## Chapter Four

# Knocking the Federal Arbitration Act Off Its Pedestal: How the NLRA Can Re-Establish Balance

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## I. Introduction

In 1985, the Supreme Court's decision in *Mitsubishi Motors* solidified a principle that has come to define the modern era of arbitration: requiring parties to engage in arbitration is simply a change of forum and does not change or weaken substantive rights.[1] The Court extended that holding to employment discrimination cases and built upon those principles with its "effective vindication" doctrine, such that mandatory arbitration is permitted as long as parties can effectively vindicate substantive legal rights.[2]

Class and collective action waivers combined with mandatory arbitration can be, and increasingly are, written to prohibit employees or consumers from bringing complaints in court and from pursuing them as class, collective, or representative actions. These waivers appear in a wide range of arbitration contracts, from credit card and cellular phone contracts to employment handbooks. In recent years, a series of Supreme Court decisions interpreting the Federal Arbitration Act ("FAA") have strengthened mandatory arbitration and narrowed dramatically the availability of collective or representative procedures. By limiting the situations where mandatory arbitration agreements can be found unenforceable and then interpreting such agree-

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1. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625–26 (1985) (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985), and *Moses H. Cone Mem. Hosp. v Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)).

2. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (quoting *Mitsubishi Motors*, 473 U.S. at 637) ("[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."); *see Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001) (expanding *Gilmer* to apply the FAA to most arbitration agreements in the employment context).

ments to eliminate the availability of class and collective procedures, the Supreme Court's recent jurisprudence has undermined access to the courts and severely constrained the options of employees, consumers, and even small businesses seeking to equalize their bargaining power with major companies.[3] These decisions have left commentators, scholars and advocates wondering what remains of the effective vindication doctrine and what remaining avenues exist to pursue class or collective actions in employment and consumer settings. As the options have dwindled, the bedrock principle that arbitration, even if mandatory, is simply a different forum and does not impact substantive rights has also been eroded.

The enforceability of class and collective action waivers in mandatory arbitration agreements in the employment setting is before the Supreme Court once again, but this time the Court must address the relationship between the FAA and National Labor Relations Act ("NLRA"). The Court will decide whether the right to class or collective legal action is a substantive right protected by Sections 7 and 8(a)(1) of the NLRA and, if so, whether interference with this right makes such waivers unenforceable.

This issue previously arose in the National Labor Relations Board's ("NLRB" or "The Board") *D.R. Horton* decision.[4] In that case and in many cases since, the NLRB interpreted the NLRA to require that employers not eliminate all avenues to class or collective legal action even when arbitration of employment disputes is required. In reaching its holding, the Board interpreted the NLRA and FAA to be harmonious with one another and accounted for the Supreme Court's recent jurisprudence on mandatory arbitration and class waivers.

The Fifth Circuit reversed the Board's decision in *D.R. Horton*, and a few years later a circuit split developed, with the Seventh and Ninth Circuits on one side of the issue and Second, Fifth and Eighth Circuits on the other.[5]

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3. *See, e.g., American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (upholding the enforceability of a class waiver in an antitrust case, finding that, although it would be prohibitively expensive to bring the case on an individual basis, mandating the waiver of class actions did not undermine the effective vindication of substantive rights under the antitrust laws); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012) (relating to the choice of judicial or arbitral forum and addressing the waiver of procedural rights); *AT&T Mobility LLC, Inc. v. Concepcion*, 563 U.S. 333 (2011) (finding that the FAA pre-empted state law making waivers of collective and class actions in arbitration agreements unenforceable); *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) (interpreting arbitration agreement to find that class or collective actions were not contemplated by the parties).

4. *In re D.R. Horton*, 357 NLRB 184 (2012), rev'd by, *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).

5. *See Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016) (largely adopting the reasoning of the Board in *D.R. Horton* to find a class waiver in an mandatory arbitration agreement violates the NLRA and is therefore unenforceable and that the saving clause of the FAA permits that finding); *Lewis v. Epic Syst. Corp.*, 823 F.3d 1147 (7th Cir. 2016) (same as *Morris*); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015) (following the Fifth Circuit's earlier ruling in *D.R. Horton* reversing the Board's holding); *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290 (2013) (following *D.R. Horton*); *Owen v Bristol Care, Inc.*, 702 F.3d 1050 (2013) (same); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) (reversing the Board's ruling that the class waiver and arbitration agreement violates the NLRA and cannot be enforced).

