 343.

70 *Id.* at 344 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

71 *Id.* (“Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”).

the FAA.<sup>72</sup> As further support for this decision the Court pointed out how the main advantages of arbitration such as informality, lower costs, greater efficiency, and the ability to choose adjudicators best matched to the dispute are lost when collective actions—including class arbitration—are allowed.<sup>73</sup> It also pointed out how class arbitration was “not even envisioned by Congress when it passed the FAA in 1925,” and that “class arbitration greatly increases risks to defendants.”<sup>74</sup> Finally, the Court found that the arbitration agreement was actually quite generous to the Concepcions and would likely afford them a better outcome than any form of collective action.<sup>75</sup> In accord with this conclusion, the Court proceeded to reverse the Ninth Circuit, explicitly overrule *Discover Bank*, and remand for consistent proceedings.<sup>76</sup>

### B. American Express Co. v. Italian Colors Restaurant

In the Supreme Court’s follow-up case to *Concepcion*, *American Express Co. v. Italian Colors Restaurant*, the Court was again confronted with the question of “whether a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act.”<sup>77</sup> In *Italian Colors*, a group of merchants who accepted American Express credit cards filed a class action lawsuit against the company even though they had signed arbitration agreements that included a waiver of the right to class actions.<sup>78</sup> The district court swiftly granted American Express’s motion to compel individual arbitration in accord with this contract, but was reversed by the Second Circuit, which found that *Concepcion* did not apply.<sup>79</sup>

On appeal the Supreme Court reversed the Second Circuit and affirmed the trial court, holding that the FAA dictates that arbitration agreements be enforced according to their terms even when it would not be feasible<sup>80</sup> for a

72 *Id.* at 352 (“California’s *Discover Bank* rule is pre-empted by the FAA.”).

73 *See id.* at 350.

74 *Id.* at 349–50.

75 *Id.* at 352 (“Indeed, [even] the District Court concluded that the Concepcions were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action.”).

76 *Id.* On remand the District Court granted AT&T’s motion to compel individual arbitration. *See Laster v. T-Mobile USA, Inc.*, Nos. 06cv675, 05cv1167, 2012 WL 1681762 (S.D. Cal. May 9, 2012).

77 *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2307 (2013).

78 This agreement provided, *inter alia*, that “[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis.” *Id.* at 2308 (quoting *In re Am. Express Merchs.’ Litig.*, 667 F.3d 204, 209 (2d Cir. 2012), *rev’d*, *Italian Colors*, 133 S. Ct. at 2304).

79 *Id.* The procedural history is actually slightly more complicated than this as it involves the Supreme Court reversing the Second Circuit’s decision in 2010, the Second Circuit reaffirming its decision on remand in 2011 (twice), and a second appeal to the Supreme Court, which generated the 2013 decision.

80 The plaintiffs argued that it would not be feasible to bring individual claims on the basis of an economist’s opinion that it would cost hundreds of thousands of dollars to prove their claims while the maximum recovery for each individual plaintiff would only be \$12,850. *Id.*

plaintiff to bring a claim through individual arbitration.<sup>81</sup> To justify this holding the Court began by laying out the text of the FAA and reiterating that the FAA predominates unless it has been “overridden by a contrary congressional command.”<sup>82</sup> It then found that the Sherman Act, under which the merchants’ claims were brought, did not include any such contrary command.<sup>83</sup> Moreover, the Court found that Rule 23 did not establish a right to class actions<sup>84</sup> and that preventing the merchants from participating in a class action lawsuit did not eliminate the merchants’ ability to bring claims under the Sherman Act—it merely prevented them from using that particular form of action to bring such claims.<sup>85</sup> Finally, the Court explicitly rejected the effective vindication doctrine, stating that “[its] decision in *AT&T Mobility* all but resolves [the issue],” since that case “specifically rejected the argument that class arbitration was necessary to prosecute claims ‘that might otherwise slip through the legal system.’”<sup>86</sup>

### C. DIRECTV v. Imburgia

*DIRECTV, Inc. v. Imburgia* is the Supreme Court’s most recent attempt to address class action waivers.<sup>87</sup> In *DIRECTV*, a service contract between DIRECTV and its customers included a provision that stated that “any claim either [party] asserts will be resolved only by binding arbitration,” and that “[n]either [party] shall be entitled to join or consolidate claims in arbitration.”<sup>88</sup> The contract also included a provision that stated that “if the ‘law of [the customer’s] state’ makes the waiver of class arbitration unenforceable, then the entire arbitration provision is ‘unenforceable.’”<sup>89</sup> When two customers brought a class action lawsuit against DIRECTV in California state court, the company moved to enforce the contract and send the matter to arbitration.<sup>90</sup> After the state trial court denied the motion, the California Court of Appeal affirmed, holding that the *Discover Bank* rule was still good law in California, even if it was trumped by the FAA in federal litigation, and that consequently *Concepcion* did not apply.<sup>91</sup>

On direct review from the California Court of Appeal,<sup>92</sup> the Supreme Court held that the court of appeal’s interpretation of *Concepcion* was invalid

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81 *Id.* at 2312, 2312 n.5 (“[T]he FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims.”).

82 *Id.* at 2309 (quoting *CompuCredit Corp v. Greenwood*, 565 U.S. 95, 98 (2012)).

83 *Id.*

84 *Id.* (“[C]ongressional approval of Rule 23 [does not] establish an entitlement to class proceedings for the vindication of statutory rights.”).

85 *Id.* at 2310–11.

86 *Id.* at 2312 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011)).

87 *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 466 (2015).

88 *Id.* (quoting the contract).

89 *Id.* (quoting the contract).

90 *Id.*

91 *Id.* at 466–67.

92 After the California Supreme Court refused to review the court of appeal’s ruling, DIRECTV petitioned the Supreme Court for a writ of certiorari. *Id.* at 467.

and that the arbitration agreement should be enforced according to its terms.<sup>93</sup> In coming to this conclusion the Court began by reminding the court of appeal that it was bound by the Supremacy Clause to follow *Conception's* interpretation of the FAA.<sup>94</sup> It then proceeded to opine that “[a]bsent any indication in the contract that [the language about the law of the state] is meant to refer to *invalid* state law, [the language] presumably takes its ordinary meaning: *valid* state law.”<sup>95</sup> Summarily dismissing the court of appeal’s attempt to maintain the validity of *Discover Bank*,<sup>96</sup> the Court held that the “law of the state,” for purposes of the contract at issue, was the FAA since the FAA had preempted California law.<sup>97</sup> Thus the Court continued its trend of reading the FAA expansively and reiterated its opinion that the FAA preempts state laws that try to make mandatory class action waivers unenforceable.<sup>98</sup>

### III. THE CIRCUIT SPLIT

In order to give an effective account of this hotly contested issue<sup>99</sup> it is also important to understand what the different circuit courts have said the law is and the way in which they each came to their decisions. Consequently, this Part lays out the reasoning and holdings of the five circuit courts that have addressed collective action waivers in employment arbitration agreements. Section III.A will examine decisions of the Seventh and Ninth Circuits that have held waivers of the right to collective action in employment contracts to be unenforceable,<sup>100</sup> while Section III.B will examine decisions of the Second, Fifth, and Eighth Circuits that have held such waivers to be enforceable.<sup>101</sup>

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93 *Id.* at 471.