On January 13, 2017, acknowledging the circuit split and the Board's petition seeking clarification, the Supreme Court granted writs of certiorari in three cases.[6] The question presented in those three cases is whether "an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act."[7]

These cases raise issues of statutory interpretation: (1) does the NLRA protect the availability of class, collective or representative actions, whether in a judicial or arbitral forum, as a substantive right; (2) does the saving clause contained in Section 2 of the FAA apply to make unenforceable a class waiver in an arbitration agreement where that waiver violated a federal statute? Ultimately, answers to these questions will resolve whether the NLRA and FAA can be read to be harmonious with one another and with recent Supreme Court precedent regarding the enforceability of class and collective action waivers in arbitration agreements, as the NLRB, Seventh and Ninth Circuits contend.

After a series of decisions that strengthened the hand of employers by making it easier to mandate arbitration and limiting the availability of aggregation in arbitration, the Board's interpretation of the NLRA in *D.R. Horton* offers a reality check about bargaining power and the meaning of "consent" to a contract when one's job is conditioned on that consent. The Board's candor and the traction it gained in the Seventh and Ninth Circuits are refreshing. These cases offer a chance to restore balance to the role of the FAA, to remove it from the pedestal it has come to occupy and place it back on even footing with other federal statutes and the rights they protect, consistent with Congress' original intent.

## II. The Federal Arbitration Act and the National Labor Relations Act

The National Labor Relations Act was passed in 1935 to address inequality in bargaining power between employers and employees, facilitate collective bargaining and by extension clarify and protect the rights of both employers and employees.[8] The Federal Arbitration Act was enacted in 1925, to address historic animosity to arbitration.[9]

Section 7 of the NLRA provides that, "Employees shall have the right … to engage in other concerted activities for the purpose of collective bargaining or other mutual

6. Question Presented, *Epic Syst. Corp. v. Lewis*, No. 16-285 (S. Ct. 2016); *Ernst & Young, LLP v. Morris*, No 16-300 (S. Ct. 2016); *National Labor Relations Board v. Murphy Oil USA, Inc.*, No. 16-307 (S. Ct. 2016).

7. Id.

8. 29 U.S.C. § 151.

9. 9 U.S.C. §§ 1–16.

aid or protection."[10] Section 8(a)(1) enforces Section 7, making it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."[11]

Section 2 of the FAA states that: "A written provision in any maritime transaction or contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[12] The final clause thereof—"save upon such grounds as exist at law or in equity for the revocation of any contract"—is the saving clause that the subject of interpretation in these cases.

# III. *In re D.R. Horton*: Framing the Interaction between the NLRA and FAA

## A. NLRB Ruling: Mandatory Arbitration Clause Containing Class Waiver Is An Unfair Labor Practice Violating NLRA

At issue in the *D.R. Horton* case was an arbitration clause in an employment contract that required all employment-related disputes to be resolved through arbitration, and prohibited collective or class actions, whether in court or in arbitration. The Board found that the class and collective action waiver unlawfully restricted the workers' exercise of their substantive right to concerted activity "for their own mutual aid or protection."[13]

Section 7's provision that, "[e]mployees shall have the right … to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" includes "collective enforcement of legal rights in court or arbitration."[14] Section 7 "protects employees from retaliation by their employer when they seek to improve their working conditions through resort to administrative and judicial forums."[15] The same is true of workers' efforts to utilize arbitration.[16] Section 7 can be invoked even when a single employee "seek[s] to initiate or to induce or to prepare for group action" and includes procedures where individuals are required to opt-in or have the right to opt-out.[17] These rights, said the NLRA, "are at the core of what Congress intended to protect by adopting the broad language of Section 7."[18]

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10. 29 U.S.C. §157.
11. 29 U.S.C. §158(a)(1).
12. 9 U.S.C. §2.
13. *In re D.R. Horton.*, 357 NLRB at 2291–92.
14. *In re D.R. Horton*, 357 NLRB at 2279; 29 U.S.C. §157.
15. *In re D.R. Horton* at 2278 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–66 (1978)).
16. *Id.*
17. *In re Id.* at 2279 (quoting *Myers Industries,* 281 NLRB 882, 887 (1976), aff'd sub nom., *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987)).
18. *Id.*

Section 8(a)(1) of the NLRA provides an enforcement mechanism for any interference with the rights provided for in Section 7.[19] The Board found that: "Just as the substantive right to engage in concerted activity aimed at improving wages, hours or working conditions through litigation or arbitration lies at the core of the rights protected by Section 7, the prohibition of individual agreements imposed on employees as a means of requiring that they waive their right to engage in protected, concerted activity lies at the core of the prohibitions contained in Section 8."[20] Considering the language of the arbitration clause at issue, which provided that employees must waive their right to any collective action in any forum, the Board found that the waiver constituted an unfair labor practice and could not be enforced.[21]

Having found that the class waiver in the mandatory arbitration clause was at odds with the NLRA, the Board also considered whether the arbitration agreement was enforceable under the FAA. In considering the relationship between two federal statutes, the Board applied the principle of statutory construction that both statutes should be given full effect absent a clear conflict.[22] The Board looked to Section 2 of the FAA which provides, in part, that "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."[23]

Noting the effective vindication doctrine which provides that "arbitration may substitute for a judicial forum only so long as the litigant can effectively vindicate his or her statutory rights through arbitration," the Board made three determinations which supported its holding that the circumstances of this case fell within the meaning of Section 2's saving clause.

First, the purpose of the FAA is to place arbitration agreements on an even footing with other private contracts. Finding that an arbitration agreement containing a class waiver violates the NLRA does not treat it any differently than any other contract found to violate the NLRA.[24] The offending aspect of the agreement in this case is not the mandatory arbitration provision, but rather that it prohibits collective or class action in both arbitral and judicial forums. The conflict between this arbitration agreement and the NLRA does not turn on "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[25]

Second, the rights violated by the class waiver in this case are substantive rights to engage in concerted activity provided for by Section 7 of the NLRA. Distinguishing

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19. *See supra* at 5–6 (quoting Section 8(a)(1).
20. *Id.* at 2281.
21. *Id.* at 2288.
22. *Id.* at 2284 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)) ("when two federal statutes 'are capable of co-existence,' both should be given effect 'absent a clearly expressed congressional intention to the contrary.'").
23. 9 U.S.C. § 2.
24. *In re D.R. Horton*, 357 NLRB at 2285.
25. *Id.* (quoting *Concepcion*, 563 U.S. at 339).

the Supreme Court's decision in *Gilmer*, the Board found that the issue is not whether the employees may vindicate their rights under the FLSA despite the class waiver, but rather whether the class waiver itself abrogates substantive rights provided for by the NLRA.[26]

Finally, the Board turned to the saving clause of the FAA, which is "fully consistent" with the FAA's intent to place arbitration on an equal plane with other contracts. Because it is a generally applicable defense to enforcement of a contract that it violates public policy, a finding that the arbitration agreement and class waiver at issue violates the NLRA does not single out arbitration in a manner prohibited by the FAA.[27] This interpretation of the NLRA and the FAA does not disfavor arbitration. It treats arbitration agreements the same as any other contract that conflicts with federal law. Finding the arbitration agreement unlawful is "consistent with the well-established interpretation of the NLRA and with core principles of Federal labor policy, does not conflict with the letter or interfere with the policies underlying the FAA and, even if it did, that the finding represents an appropriate accommodation of the policies underlying the two statutes."[28]

Because the FAA's saving clause applied — the NLRA provided "grounds at law or in equity" for the contract's revocation — invalidating the class action waiver did not conflict with the FAA's "liberal federal policy favoring arbitration agreements."[29]

The Board delineated the limits of its holding, consistent with the Supreme Court's decisions regarding when the intent to permit class arbitration can be ascertained from an arbitration agreement.[30] The Board's finding is limited to employment cases and does not extend to consumer cases or other contracts of adhesion. Nor does it compel employers into class arbitration without evidence of their intent to do so; "[s]o long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration."[31] The Board reiterated that there is no hostility to arbitration in its holding, and in fact that arbitration is a "central pillar" of Federal labor law such that the Board often defers to arbitral determinations.[32]

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26. *Id.* at 2285–86 (distinguishing *Gilmer* which addressed neither the rights provided for by Section 7 of the NLRA nor a class waiver).

27. *In re D.R. Horton*, 357 NLRB at 2287.

28. *Id.* at 2284.