94 *Id.* at 468.

95 *Id.* at 469.

96 *Id.* at 470 (“The view that state law retains independent force even after it has been authoritatively invalidated by this Court is one courts are unlikely to accept.”).

97 *Id.* at 471.

98 *Id.*

99 See *supra* note 2; see also Todd D. Wozniak & Jack S. Gearan, *Ninth Circuit Court of Appeals Widens Circuit Split as to Class Action Waivers in Employee Arbitration Agreements*, NAT’L L. REV. (Sept. 1, 2016), <http://www.natlawreview.com/article/ninth-circuit-court-appeals-widens-circuit-split-to-class-action-waivers-employee>.

100 See *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016); *infra* subsections III.A.1; III.A.2.

101 See *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) (*per curiam*); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *infra* subsections III.B.1; III.B.2; III.B.3.

### A. *Waivers Are Unenforceable*

#### 1. The Seventh Circuit: *Lewis v. Epic Systems Corp.*

In *Lewis v. Epic Systems Corp.*, the Seventh Circuit was presented with the question of whether an employer could legally require its employees to waive their right to class action litigation as a condition for continuing employment.<sup>102</sup> Specifically, the employer, Epic Systems Corporation (“Epic”), sent an email to its employees that contained an arbitration agreement mandating that the employees waive “the right to participate in or receive money or any other relief from any class, collective, or representative proceeding,” and that employees were “deemed to have accepted [the] Agreement” if they “continue[d] to work at Epic.”<sup>103</sup> One of the employees who received and accepted the terms of this email later sued Epic, claiming the arbitration agreement violated federal law.<sup>104</sup>

The Seventh Circuit held the agreement was unenforceable, noting that it “violates the National Labor Relations Act (NLRA)” and is thus “unenforceable under the Federal Arbitration Act (FAA).”<sup>105</sup> To support its holding the court began by examining the text of the NLRA and the legal precedent interpreting it.<sup>106</sup> In doing so, the court found that “the Board has, ‘from its earliest days,’ held that ‘employer-imposed, individual agreements that purport to restrict Section 7 rights’ are unenforceable” and that one such right is the right to engage in concerted activities.<sup>107</sup> The court then proceeded to hold that “concerted activity” for purposes of the NLRA includes the right to collective and class legal action, finding support both in the statute itself<sup>108</sup> and in the NLRB’s interpretation of the statute.<sup>109</sup>

In light of this definition, the court found that Epic had clearly violated section 7 of the NLRA by prohibiting all forms of collective legal action and that the contract was consequently unenforceable since “[c]ontracts that stipulate away employees’ Section 7 rights or otherwise require actions unlawful under the NLRA are unenforceable.”<sup>110</sup> The court then turned to Epic’s argument that the FAA overrides the NLRA and makes the agreement

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102 *Lewis*, 823 F.3d at 1151.

103 *Id.* (quoting the email sent to Epic’s employees).

104 *Id.*

105 *Id.*

106 *See id.* at 1151–52.

107 *Id.* at 1152 (quoting *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2280 (2012), *enforced in part, rev’d in part sub nom.* *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013)).

108 *Id.* at 1153 (“The NLRA’s history and purpose confirm that the phrase ‘concerted activities’ in Section 7 should be read broadly to include resort to representative, joint, collective, or class legal remedies.”).

109 *Id.* (“[T]he Board, in accordance with the reasoning above, has interpreted Sections 7 and 8 to prohibit employers from making agreements with individual employees barring access to class or collective remedies.” (citing *D.R. Horton*, 357 N.L.R.B. at 2280)).

110 *Id.* at 1155 (first citing *Nat’l Licorice Co. v. NLRB*, 309 U.S. 350, 361 (1940); and then citing *D.R. Horton*, 357 N.L.R.B. at 2280).

enforceable in spite of its unenforceability under the NLRA.<sup>111</sup> In rejecting this argument, the court pointed to the fact that in order for the FAA to trump the NLRA the two statutes would first have to clash.<sup>112</sup> Since the agreement is unlawful under the NLRA, however, it meets the criteria of the FAA's saving clause for nonenforcement,<sup>113</sup> and there is no conflict between the statutes.<sup>114</sup>

The court also distinguished *Concepcion* and *Italian Colors*, explaining that those cases were fundamentally about encouraging arbitration as a judicial remedy, whereas sections 7 and 8 of the NLRA are about employees' rights to engage in concerted activity.<sup>115</sup> Consequently, since the court rejected the argument that the FAA should trump anything that makes arbitration less attractive, including statutory rights, it also rejected the argument that those cases apply to the nonexistent clash between the FAA and the NLRA.<sup>116</sup> Moreover, the court held that since the NLRA is actually pro-arbitration, to suggest that one of its provisions runs contrary to the Supreme Court's command to favor arbitration is nonsensical.<sup>117</sup> The court, quoting *Italian Colors*, also pointed out that "[a]rbitration agreements that act as a 'prospective waiver of a party's right to pursue statutory remedies'—that is, of a substantive right—are not enforceable."<sup>118</sup> And since the court found the right to concerted activity to be a substantive right, not just a procedural one,<sup>119</sup> it followed that *Italian Colors*' own reasoning supported the holding that the agreement was unenforceable because it required a waiver of a substantive right.<sup>120</sup> Thus the court concluded that the mandatory waiver agreement in Epic's employment agreement was unenforceable.<sup>121</sup>

## 2. The Ninth Circuit: *Morris v. Ernst & Young*

Not only did the Ninth Circuit in *Morris v. Ernst & Young* reach the same basic conclusion as the Seventh Circuit (that employers cannot require their

111 *Id.* at 1156. This is the same argument advanced by the circuits that have held collective action waivers in employment contracts to be enforceable. See *infra* Section III.B.

112 *Lewis*, 823 F.3d at 1157.

113 Illegality is one of the grounds for unenforceability under the saving clause since it is a ground on which a contract may be invoked. See *supra* note 17.

114 *Lewis*, 823 F.3d at 1157.

115 *Id.* at 1157–59.

116 *Id.* at 1158.

117 *Id.*

118 *Id.* at 1160 (quoting *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013)).

119 See *id.* ("The right to collective action in section 7 of the NLRA . . . lies at the heart of the restructuring of employer/employee relationships that Congress meant to achieve in the statute. . . . That Section 7's rights are 'substantive' is plain from the structure of the NLRA: Section 7 is the NLRA's *only* substantive provision. Every other provision of the statute serves to enforce the rights Section 7 protects.")

120 *Id.* at 1160–61.

121 *Id.* at 1161.



employees to waive their right to collective action),<sup>122</sup> it did so via very similar reasoning. In *Morris*, employees of Ernst & Young “were required to sign agreements not to join with other employees in bringing legal claims against the company.”<sup>123</sup> Despite this, two employees brought a class action lawsuit against the company. After the district court dismissed the lawsuit and ordered arbitration in accord with the employment agreement, the employees appealed to the Ninth Circuit arguing that the agreement violated federal labor laws.<sup>124</sup>

In reversing the district court’s decision, the circuit court began by opining that “[c]oncerted activity—the right of employees to act *together*—is the essential, substantive right established by the NLRA.”<sup>125</sup> It then referenced the NLRB’s assessment that “an employer violates the NLRA ‘when it requires employees covered by the Act . . . to sign an agreement that precludes them from filing joint, class, or collective claims.’”<sup>126</sup> Assessing the Board’s reasoning under the *Chevron* doctrine,<sup>127</sup> the court found that the agency’s interpretation of the organic statute was consistent with the intent of Congress and that a plain reading of the statute prohibits an employer from requiring employees to waive their right to collective action.<sup>128</sup>

The *Morris* court, like the court in *Lewis*, then went on to find that “[t]he Federal Arbitration Act . . . does not dictate a contrary result.”<sup>129</sup> Under its examination of the FAA, the court found that although the Act requires arbitration contracts to be placed on equal footing with all other contracts, not all contract terms receive blanket enforcement under the FAA.<sup>130</sup> Moreover, the court held that standard contract defenses apply and that one of these defenses, illegality, was implicated by the fact that “the contract term defeats a substantive federal right [under the NLRA] to pursue concerted work-related legal claims.”<sup>131</sup> Even more importantly, the court held that since the right to collective action at issue here was a “substantive right,”<sup>132</sup> the

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122 See *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 986 (9th Cir. 2016) (“[T]he right to concerted employee activity [such as collective legal action] cannot be waived in an arbitration agreement.”).

123 *Id.* at 979.

124 *Id.*

125 *Id.* at 980 (citing 29 U.S.C. § 157 (2012)).

126 *Id.* (quoting *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2277 (2012), *enforced in part, rev’d in part sub nom. D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013)).

127 For an explanation of the *Chevron* doctrine see GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 560–79 (7th ed. 2016).

128 *Morris*, 834 F.3d at 981–84 (“In sum, the Board’s interpretation of § 7 and § 8 is correct. Section 7’s ‘mutual aid or protection clause’ includes the substantive right to collectively ‘seek to improve working conditions . . .’ [and] [u]nder § 8, an employer may not defeat the right by requiring employees to pursue all work-related legal claims individually.” (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978))).

129 *Id.* at 984.

130 *Id.*

131 *Id.* at 985.

132 *Id.* at 986 (“The rights established in § 7 of the NLRA—including the right of employees to pursue legal claims together—are substantive. They are the central, funda-

FAA did not mandate the enforcement of the contract term limiting this right.<sup>133</sup>

In response to the dissent's argument that the FAA trumps the NLRA and should therefore predominate, the court employed the same reasoning as the Seventh Circuit and found that there is no need to consider whether the NLRA trumps the FAA (or vice versa) since they are capable of co-existing.<sup>134</sup> The court also disagreed with the dissent's reading of Supreme Court precedent<sup>135</sup> and maintained that "the Supreme Court has repeatedly made clear [that] there is a limiting principle built into the FAA on what may be waived in arbitration: where substantive rights are at issue, the FAA's saving clause works in conjunction with the other statute to prevent conflict."<sup>136</sup> Thus the court concluded that "[i]rrespective of the forum in which disputes are resolved, employees must be able to act in the forum *together*," and that "[a]n employer may not condition employment on the requirement that an employee sign [a contract waiving this substantive right]."<sup>137</sup>

### B. Waivers Are Enforceable

#### 1. The Second Circuit: *Sutherland v. Ernst & Young LLP*, *Patterson v. Raymours Furniture Co.*

Unlike the courts in *Morris* and *Lewis*, the Second Circuit in *Sutherland v. Ernst & Young* found that employees may legally waive their right to collective action.<sup>138</sup> In *Sutherland*, Stephanie Sutherland, one of Ernst & Young's employees, brought a collective action lawsuit against the company in order to recover overtime wages pursuant to the Fair Labor Standards Act despite the fact that she had signed an arbitration agreement waiving her right to

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mental protections of the Act . . . . Without § 7, the Act's entire structure and policy flounder.").

133 *Id.* ("[W]hen an arbitration contract professes the waiver of a substantive federal right, the FAA's saving clause prevents a conflict between the statutes by causing the FAA's enforcement mandate to yield. . . . There is no doubt that Congress intended for § 7 and its right to 'concerted activities' to be the 'primary substantive provision' of the NLRA. For this reason, the right to concerted employee activity cannot be waived in an arbitration agreement." (citations omitted) (first citing *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1159 (7th Cir. 2016); and then citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991))).

134 *Id.* at 987.

135 For example, in dismissing *Concepcion* and *Italian Colors* the court determined that those cases were about the adequacy of arbitration as a legal remedy—i.e., the right to arbitration generally—whereas the NLRA's prohibition on class action waivers is about the right to a *specific type* of arbitration—i.e., collective arbitration—in a specific situation—i.e., employment contracts. *See id.* at 989 ("At its heart, this is a labor law case, not an arbitration case."). The court also further distinguished *Concepcion* by pointing out that it involved a *consumer* arbitration contract rather than a *labor* arbitration contract. *See id.* at 987–89.

136 *Id.* at 988.

137 *Id.* at 989–90.

138 *See Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) (per curiam).

class action as part of her employment.<sup>139</sup> In dismissing the lawsuit and sending the parties to arbitration in accord with the agreement, the court began by discussing the FAA and the Supreme Court's command that courts should "rigorously enforce arbitration agreements according to their terms, including terms that specify *with whom* [the parties] choose to arbitrate their disputes, and the rules under which that arbitration will be conducted,"<sup>140</sup> unless the FAA has been overridden by a "contrary congressional command."<sup>141</sup> The court then proceeded to examine the FLSA for such a congressional command but concluded that it did not include one.<sup>142</sup>

In addition, the court found that since the FLSA requires employees to opt into class actions, it follows that they should also be able to waive their right to them.<sup>143</sup> And since both *Concepcion* and *Italian Colors* upheld class arbitration waivers, the court concluded that Ernst & Young's waiver should similarly be upheld.<sup>144</sup> The court then proceeded to address Sutherland's alternative argument that her rights could not be effectively vindicated in an individual action because the result of a victory would be vastly outweighed by the costs necessary to obtain it.<sup>145</sup> In doing so, it determined that the Supreme Court's decision in *Italian Colors* instructed that "the 'effective vindication doctrine' cannot be used to invalidate class-action waiver provisions in circumstances where the recovery sought is exceeded by the costs of individual arbitration" and that consequently Sutherland's claim failed.<sup>146</sup>

The court also (somewhat) addressed in a footnote the argument relied upon by the Seventh and Ninth Circuits<sup>147</sup> that the NLRA prohibits waivers of collective actions.<sup>148</sup> In doing so, the court stated that *D.R. Horton* (which held that a waiver of the right to pursue a FLSA claim collectively was unenforceable under the NLRA<sup>149</sup>) was decided by the NLRB without a proper quorum and that it did not address the specific type of class waiver presented in *Sutherland*.<sup>150</sup> Moreover, the court held that even if *D. R. Horton* was applicable, it did not owe any deference to the NLRB's judgment, and that the

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139 *Id.* at 292, 293–94. The agreement that the employee signed explicitly stated that, among other things, "[c]overed Disputes [including claims based on federal statutes such as the FLSA] pertaining to different [e]mployees will be heard in separate proceedings." *Id.* at 294 (alterations in original).