29. *Id.* at 2285 (quoting *Gilmer*, 500 U.S. at 28); *see Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

30. *See Stolt-Nielsen*, 59 U.S. 662; *Conception*, 563 U.S. 333. This line of Supreme Court authority contains broad language, often in dicta, distinguishing individual arbitration from class arbitration — they are so different, opined the Court. Because of these differences, the intent to permit class arbitration cannot be read solely from the intent to engage in arbitration. *See, e.g.*, *Stolt-Nielsen*, 559 U.S. at 684–85. There must be "a contractual basis for concluding that the party agreed" to permit class arbitration. *Id.* at 684.

31. *In re D.R. Horton*, 357 NLRB at 2288.

32. *Id.* at 2289.

In summary, the key elements of the Board's ruling in *D.R. Horton* are: (1) the right to engage in "concerted activity" under Section 7 of the NLRA is a substantive right; (2) a contract that interferes with that right cannot be enforced; (3) such a holding under the NLRA can be reconciled with the FAA through the saving clause of the latter statute; and (4) because illegality is a general defense to enforcement of a contract and does not single out arbitration, the FAA and NLRA do not conflict.

## B. The Fifth Circuit Reversed the Board's Holding

Reviewing the Board's decision after an appeal by the employer, the Fifth Circuit conceded that the Board's finding was anchored in precedent.[33] However, the court found that Board placed too much emphasis on the NLRA, not giving "proper weight" to the FAA:[34] "[c]aselaw under the FAA points us in a different direction than the course taken by the Board."[35]

Beginning its analysis with *Mitsubishi's* well-known holding that arbitration is simply a forum change and "has been deemed not to deny a party any statutory right" and that courts have repeatedly "rejected litigants' attempts to assert a statutory right that cannot be effectively vindicated through arbitration," the Fifth Circuit held that the availability of class or collective action procedures is not a substantive right.[36]

The court rejected the Board's finding that the substantive right being violated by the class waiver in this case did not flow from Federal Rule of Civil Procedure 23, but rather from the NLRA itself.[37] Because several cases find that "there is no right to use class procedures" under employment-related statutes, the court rejected the Board's effort to separate Rule 23 from the NLRA.[38] The Fifth Circuit also found that the Board's approach conflicted with the FAA: underpinning the Board's analysis was a determination that the policy purpose of the NLRA "trumped the different policy considerations in the FAA that supported enforcement of arbitration agreements."[39]

Relying on the Supreme Court's decision in *CompuCredit*, the Fifth Circuit found the FAA requires that arbitration agreements be "enforced according to their terms" with only two exceptions: (1) application of the FAA's saving clause or (2) a congressional command to the contrary, neither of which applied to the NLRA and D.R. Horton's class waiver.[40]

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33. *See D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 356–7 (5th Cir. 2013) (citing *Brady v. Nat'l Football League*, 644 F.3d 661 (8th Cir. 2011)).

34. *Id.* at 348.

35. *Id.* at 357.

36. *Id.* at 357.

37. *Id.*

38. *Id.* (citing *Gilmer*, 500 U.S. at 32 (an ADEA case), and *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (an FLSA case)).

39. *Id.* at 358.

40. *Id.* at 358 (citing *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012)).

The court found that the saving clause of the FAA did not apply because, although the Board's interpretation of the FAA and NLRA did not disadvantage arbitration on its face, it had the effect of disfavoring arbitration.[41] "Regardless of whether employees resorted to class procedures in an arbitral or a judicial forum, employers would be discouraged from using individual arbitration."[42] The Fifth Circuit quotes heavily from the Supreme Court's discussion of the differences between class and individual arbitration.[43] And from this, the Fifth Circuit makes a leap — because class-wide arbitration and individual arbitration are different from one another, any class waiver must be permissible under the FAA, whether that waiver is limited to arbitration or applies to both arbitration and the judicial forum, as was the case with the agreement at issue here. "Taken together, the effect of requiring the availability of class procedures was to give companies less incentive to resolve claims on an individual basis."[44] The Fifth Circuit neglects to mention that these reasons "taken together" were all about the differences between class and individual *arbitration* only. The Fifth's Circuit's holding means that the availability of *any* forum for collective or class claims by its very existence disadvantages arbitration and therefore may be banned. Because "[r]equiring a class mechanism is an actual impediment to arbitration and violates the FAA," the saving clause is inapplicable.[45]