140 *Id.* at 296 (internal quotation marks omitted) (quoting *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013)).

141 *Id.* at 295 (quoting *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012)).

142 *Id.* at 296 ("[T]he text of the FLSA does not 'evin[c]e an intention to preclude a waiver of class-action procedure.'" (alteration in original) (quoting *Italian Colors*, 133 S. Ct. at 2309 (internal quotation marks omitted))).

143 *Id.* at 296–97.

144 *Id.* at 297.

145 *See id.* at 298.

146 *Id.* at 298–99.

147 Since *Sutherland* predates both *Lewis* and *Morris*, the court did not address either case specifically.

148 *See Sutherland*, 726 F.3d at 297 n.8.

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

150 *Sutherland*, 726 F.3d at 297 n.8.

NLRA was irrelevant to its decision.<sup>151</sup> Thus the court held that the waiver in Sutherland's employment contract was legally enforceable and moved to compel individual arbitration pursuant to the FAA accordingly.<sup>152</sup>

In its most recent case addressing the issue, *Patterson v. Raymours Furniture Co.*, the Second Circuit was again presented with a situation in which a group of employees sought to bring a collective action lawsuit that was prohibited by a mandatory arbitration agreement in their employment contracts.<sup>153</sup> Noting that the arguments advanced by the Seventh Circuit in *Lewis* and the Ninth Circuit in *Morris* were quite persuasive,<sup>154</sup> the court nonetheless held that it was bound by its prior precedent in *Sutherland*.<sup>155</sup> Consequently, it reaffirmed its conclusion that collective action waivers in employment contracts are legally enforceable.<sup>156</sup>

## 2. The Fifth Circuit: *D.R. Horton, Inc. v. NLRB*; *Murphy Oil USA, Inc. v. NLRB*

In *D.R. Horton, Inc. v. NLRB*—the Fifth Circuit's evaluation of the NLRB's decision in *D.R. Horton*<sup>157</sup>—the court held that the Board's decision gave too little weight to the FAA and that the arbitration agreement which the Board found to be unenforceable<sup>158</sup> was instead enforceable.<sup>159</sup> To support this holding, the court began by dismissing the argument that the Board's decision was invalid on account of the fact that one of the deciding

151 *Id.*

152 *Id.* at 299.

153 See *Patterson v. Raymours Furniture Co.*, 659 F. App'x 40 (2d Cir. 2016), *petition for cert. filed*, No. 16-388 (U.S. Sept. 22, 2016). This arbitration agreement stated, *inter alia*, that “[c]laims under this [Employment Arbitration] Program cannot be litigated by way of class or collective action. Nor may Claims be arbitrated by way of a class or collective action.” *Id.* at 41 n.1.

154 *Id.* at 43 (“If we were writing on a clean slate we might well be persuaded, for the reasons forcefully stated in . . . *Lewis* and *Morris*, to join the Seventh and Ninth Circuits . . .”).

155 *Id.*

156 *Id.*

157 See *supra* note 149 and accompanying text. To distinguish the NLRB decision from the Fifth Circuit decision, future short cites to the NLRB decision will be cited as “*D.R. Horton*” while short cites to the Fifth Circuit decision will be cited as “*Horton*.”

158 This arbitration agreement, which all of Horton's employees were required to sign as a condition of their employment, stated that, among other things:

Horton and its employees agreed that “all disputes and claims” would “be determined exclusively by final and binding arbitration . . .” [and] that “the arbitrator [would] not have the authority to consolidate the claims of other employees” and would “not have the authority to fashion a proceeding as a class or collective action.”

*D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 348 (5th Cir. 2013) (second alteration in original) (quoting the arbitration agreement). Consequently, all employment-related disputes were required to be resolved through individual arbitration.

159 *Id.*

Board members was improperly appointed.<sup>160</sup> It similarly rejected arguments that the appointment expired before the judgment was passed and that a judgment by a three-person Board was invalid.<sup>161</sup>

The court then turned to the Board's conclusion that Horton had violated sections 7 and 8(a)(1) of the NLRA.<sup>162</sup> Although the court gave some deference to the Board,<sup>163</sup> it also found that the Board failed to account for the FAA.<sup>164</sup> Characterizing class actions as a procedural right, not a substantive right,<sup>165</sup> the court pointed out that multiple courts have determined that there is no right to class procedures under the Age Discrimination in Employment Act (ADEA) and the FLSA.<sup>166</sup> Moreover, the court emphasized that "under the FAA . . . arbitration agreements must be enforced according to their terms," with two exceptions: when the FAA's saving clause applies,<sup>167</sup> or when a contrary congressional command is present.<sup>168</sup> In determining that the first exception did not apply, the court found support in the Supreme Court's decision in *Concepcion*.<sup>169</sup> Arguing that the Board's decision would have the effect of disfavoring arbitration, the exact problem for which the California judicial rule<sup>170</sup> at issue in *Concepcion* was struck down, the court held that "[r]equiring a class mechanism . . . violates the FAA" and that "[t]he saving clause is not a basis for invalidating the waiver of class procedures in the arbitration agreement."<sup>171</sup>

The court next addressed the second exception and found that "[t]here is no argument that the NLRA's text contains explicit language of a congressional intent to override the FAA."<sup>172</sup> The court also determined that the legislative history did not contain such an intent and that no such intent

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160 *Id.* at 350–51. In an attempt to avoid the issue the court flat out declared that it was "leav[ing] the constitutional issue for the Supreme Court." *Id.* at 351.

161 *See id.* at 352–54.

162 *Id.* at 355.

163 *See id.* at 356.

164 *See id.* at 357.

165 *Id.* ("The use of class action procedures, though, is not a substantive right. . . . [Rather] [t]his court . . . has characterized a class action as 'a procedural device.'" (quoting *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630, 643 (5th Cir. 2012), *abrogated by* 133 S. Ct. 2064 (2013) (internal quotation marks omitted))).

166 *Id.*

167 *See supra* note 17.

168 *Horton*, 737 F.3d at 358.

169 *Id.* at 359 ("A detailed analysis of *Concepcion* leads to the conclusion that the Board's rule does not fit within the FAA's saving clause.").

170 Known as the *Discover Bank* rule after the California Supreme Court case creating it, this rule prohibited class action waivers in certain circumstances. *See Discover Bank v. Superior Court*, 113 P.3d 1100, 1103 (Cal. 2005) ("[T]he law in California is that class action waivers in consumer contracts of adhesion are unenforceable, whether the consumer is being asked to waive the right to class action litigation or the right to classwide arbitration."), *abrogated by Concepcion*, 563 U.S. at 333.

171 *Horton*, 737 F.3d at 359–60.