Having first read the purpose of the FAA so expansively, perhaps it is not surprising that the Fifth Circuit was unable to locate an explicit congressional command in the NLRA that its purpose should trump the purpose or policy of the FAA.[46] Because the text of the NLRA does not mention arbitration explicitly and there is nothing in the legislative history of the NLRA disavowing arbitration, there is no such congressional command permitting enforcement of the NLRA despite the FAA.[47] Nor can a contrary congressional command be "inferred from an inherent conflict between the FAA and the NLRA's purpose."[48] It is not surprising that the Fifth Circuit was unable to find language in the NLRA hostile to arbitration, since the NLRA permits and sometimes requires arbitration, as the NLRA itself acknowledged.[49]

Note, once again, that the problem with the arbitration agreement here was not mandatory arbitration, but rather the class waiver in any and all forums. The Fifth Circuit's search for a conflict between the FAA and the NLRA and its reliance on

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41. *Id.* at 359.
42. *Id.* (citing *Concepcion*, 563 U.S. at 339–40, describing the FAA's saving clause).
43. *Id.*
44. *Id.*
45. *Id.* at 360.
46. *D.R. Horton*, 737 F.3d at 360.
47. *D.R. Horton*, 737 F.3d at 360–61.
48. *Id.* at 361.
49. *See In re D.R. Horton*, 357 NLRB at 2289 ("our holding rests not on any conflict between an agreement to arbitrate and the NLRA, but rather solely on the conflict between the compelled waiver of the right to act collectively in any forum, judicial or arbitral, in an effort to vindicate workplace rights and the NLRA.").

caselaw holding that substantive employment rights may be vindicated without the right to class or collective action[50] are addressed below.[51]

In *Murphy Oil v. NLRB*,[52] the Fifth Circuit followed its holding in *D.R. Horton*. *Murphy Oil* is one of the three cases before the Supreme Court.

## IV. The Circuit Split: *Lewis v. Epic Systems, Inc.* and *Morris v. Ernst & Young, LLP*

In 2016, the Seventh and Ninth Circuits created the circuit split that ripened the question of the relationship between the right to concerted activity provided for by Sections 7 and 8(a)(1) of the NLRA and the FAA's policy favoring the enforcement of arbitration agreements.

Distinguishing the issue from those addressed in Concepcion and Italian Colors and addressing the Fifth Circuit's reasoning head-on, the Seventh Circuit upheld a district court decision denying Epic Systems' motion to compel arbitration of misclassification claims under the FLSA on the grounds that the arbitration agreement violated Sections 7 and 8(a)(1) of the NLRA.[53] First, the Seventh Circuit found that the NLRB's interpretation of "concerted activities" in Section 7 to include engaging in class or collective actions was reasonable and entitled to deference under Chevron.[54] The expansive language of the arbitration agreement is not limited to prohibiting class actions under Rule 23 but instead prohibits "all collective or representative procedures and remedies, not just class actions."[55] The breadth of its own contractual language makes Epic's argument — that the NLRA was passed before Rule 23's class certification procedures existed and therefore "concerted action" must not include class actions — irrelevant. There were a variety of representative and collective action procedures when the NLRA was enacted, and the NLRA itself contains expansive language about what constitutes protected concerted activities.[56] Because the arbitration

50. *Id.* at 361.

51. *See infra* at 13.

52. 808 F.3d 1013 (5th Cir. 2015)

53. *See Lewis*, 823 F.3d 1147.

54. *Lewis*, 823 F.3d at 1151–1154 (relying upon *Eastex, Inc. v. Nat'l Labor Relations Bd.*, 437 U.S. 556, 566 (1978) and *Brady*, 644 F.3d at 673 and the statutory language and legislative history of the NLRA). Given the overlapping analyses of the Seventh and Ninth Circuits' decisions in *Lewis* and *Morris*, this article focuses on the Seventh Circuit's reasoning, but endeavors to provide cross-citations to *Morris*. The primary difference between the Seventh Circuit's reasoning in *Lewis* and the Ninth Circuit's reasoning in *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), is that the court in *Morris* did not see any reason to move past step one of the *Chevron* analysis. *See Morris*, 834 F.3d at 981, 983 (finding that "the intent of Congress is clear from the statute and is consistent with the Board's interpretation" of Sections 7 and 8 of the NLRA and for that reason there is no need "to proceed to the second step of *Chevron*").

55. *Id.* at 1154.

56. *Id.*

agreement at issue "combines two distinct rules: first, any wage-and-hour dispute must be submitted to arbitration rather than pursued in court; and second, no matter where the claim is brought, the plaintiff may not take advantage of any collective procedures available in the tribunal."[57] The second part of this provision "runs straight into the teeth of Section 7."[58] Contracts that give away rights protected under Section 7 of the NLRA are unenforceable under Section 8(a)(1) of that statute.[59] Such "rights would amount to very little if employers could simply require their waiver."[60]

Adopting the reasoning of the court in D.R. Horton,[61] Epic contends that the FAA "trumps the NLRA" because the NLRA does not contain a congressional command against arbitration.[62] There is no need, however, to proceed to this stage of analysis unless there is a conflict between the NLRA and FAA. Courts should strive to avoid reading two statutes, especially two federal statutes, in a manner that leads to conflict. Rules of statutory construction provide that, "when two statutes are capable of co-existence," "it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[63]

Interpreting the NLRA and the FAA alongside one another raises the question what it means to "to make arbitration agreements as enforceable as other contracts, but not more so," for this is the purpose of the FAA.[64] Placing arbitration "on equal footing with all other contracts," does not mean that all contracts must be enforced under the FAA.[65] The dissent in Morris and the majority in D.R. Horton adopt an expanded view of the FAA that has the effect, not of placing it on equal footing with

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57. *Id.* at 1155.

58. *Id.*

59. *Id.* (citing *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 361 (1940)).

60. *Morris*, 834 F.3d at 983.

61. 737 F.3d at 360.

62. *Lewis*, 823 F.3d at 1156. Note that the language of Epic's arbitration agreement provided that, if the collective action waiver was found unenforceable, any collective claim must proceed in court, not arbitration. *Lewis*, 823 F.3d at 1156. For this reason, a finding that the collective action waiver violates the NLRA should be enough to render that clause unenforceable and to trigger the provision of the agreement that pushes collective claims into court. *Id.* However, the Seventh Circuit had to address Epic's arguments that the FAA's saving clause does not apply, and that, "even if the NLRA killed off the collective-action waiver, the FAA resuscitates it, and along with it, the rest of the arbitration apparatus." *Id.* The Seventh Circuit rejects this reading of the FAA. *See infra* at 17.

63. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974), interpreting the FAA and the Carriage of Goods by Sea Act); *see Morris*, 834 F.3d at 987 (articulating the same reasoning and relying upon the same authority).

64. *Lewis*, 823 F.3d at 1156 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, n.12 (1967)). The idea of the FAA is that federal statutory claims "are just as arbitrable as anything else, 'unless the FAA's mandate has been overridden by a contrary congressional command.'" *Lewis*, 823 F.3d at 1156 (quoting *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012)) (internal quotations omitted).

65. *Morris*, 834 F.3d at 984 (quoting *Buckeye Check Cashing, Inc v. Cardegna*, 546 U.S. 440, 443 (2006)).

other federal statutes, but rather placing it on a pedestal. As the Morris court observed, it cannot be the law that "a party may simply incant the acronym 'FAA' and receive protection for illegal contract terms anytime the party suggests it will enjoy arbitration less without those illegal terms."[66]

When a term of an arbitration agreement or an arbitration agreement in full contravenes other federal authority, it may be unenforceable under the FAA's saving clause, which permits arbitration agreements "to be invalidated by generally applicable contract defenses, … but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[67] Illegality is one such ground.[68] The arbitration agreement with its broad class and collective action waiver is illegal—it violates Sections 7 and 8 of the NLRA—and is therefore unenforceable under the saving clause of Section 2 of the FAA. There is no conflict between the two statutes.[69]

It was not the arbitration provisions that made the agreements in *Epic Systems*, *Ernst & Young*, and *D.R. Horton* before those problematic. It was that they forbid the use of any class or collective action mechanism, no matter the forum. As Ninth Circuit explained in *Morris*, "[t]he illegality of the 'separate proceedings' term here has nothing to do with arbitration as a forum. It would equally violate the NLRA for Ernst & Young to require its employees to sign a contract requiring the resolution of all work-related disputes *in court* and in 'separate proceedings.'"[70] And, "[w]hen

66. *Morris*, 834 F.3d at 989 (citing *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 927 (9th Cir. 2013), in its understanding of *Concepcion*).