172 *Id.* at 360.

could be found in an “inherent conflict” between the NLRA and the FAA.<sup>173</sup> In light of the fact that it did not find either exception to the FAA’s mandate applicable, the court then held that the FAA precluded the NLRB’s decision and that the arbitration agreement was legally enforceable according to its terms.<sup>174</sup>

Two years later the Fifth Circuit addressed the issue again in *Murphy Oil USA, Inc. v. NLRB* and reaffirmed its belief that waivers of the right to collective action in employment contracts are enforceable.<sup>175</sup> In *Murphy Oil*, four Murphy Oil employees brought a collective action against the company in federal court in defiance of the arbitration agreement they had signed,<sup>176</sup> as well as an unfair labor practice charge with the NLRB.<sup>177</sup> In the action before the NLRB, the Board held that the agreement was unlawful, employing the same reasoning it used in *D.R. Horton*, and disregarding the Fifth Circuit’s intervening decision in *Horton*.<sup>178</sup> Although the court held Murphy Oil’s initial arbitration agreement to be unenforceable on other grounds,<sup>179</sup> it refused to reevaluate its decision in *Horton* and held that the revised arbitration agreement was enforceable according to its terms, while simultaneously cautioning the NLRB against disregarding its decisions in the future.<sup>180</sup>

### 3. The Eighth Circuit: *Owen v. Bristol Care, Inc.*; *Cellular Sales of Missouri, LLC v. NLRB*

Like the Second Circuit in *Sutherland* and the Fifth Circuit in *Horton*, the Eighth Circuit in *Owen v. Bristol Care, Inc.* held that class action waivers in employment contracts are enforceable.<sup>181</sup> In *Owen*, one of Bristol Care’s employees, who had signed a mandatory arbitration agreement (MAA) as

173 *Id.* at 361. Relying heavily on the Supreme Court’s decision and reasoning in *Gilmer*, the court found that there were major problems with the theory that the NLRA was in conflict with the FAA but did not go on to try to synthesize them like the courts in *Lewis* and *Morris*. *Id.*

174 *Id.* at 362 (“Because the Board’s interpretation does not fall within the FAA’s ‘saving clause,’ and because the NLRA does not contain a congressional command exempting the statute from application of the FAA, the Mutual Arbitration Agreement must be enforced according to its terms.”).

175 See *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

176 *Id.* at 1015. This agreement stated that “[Murphy Oil] and Individual agree to resolve any and all disputes or claims . . . which relate . . . to Individual’s employment . . . by binding arbitration,” and that employees waived the right to pursue class or collective claims in an arbitral or judicial forum. *Id.* (alterations in original) (quoting the arbitration agreement).

177 *Id.* at 1016.

178 *Id.* at 1017.

179 Specifically, the court rejected the language of this agreement for being too broad and potentially eliminating employees’ rights to file unfair labor charges with the NLRB. *Id.* at 1019.

180 *Id.* at 1015, 1021 (“[T]he Board will not be surprised that we adhere, as we must, to our prior ruling. . . . [And] might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders.”).

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

part of her employment,<sup>182</sup> brought a class action suit against the company alleging violations of the FLSA.<sup>183</sup> In reversing the district court's decision to invalidate the agreement, the court began by determining, on the basis of Supreme Court precedent, that the FAA trumps all other statutes with regards to arbitration unless there is a contrary congressional command in those statutes.<sup>184</sup> Searching the FLSA for such a command and not finding one,<sup>185</sup> the court, like the court in *Sutherland*, then opined that since the FLSA requires employees to opt into class actions, it follows that they should also be able to waive their right to them.<sup>186</sup> Moreover, the court dismissed the NLRB's decision in *D.R. Horton*, holding that it did not apply to the facts presented in *Owen*, and that the court would not defer to the NLRB's reasoning even if it did apply.<sup>187</sup> Thus, the court concluded that "the class waiver in the MAA is enforceable" and directed the district court to compel arbitration.<sup>188</sup>

In a more recent decision, *Cellular Sales of Missouri, LLC v. NLRB*, the Eighth Circuit addressed the issue again when a Cellular Sales employee filed a class action lawsuit against the company for violating the FLSA.<sup>189</sup> Just as the Fifth Circuit in *Murphy Oil* affirmed its earlier holding in *Horton*, so too did the Eighth Circuit affirm its earlier holding in *Owen*.<sup>190</sup> Citing *Murphy Oil* and *Owen*, the court held that the NLRB's interpretation of the NLRA—that it prohibits mandatory agreements that require individual arbitration of work-related claims—was incorrect<sup>191</sup> and that "Cellular Sales did not violate [the NLRA] by requiring its employees to enter into an arbitration agree-

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182 This arbitration agreement contained a waiver that prohibited the parties "from arbitrating claims subject to [the] Agreement as, or on behalf of, a class." *Id.* at 1051 (alteration in original) (quoting the arbitration agreement).

183 *Id.*

184 *Id.* at 1052.

185 *Id.* ("Owen identifies nothing in either the text or legislative history of the FLSA that indicates a congressional intent to bar employees from agreeing to arbitrate FLSA claims individually, nor is there an 'inherent conflict' between the FLSA and the FAA.")

186 *Id.* at 1052–53 ("[I]f an employee must affirmatively opt in to any such class action, surely the employee has the power to waive participation in a class action as well.")

187 *Id.* at 1053–54.

188 *Id.* at 1055.

189 See *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016). Like the employees in all of the other cases discussed in Part III, the employee in *Cellular Sales* had signed a mandatory arbitration agreement as a condition of his employment. This agreement stipulated that "Employee hereby agrees to arbitrate any such claims, disputes, or controversies only in an individual capacity and not as a plaintiff or class member in any purported class, collective action, or representative proceeding." *Id.* at 774 (quoting the arbitration agreement).

190 *Id.* at 776. The similarities between *Cellular Sales* and *Murphy Oil* do not stop there, for in both cases the courts did find that the arbitration agreements were partially flawed insofar as they potentially restrained employees' rights to file unfair labor practice charges. See *id.* at 777–78; *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

191 *Cellular Sales*, 824 F.3d at 776.

ment that included a waiver of class or collective actions in all forums to resolve employment-related disputes.”<sup>192</sup>

#### IV. ANALYSIS

##### A. *The Current State of the Law*

While it might be tempting to believe that the Supreme Court’s recent jurisprudence resolves the issue in favor of enforcing collective action waivers in employment contracts,<sup>193</sup> the aforementioned circuit split undermines such a conclusion.<sup>194</sup> Nonetheless, a few inferences can be discerned from the tea leaves of these judicial opinions. First, the Supreme Court in *Concepcion* and *DIRECTV* made it very clear that it intends to interpret the FAA expansively and that the FAA’s reach is not limited by state laws that attempt to stand in its way.<sup>195</sup> *Italian Colors* also makes clear that a plaintiff’s inability to bring a claim absent a collective action does not prevent mandatory waivers from being enforceable.<sup>196</sup> Moreover, *Gilmer* and *Adams* make clear that employment agreements that do not involve transportation workers are not categorically exempt from the reach of the FAA.<sup>197</sup>

In addition, all of the circuits agree that, given this Supreme Court precedent, the FAA is entitled to some level of deference. For example, both the Seventh Circuit in *Lewis* and the Ninth Circuit in *Morris* conceded the fact that the FAA imposes a “federal policy favoring arbitration agreements.”<sup>198</sup> Likewise, the Second, Fifth, and Eighth Circuits have all relied on this exact same language to arrive at their respective holdings.<sup>199</sup> The circuits disagree, however, as to just how much deference the FAA is owed. The Seventh Circuit, which arguably gives the FAA the least deference, believes that the NLRA is the more relevant federal statute in the employment context and that the FAA does not extend so far as to trump employees’ statutory rights.<sup>200</sup> The Ninth Circuit similarly limits its deference to the FAA when

192 *Id.*

193 *See supra* Part II.