67. *Lewis*, 823 F.3d at 1156 (quoting *Concepcion*, 563 U.S. at 339).

68. *Id.* at 1157 (citing *Buckeye Check Cashing, Inc.*, 546 U.S. at 444).

69. *Id.*

70. *Morris*, 834 F.3d at 985. Ernst & Young, as a condition of employment, required the plaintiffs in this case to sign "concerted action waivers," agreements "not to join with other employees in bringing legal claims against the company." *Morris*, 834 F.3d at 979. This waiver "required employees to (1) pursue legal claims against Ernst & Young exclusively through arbitration and (2) arbitrate only as individuals and in 'separate proceedings.'" *Id.* The effect: "employees could not initiate concerted legal claims against the company in any forum[.]" *Id.*

It is worth noting that at least one district court has pushed past the interpretation of the NLRA that is at the core of the holdings of the Board and the Seventh and Ninth Circuits to apply the same reasoning to the FLSA, contending that it protects, as a substantive right, the ability to collectively assert wage and hour claims. *See Gaffers v. Kelly Servs., Inc.*, No. 16-10128, 2016 WL 4445428 (E.D. Mich. Aug. 24, 2016). The district court distinguished the FLSA from other employments statutes by noting that "one of the principal rationales for precluding employers from contracting around an employee's FLSA rights is that, by doing so, the employer would also gain an competitive advantage over its competitors." *Id.* at *8; *but see Lewis*, 823 F.3d at 1161 ("while the FLSA and ADEA allow class or collective actions, they do not guarantee collective process."). Should the Supreme Court ultimately uphold the Seventh and Ninth Circuit rulings relating to the NLRA, the appellate courts may need to contend with this open question. Another circuit split looming is whether including an opt-out provision in a mandatory arbitration agreement with a class waiver is enough to resolve its conflict with the NLRA. *Compare Lewis*, 823 F.3d at 1155, and *Tigges v. AM Pizza, Inc.*, No. 16-10474, 2016 WL 4076829 (D. Mass. Jul. 29, 2016) (following the Seventh Circuit in holding that including an

an illegal provision not targeting arbitration is found in an arbitration agreement the FAA treats the contract like any other; the FAA recognizes a general contract defense of illegality."[71]

Chief Judge Wood directly addressed the Fifth Circuit's conflicting holding in *D.R. Horton*, in particular, its reliance on dicta in *Concepcion* and *Italian Colors* that class arbitration is significantly different than individual arbitration because "class arbitration sacrifices arbitration's 'principal advantage' of informality, 'mak[ing] the process slower, more costly and more likely to generate procedural morass than final judgment' " and therefore increases risks to defendants.[72] First, the court in *D.R. Horton* did not seek an interpretation of the NLRA and FAA that reconciles or harmonizes them, breaking important rules of statutory construction. Because of the saving clause of the FAA, there is no need for the court to "go out *looking* for trouble."[73]

The NLRB's ruling in *D.R. Horton* and the Seventh and Ninth Circuit's decisions in *Lewis* and *Morris* need not conflict with the Supreme Court's recent jurisprudence regarding arbitration, including *Concepcion* and *Italian Colors*, which deal with a state law and issues of the Supremacy Clause and with the question of whether the economics of proving an antitrust claim require that class certification must be made available, respectively. Neither decision "goes so far as to say that *anything* that conceivably makes arbitration less attractive automatically conflicts with the FAA, nor does either case hold that an arbitration clause automatically precludes collective action even if it is silent on that point."[74] The Seventh Circuit nicely explains how the FAA's saving clause "provides for the very situation at hand."[75]

Finally, the Seventh Circuit's decision in *Lewis* and the Ninth Circuit in *Morris* tackle the question of whether the rights provided for by Sections 7 and 8 of the NLRA are procedural or substantive. This determination may be dispositive of the outcome of these cases, "as substantive rights cannot be waived in arbitration agreements."[76] Considering decades of caselaw interpreting the NLRA, the Seventh Circuit found that the right to engage in concerted action delineated in Section 7 and enforced in Section 8(a)(1) is a substantive right that "lies at the heart of the restructuring of

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opt-out clause does not resolve the conflict with the NLRA) *with Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1077 (9th Cir. 2014 (holding that an arbitration agreement requiring individual arbitration may be enforceable where the employee had the right to opt out without penalty).