194 *See supra* Part III, especially Section III.A. The fact that not one, but two, circuits (the Seventh and Ninth) have held such waivers to be unenforceable demonstrates that even if the Court’s jurisprudence should resolve the issue, it certainly has not done so in practice.

195 *See supra* Sections II.A; II.C.

196 *See supra* Section II.B.

197 *See supra* Section I.B.

198 *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 991 (9th Cir. 2016) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011)); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1159 (7th Cir. 2016) (quoting *Concepcion*, 563 U.S. at 346).

199 *See D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 360 (5th Cir. 2013) (quoting *Concepcion*, 563 U.S. at 346); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 295 (2d Cir. 2013) (per curiam) (quoting *CompuCredit Corp v. Greenwood*, 565 U.S. 95, 98 (2012)); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013) (quoting *CompuCredit*, 565 U.S. at 98).

200 *See Lewis*, 823 F.3d at 1157–58.



substantive rights are involved and does not believe that contract terms must automatically be enforced just because they are in an arbitration agreement.<sup>201</sup> Conversely, the Second, Fifth, and Eighth Circuits all value the FAA highly and believe that it should always be given deference unless it is clear that Congress intended otherwise, a rather high bar to meet.<sup>202</sup> As a result, the Second and Eighth Circuits have held that the FAA overrides a plaintiff's ability to bring collective FLSA claims, while the Fifth Circuit has held that the FAA overrides a plaintiff's ability to exercise his rights under the NLRA.<sup>203</sup>

Furthermore, all the circuits seem to be in agreement that the main debate is over the right to group action as opposed to individual action, not the right to litigation as opposed to arbitration. For example, the Seventh Circuit in *Lewis* found the waiver to be invalid not because it prevented employees from litigating claims in court, but because it infringed on their right to bring claims as a group through "concerted action."<sup>204</sup> Similarly, the Ninth Circuit in *Morris* found that it was the fact that the waiver prevented employees from bringing claims as a group that made it unenforceable under the NLRA.<sup>205</sup> The Second Circuit in *Sutherland* also made clear that it was approaching the issue from the individual-group perspective in rejecting the effective vindication doctrine—the concept that some claims can only be effectively vindicated when brought as a group action.<sup>206</sup> In the same way, the Fifth Circuit in *Horton* indicated that it was basing its holding on the individual-group distinction by focusing its analysis on the fact that it was the right to *collective* procedures—which could be either arbitral or judicial—that was preempted by the FAA.<sup>207</sup> Finally, the Eighth Circuit in *Owen* based its holding in large part on its conclusion that it was not bound to obey the NLRB's pronouncement that employees have a right to concerted action under the NLRA—a clear sign that it viewed the issue as an individual-group one.<sup>208</sup>

Closely related to the individual-group dichotomy is the relative weight the circuits grant to the FAA and NLRA. Unsurprisingly, the circuits that consider the NLRA to be compatible with or trump the FAA have also found the NLRA's right to concerted activity to be dispositive, while the circuits that consider the FAA to trump the NLRA have found the FAA's emphasis on enforcing arbitration agreements according to their terms to be dispositive. Thus, the Seventh Circuit in *Lewis* held that an employer cannot force an employee to waive his right to concerted activity (i.e., collective action) since

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201 See *Morris*, 834 F.3d at 983, 986–89.

202 See *Horton*, 737 F.3d at 360–61; *Sutherland*, 726 F.3d at 295–96; *Owen*, 702 F.3d at 1052.

203 See *supra* Section III.B.

204 *Lewis*, 823 F.3d at 1161.

205 *Morris*, 834 F.3d at 986.

206 See *Sutherland*, 726 F.3d at 298.

207 See *Horton*, 737 F.3d at 359–60.

208 See *Owen*, 702 F.3d at 1053–54.

the FAA's saving clause prevents the FAA from clashing with the NLRA causing the NLRA to govern.<sup>209</sup> In a similar way the Ninth Circuit in *Morris* held that employees are entitled to bring collective actions because the substantive right to concerted activity in the NLRA trumps the FAA's directive that arbitration agreements be enforced according to their terms.<sup>210</sup> Conversely, the Second Circuit in *Sutherland* emphasized the fact that it was not bound to follow the NLRB's interpretation of the NLRA and that consequently the waiver agreement should be enforced in accord with the FAA's mandate.<sup>211</sup> The Fifth Circuit in *Horton* came to the same conclusion, directly rejecting the NLRB's interpretation and finding that the FAA trumps what it considered to be a procedural right to concerted activity.<sup>212</sup> Finally, in keeping with this pattern the Eighth Circuit in *Owen* held that the NLRA was subservient to the FAA since Congress had not indicated otherwise and that the FAA conclusively decided the outcome of the case.<sup>213</sup>

Given these differing approaches, it is unsurprising that the current state of the law is muddled. Each court's policy decision to read the FAA broadly or (relatively) narrowly, and to accord dispositive or dismissive weight to the NLRA, has a tremendous impact on the outcome an employer should expect to see when it moves to compel individual arbitration on the basis of a contract with its employees. Consequently, until the Supreme Court definitively decides the issue, the legality of class action waivers in employment contracts will remain dependent on the court in which a lawsuit is brought.

### B. *Class Action Waivers Should Be Unenforceable*

Now that the Court has agreed to resolve the circuit split,<sup>214</sup> it will be forced to make the aforementioned policy choices for itself. Despite the Court's trend of reading the FAA expansively, nothing in the Court's recent jurisprudence mandates that its hands are bound when it comes to class action waivers in the employment context. Not only *can* the Court reverse this trend, the Court *should* reverse this trend and make class action waivers in the employment context unenforceable for the following reasons. First, the agency explicitly tasked with managing employer-employee relations, the NLRB, has interpreted the NLRA to prohibit such waivers. Second, sound policy suggests that the benefits of enforcing these waivers are outweighed by the costs of doing so.

The Court's recent precedent, although somewhat concerning, can be distinguished on the basis of the difference between merchant-consumer contracts and employer-employee contracts. For example, in *Concepcion* the

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209 *Lewis*, 823 F.3d at 1157–58.

210 *Morris*, 834 F.3d at 985–87.

211 *Sutherland*, 726 F.3d at 295, 297 n.8.

212 *Horton*, 737 F.3d at 357.

213 *Owen*, 702 F.3d at 1052, 1054.

214 On January 13, 2017, the Court consolidated *Lewis*, *Morris*, and *Murphy Oil* and granted cert. 823 F.3d 1147 (7th Cir. 2016), cert. granted, No. 16-285, 2017 WL 125664 (U.S. Jan. 13, 2017) (mem.).

contract at issue was between a telephone provider (a merchant) and its customers (consumers).<sup>215</sup> Likewise, the contract at issue in *Italian Colors* involved a credit card company (a merchant) and merchants interested in accepting the cards offered by that company (consumers in this context insofar as they “consumed” American Express’s “good”).<sup>216</sup> Finally, the contract at issue in *DIRECTV* involved a cable television provider (a merchant) and its customers (consumers).<sup>217</sup> In contrast, all of the circuit court cases examined in Part III involved contracts between employers and their employees.<sup>218</sup>

This distinction is important for a couple of reasons. First, the NLRB is tasked with governing relations between employers and employees, not merchants and consumers.<sup>219</sup> Consequently, the federal statute that gives employees the right to engage in concerted activity—the NLRA—likewise only gives this right to employees in the context of their relationship with their employers, not as consumers generally.<sup>220</sup> This means that the Court has an additional tool it can use to find class action waivers unenforceable in the employment context that it could not use in the merchant-consumer context.

Moreover, the right to a class action is more critical in the employment context insofar as it is easier for a consumer to switch merchants if he does not want to be bound by the mandatory arbitration agreement offered to him than it is for an employee to find another job if his current one is forcing him to sign such an agreement.<sup>221</sup> This argument is somewhat of a double-edged sword, however, given the reality of existing market conditions. Although consumers can technically choose a different provider of goods or services if they do not like the contract being offered to them, in reality, they will almost certainly be required to sign such a waiver regardless of where they go since they are virtually universal in the consumer context.<sup>222</sup> It follows that if mandatory class action waivers can be enforced in a context where doing so effectively eliminates the ability to bring class actions (the consumer context)

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

216 *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2306 (2013). Even if the merchant-consumer relationship is tenuous in this case, a company-company relationship would be equally distinguishable from the employer-employee relationship.

217 *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 466 (2015).

218 *See supra* Part III.

219 *See* 29 U.S.C. §§ 151–53, 156, 160 (2012).

220 *See supra* subsection I.A.2.

221 Which would you rather do: quit your job and hope to find a new one or switch phones from Verizon to T-Mobile or insurance from State Farm to Geico?

222 For example, a 2015 study of the Consumer Financial Protection Bureau (CFPB) found that over 92% of contracts for prepaid cards and over 86% of student loan contracts included mandatory arbitration clauses. *See* STONE & COLVIN, *supra* note 3, at 16. Even more crucially, the same study found that over 90% of these mandatory arbitration agreements expressly prohibited class actions. *See id.*

they should also be enforced in a context where the ability to avoid such waivers remains viable (the employee context).<sup>223</sup>

It could also be argued that even if the Court's recent precedent does not bind it, its decisions in *Gilmer* and *Adams* do. Unlike most of the other Supreme Court cases that have touched on mandatory arbitration agreements, *Gilmer* at least tangentially involved an employer-employee relationship.<sup>224</sup> Nonetheless, *Gilmer* can be distinguished from true mandatory waiver clauses in the employment context insofar as the arbitration agreement in the case was a securities registration application, not an employment contract.<sup>225</sup> *Adams*, on the other hand, involves a true employer-employee relationship.<sup>226</sup> It too can be distinguished on multiple grounds, however. First, as Section IV.A established, the real debate when it comes to these waiver clauses is over the individual-group distinction. Yet *Adams* only involved a waiver of the plaintiff's right to *litigation*, not his right to group action.<sup>227</sup> In addition, *Adams* merely stands for the proposition that the FAA's exemption clause applies solely to transportation workers—rather than all employees—not that the FAA automatically necessitates enforcement of class action waivers.<sup>228</sup> Thus, it is clear that the Court is not required to find class action waivers in the employment context enforceable on account of its prior precedent.

Not only is the Court not required to enforce class action waivers, the Court *should not* enforce such waivers. The federal law of the NLRA, as understood by the agency responsible for interpreting it, is explicitly clear on the issue. For example, the NLRB in *D.R. Horton* explained how “[t]he Board has long held . . . that the NLRA protects employees’ ability to join together to pursue workplace grievances, including through litigation,” and that “an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator . . . is engaged in conduct protected by [the NLRA].”<sup>229</sup> It follows that the right to engage in concerted activity under the NLRA—whether it be class litigation or class arbitration—should be given the deference it deserves: that of a substantive federally guaranteed right.<sup>230</sup> As such, it should easily fall within the FAA's saving clause, which only makes arbitration clauses enforceable when they do not impinge on a ground that exists for the revocation of a contract;

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223 Incidentally, one of the best illustrations of the dangers of the ubiquity in the consumer context and one of the most compelling arguments for overruling *Concepcion* and making class action waivers unenforceable in that context is the ongoing Wells Fargo fiasco. See, e.g., *Wells Fargo Asks Court to Force Customers to Arbitration in Fake Accounts Cases*, N.Y. TIMES (Nov. 24, 2016), <http://www.nytimes.com/2016/11/24/business/wells-fargo-asks-court-to-force-customers-to-arbitration-in-fake-accounts-cases.html>.

224 See *supra* Section I.B.

225 See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991).

226 See *supra* Section I.B.

227 See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 110 (2001).

228 See *id.* at 109.

229 *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2278–79 (2012).

230 See *id.* at 2280.

the infringement of a substantive right is such a ground.<sup>231</sup> Moreover, the NLRA is more applicable to the employment context than the FAA and thus should be given more weight if they do come into conflict in that context. Unlike the FAA, which is, by its language, tailored towards arbitration agreements in commerce generally, the NLRA is specifically addressed to the employment context.<sup>232</sup> In addition, the NLRA is administered by an agency that by definition focuses on labor law, while the FAA is not.<sup>233</sup> Given these facts, the Supreme Court should follow the lead of the Seventh and Ninth Circuits and favor the NLRA over the FAA when it comes to class action waivers in the employment context.

Finally, sound policy also dictates that class action waivers in employment contracts should be unenforceable. As a lauded *New York Times* investigatory series has pointed out, forced individual arbitration in the employment context makes it less likely that discriminatory employment practices will be eliminated, as employees do not know what is happening to their fellow employees.<sup>234</sup> Court records also show that “[b]y banning class actions, companies have essentially disabled consumer challenges to practices like predatory lending, wage theft and discrimination.”<sup>235</sup> One likely cause is the fact that the ability of employees to effectively vindicate their rights is often impeded when they are unable to bring their claims as a group.<sup>236</sup> This suggests that the Court should not extend its rejection of the effective vindication doctrine in *Italian Colors* to the employment context. In addition, although *Concepcion* and its progeny have not yet signaled the much-feared death of the class action,<sup>237</sup> a Court decision that extends the

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231 9 U.S.C. § 2 (2012); see also *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1155 (7th Cir. 2016).

232 Compare 9 U.S.C. § 2 (“[A] contract evidencing a transaction involving commerce . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable . . .”), with 29 U.S.C. § 157 (2012) (“Employees shall have the right . . . to engage in other concerted activities . . .”).

233 The very name of that organization, the National *Labor Relations* Board, indicates this fact. See 29 U.S.C. § 153; see also *supra* subsection I.A.2.