71. *Morris*, 834 F.3d at 985 (citing 9 U.S.C. § 2 and *Concepcion*, 563 U.S. at 339).

72. *Id.* (quoting *D.R. Horton*, 737 F.3d at 359) (internal quotations omitted).

73. *Id.* at 1158. As the NLRB also notes, *In re D.R. Horton*, 357 NLRB at 2289, it is "ironic" to find that the NLRA is in conflict with the FAA given that the NLRA explicitly permits labor unions and employers to use arbitration to resolve disputes and to negotiate collective bargaining agreements. *Lewis*, 823 F.3d at 1158. The Seventh Circuit also notes that the Fifth's Circuit's interpretation of the NLRA and FAA would effectively make the saving clause of the FAA meaningless, "a nullity." *Id.* at 1159.

74. *Lewis*, 823 F.3d at 1158; *see Jock v. Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. 2011), *cert. denied* 565 U.S. 1259 (2012) (interpreting state contract law to find that an arbitration agreement permitted the parties to seek collective treatment of their claims, distinguishing *Stolt-Nielsen*).

75. *Id.* at 1159.

76. *Morris*, 834 F.3d at 985.

employer/employee relationships that Congress meant to achieve in the [NLRA]."[77] Section 7 is, in fact, the only substantive provision of the NLRA—every other provision "serves to enforce the rights Section 7 protects."[78] It is important to note that "Rule 23 is not the source of the collective right here; Section 7 of the NLRA is."[79] The same can be said for the FLSA and ADEA; because this ruling is about the rights protected by the NLRA, cases finding that there is no substantive right to a class action in the ADEA or FLSA context are not to the contrary.[80] For this reason, the reliance placed by the court in *D.R. Horton* and the dissent in *Morris* on *CompuCredit*, *Gilmer*, and *Italian Colors* is misplaced.[81] Substantive rights "survive contract terms that purport their waiver."[82]

The dissent in *Morris*, like the court in *D.R. Horton*, misread these cases in a way that gives rise to a conflict between the FAA and other substantive federal statutes. But, this reading ignores the FAA's saving clause.[83] That clause "prevents a conflict" between the FAA and the NLRA by "causing the FAA's enforcement mandate to yield" where an arbitration agreement results in the waiver of substantive rights, as is the case here.[84]

## Conclusion

Although the Fifth Circuit's decisions in *D.R. Horton* and *Murphy Oil* and Judge Ikuta's dissent in *Morris* contend that the *Lewis* and *Morris* courts have incorrectly interpreted the NLRA, FAA, and relevant Supreme Court jurisprudence, I contend that, in fact, *D.R. Horton* and *Murphy Oil*'s reading of the relevant authority is strained. Perhaps this strain was not so clear in earlier cases, although the Supreme Court's recent jurisprudence regarding mandatory arbitration and class waivers has earned its share of critiques. But, in the trio of cases currently before this Court, the conflict between substantive federal law and the arbitration agreement at issue is more direct than in previous cases.[85] As a result, the reality—that the FAA and Supreme Court have bred a class of "super contracts," the enforcement of which has swallowed critical state law and now threatens to swallow vital substantive federal rights—has become evident.[86]

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77. *Lewis*, 823 F.3d 1160; *Morris*, 834 F.3d at 985–87.

78. *Id.*

79. *Id.* at 1161.

80. *Id.*

81. *See Morris*, 834 F.3d at 987 ("In today's case, the issue is not whether any particular forum, including arbitration, is available but rather which substantive rights must be available within the chosen forum."). *CompuCredit*, *Gilmer*, and *Italian Colors* are all judicial forum cases. *See Morris*, 834 F.3d at 987–88; *but see D.R Horton*, 737 F.3d. at 360; *Morris*, 834 F.3d at 992 (Ikuta, J., dissenting).

82. *Morris*, 834 F.3d at 987 (citing *CompuCredit*, 132 S. Ct. at 671).

83. *Morris*, 834 F.3d at 988.

84. *Morris*, 834 F.3d at 986; *Lewis*, 823 F.3d at 1159.

85. *Morris*, 834 F.3d at 988.

86. These concepts are developed in the context of the relationship between federal common law relating to arbitration and state contract law in Professor Richard Frankel's article. Richard Frankel, *The Arbitration Clause As Super Contract*, 91 Wash. U. L. Rev. 531 (2014).