234 See Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>. An examination of the facts in *Lewis* also illustrates this problem; if Jacob Lewis had been undisputedly forced into individual arbitration, it is likely that many of his fellow employees would not have realized that they too were potentially being deprived of overtime pay. See *Lewis*, 823 F.3d at 1151; see also *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 358–59 (1995) (“The disclosure through litigation of incidents or practices that violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance . . .”).

235 Silver-Greenberg & Gebeloff, *supra* note 234.

236 See *id.* (“[I]t is nearly impossible for one individual to take on a corporation with vast resources.”).

237 Compare Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 767 (2012) (“In *AT&T Mobility LLC v. Concepcion*, the Supreme Court

FAA to the employment context would threaten to do so. At that point it is hard to imagine what would prevent companies from instituting class action waivers in all facets of their business, both internal and external.<sup>238</sup> This would have the unsavory effect of solidifying the aforementioned problems, such as the fact that “class actions have been the only way through which workers have been able to significantly address wage violations occurring across industries.”<sup>239</sup> Thus, it is clear that the risks of enforcing class action waivers in the employment context are great.

Moreover, the main benefit of holding such waivers to be unenforceable—that courts will be able to avoid an enormous proliferation of class action lawsuits—is not nearly as substantive as it appears to be. Just because employees are able to pursue their claims through group actions does not mean that those actions have to be brought through litigation. They could just as easily be brought through class arbitration, avoiding the clogging-the-courts problem altogether. It is also not clear that employees are currently rushing to file class actions—despite the fact that they are able to do so.<sup>240</sup> Not all employees view arbitration as a negative forum, as it does confer certain benefits such as privacy, speed, ease of access, and low upfront cost, and it is likely that many would rather participate in individual arbitration than a class action.<sup>241</sup> In addition, there is the possibility that if companies know that they can be held accountable by their employees through the use of group action, they will be less likely to abuse their employees in the first place. This, in turn, would lead to fewer class action suits in the long run. Perhaps most importantly, the ultimate goal of the federal court system is to ensure that aggrieved parties attain justice, not to create a well-oiled machine for doing so.<sup>242</sup>

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potentially allowed for the evisceration of class arbitration, and indeed most class actions, in consumer and employment settings where contracts contain a pre-dispute arbitration provision . . . .”), with Christopher R. Drahozal, *FAA Preemption After Concepcion*, 35 BERKELEY J. EMP. & LAB. L. 153, 154 (2014) (“[I]n several respects, the impact of *Concepcion* has been overstated.”).

238 The benefits these agreements provide to employers greatly outweigh their costs, and it is clear that the trend among companies is already towards including such agreements. See, e.g., STONE & COLVIN, *supra* note 3, at 4 (“[T]oday it is common for employees to be presented with terms of employment that include both a clause that obligates them to arbitrate all disputes . . . and one that prohibits them from pursuing their claims in a class or collective action.”).

239 Nicole Wredberg, Note, *Subverting Workers’ Rights: Class Action Waivers and the Arbitral Threat to the NLRA*, 67 HASTINGS L.J. 881, 888 (2016).

240 See, e.g., Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 194–95 (2010) (finding that “[e]mployment discrimination litigation is a system dominated by individual cases” and that “[l]ess than 1 [employment discrimination] case in 10 has any element of collective action”).

241 See STONE & COLVIN, *supra* note 3, at 3.

242 See ADMIN. OFFICE OF THE U.S. COURTS, *THE FEDERAL COURT SYSTEM IN THE UNITED STATES: AN INTRODUCTION FOR JUDGES AND JUDICIAL ADMINISTRATORS IN OTHER COUNTRIES* 8–9 (3d ed. 2010) (“The federal courts often are called the guardians of the Constitution

Finally, the Court should take account of Congress's renewed interest in the matter. Although the Arbitration Fairness Act is currently stalled in both the House and the Senate, it is clear that its support in Congress is not insignificant.<sup>243</sup> Moreover, the outcry over the recent Wells Fargo scandal could force Congress's hand.<sup>244</sup> The ramifications of the bill, if passed, would be enormous. In its most recent form the bill proposes to add a section to Title 9 of the United States Code which would state that "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute."<sup>245</sup> This would effectively reverse *Concepcion* and strike down mandatory class action waivers in both the employment and consumer context. Even in the absence of the bill's passage, class action waivers in employment contracts should be unenforceable as the Court's current precedent does not foreclose the possibility, and sound policy and the NLRA advocate for this position.

### CONCLUSION

For now, uncertainty remains when it comes to the legality of class action waivers in employment contracts. Although the Supreme Court has considered the issue, at least tangentially, and multiple circuits have taken their shot at resolving the issue, no concrete conclusion can be reached.<sup>246</sup> On the one side stand the Seventh and Ninth Circuits which have held these types of waivers to be unenforceable. On the other side stand the Second, Fifth, and Eighth Circuits which have held the exact same types of waivers to be enforceable. Now that the Court has chosen to intervene, it should take seriously the concept that the power of the FAA is not limitless, despite the Court's recent trend of construing it expansively. The agency most in tune with the labor needs of the country has spoken and interpreted an equally valid (and potentially more relevant) federal law, the NLRA, to guarantee employees' rights to engage in concerted activity—including collective

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because their rulings protect the rights and liberties guaranteed by the Constitution. Through fair and impartial judgments, they determine facts and interpret the law to resolve legal disputes. . . . The framers of the Constitution considered an independent federal judiciary essential *to ensure fairness and equal justice to all citizens . . .*" (emphasis added)).

243 See, e.g., Letter from Henry C. "Hank" Johnson, Jr., Ranking Member, House Subcomm. on Regulatory Reform, Commercial & Antitrust Law & John Conyers, Jr., Ranking Member, House Comm. on the Judiciary, to Bob Goodlatte, Chairman, House Comm. on the Judiciary (Nov. 16, 2015) (on file with author).

244 See, e.g., Aaron Jordan, *Why the Wells Fargo Scandal Shows the Need to End Forced Arbitration*, ALLIANCE FOR JUST. (Sept. 20, 2016), <http://www.afj.org/blog/why-the-wells-fargo-scandal-shows-the-need-to-end-forced-arbitration>; see also *Wells Fargo Asks Court to Force Customers to Arbitration in Fake Accounts Cases*, *supra* note 223.

245 Arbitration Fairness Act of 2015, S. 1133, 114th Cong. § 402; see also Arbitration Fairness Act of 2013, H.R. 1844, 113th Cong. § 402.

246 See *supra* Part IV.

actions—in pursuit of their workplace interests.<sup>247</sup> Even if the NLRA does not trump the FAA, it is not clear that the two statutes are in conflict when the FAA's savings clause is taken into account. Moreover, sound policy suggests that the benefits of enforcing these waivers are outweighed by the risks of doing so.<sup>248</sup> Thus, the unbridled enlargement of the FAA should stop at employment contracts, and mandatory class action waivers in these contracts should be found unenforceable. The eyes of countless companies and their employees now turn to the Court.

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247 See, e.g., *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), *enforced in part, rev'd in part sub nom. D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013); see also *supra* subsection I.A.2.

248 See *supra* Section IV.B.