NOTE

LEWIS V. EPIC: AN EMPLOYEE ARBITRATION ODYSSEY

ANDREW J. FABIANCZYK*

Mandatory arbitration agreements cover a substantial portion of the nonunion workforce. Increasingly, employers force employees into bilateral arbitration by inserting a collective action waiver into arbitration agreements. Lower courts have extended the Supreme Court's recent interpretations of the Federal Arbitration Act (FAA) to enforce such waivers, notwithstanding the fact that enforcement deprives employees of their substantive rights under the National Labor Relations Act (NLRA).

---

* J.D. Candidate, May 2018, University of Wisconsin Law School. The author wishes to make the following disclosure: From July 2012 to July 2015, I worked as a technical communicator at Epic, the employer-defendant in the case this Note discusses. Although likely eligible to join the class in the underlying dispute, I have not done so. I want to thank Clinical Associate Professor Sarah Orr at the University of Wisconsin Law School for sparking my interest in arbitration issues. I also want to thank the senior editorial staff of the *Wisconsin Law Review* for the opportunity to publish this piece.

In *Lewis v. Epic*, the Seventh Circuit bucked the trend among the lower courts and found a collective action waiver illegal under the NLRA and thus unenforceable under the FAA. The decision adopts the National Labor Relations Board's position that the Supreme Court's FAA decisions do not compel enforcement of arbitration clauses that are otherwise illegal. Whereas other circuit courts to consider the issue quickly found a conflict between the NLRA and FAA—and determined that the FAA trumped the NRLA—the Seventh Circuit harmonized the statutes.

Nevertheless, the Seventh Circuit could have theorized its position more fully and put pro-arbitration arguments to rest. This Note seeks to fill in the gaps left by the Seventh Circuit's decision and expose the flaws in the competing view. The Note also tests the validity of the Supreme Court's FAA precedents as applied to the labor and employment context. It explains that the Court's FAA precedents do not support the dismantling of federal labor law under the guise of arbitration enforcement. Finally, the Note argues that the *Lewis* case provides a perfect opportunity for the Supreme Court to sheathe the arbitral sword and restore the prospect and promise of collective action under the NLRA.

INTRODUCTION

You are in your office, at your computer workstation, when you receive an email from your employer's legal division. The email explains that your employer seeks to modify the employment contract you signed on your first day of work. It includes an arbitration agreement that says you may bring wage-and-hour claims only through bilateral arbitration, and that you waive "the right to participate in or receive money or any other relief from any class, collective, or representative proceeding." The email includes instructions on how to accept the new terms, and it also specifies that your continued work constitutes acceptance of the terms. There is no option for you to decline—if you want to keep your job—anyway. Like many employees, you do not have the resources to take time off, find new employment,[1] and support yourself or your family through the duration of the search. You review the agreement, acknowledge it, and accept it with a click of your mouse. With that one click, have you signed away your substantive rights under federal labor law?[2]

A clause like the one described above is known as a collective action waiver. These waivers, together with the arbitration agreement of which they form one small part, operate to take the employee litigant

1. And there is no reason to expect that your new place of employment will not require you to sign a similar agreement.

2. The hypothetical scenario here is derived from the facts of the underlying employment misclassification and wage-and-hour dispute in *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1151 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (U.S. Jan. 13, 2017) (No. 16-285).

out of the judicial system and place her into arbitration on an individual basis—a single employee bringing what may, in fact, be a widespread grievance against her employer. Because collective action waivers are not self-executing, it is unclear just how widespread they are, but there are signs that they have proliferated, and not merely in low-wage occupations.[3] Arbitrators continue to see an uptick in business, which suggests that these clauses cover a good number of employees.[4]

Whether a court will enforce a collective action waiver is a high-stakes issue, with compelling interests on both sides. Employees, whose individual claims may be of such low value as to sound the "death-knell" of the litigation, turn instead to collective means to level the playing field. Employers, on the other hand, have embraced these waivers to avoid the resource-intensive defense of collective claims. Both employees and employers, it turns out, can point to a federal statute in support of their position. But only one group's position can accommodate both statutes.

The National Labor Relations Act (NLRA) creates a framework that encourages employers and employees to work together to prevent and resolve labor disputes. At its core is the principle of collective action. The NLRA's key sections grant employees collective rights and require employers to honor those rights so as not to be guilty of unfair labor practices.[5] Section 7 sets out employees' rights as to organization and reads—in relevant part—as follows:

> Employees 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

3. 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?_r=0 [https://perma.cc/MH7M-PUL4]. The *Times* investigation found individual arbitration clauses—functional equivalents to collective action waivers—in the employment contracts of restaurant workers, retail workers, Silicon Valley and Wall Street workers, and even executives. *Id.*

4. The American Arbitration Association alone had 1,857 employment arbitration cases filed in 2012, a nearly 5 percent increase over 2011's filings. *See* AM. ARBITRATION ASS'N, 2012 ANNUAL REPORTS 5 (2013), https://www.adr.org/aaa/faces/s/about/annualreports [https://perma.cc/7UJF-B2EL]. There were also enormous percentage increases of case filings in 2014 (42 percent increase) and 2015 (26 percent increase). AM. ARBITRATION ASS'N, 2014 ANNUAL REPORTS & FINANCIAL STATEMENTS 10, 17 (2015).

5. *See* 29 U.S.C. §§ 157–58 (2012).

> bargaining *or other mutual aid or protection*, and shall also have the right to refrain from any or all of such activities.[6]

Section 8 makes employer interference with the rights granted in § 7 an unfair labor practice.[7] The National Labor Relations Board (NLRB), the agency tasked with interpreting the NLRA and adjudicating disputes arising from NLRA provisions, has repeatedly ruled that collective action waivers deprive employees of a collective substantive right and, therefore, violate the NLRA.[8] Thus, § 7 establishes a framework for employees to collectively assert their rights against employers.

In seeming opposition to the NLRA stands the Federal Arbitration Act (FAA), enacted in 1925 "in response to widespread judicial hostility to arbitration agreements."[9] The FAA's operative section provides that "an agreement in writing to submit to arbitration an existing controversy . . . shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law* or in equity for the revocation of any contract."[10] The Supreme Court's recent decisions interpreting this language have turned the FAA into a potent weapon for employers.[11] They have seized upon the broad language in the Supreme Court's recent arbitration jurisprudence and won considerable victories in collective action waiver enforcement cases before the Second, Fifth, and Eighth Circuits, which all rejected the NLRB's *D.R. Horton*[12] decision.[13]

Recent circuit court decisions, however, have recognized limitations on the FAA and resurrected the NLRB's theory. In *Lewis v. Epic Systems Corporation*,[14] the Seventh Circuit considered a collective action waiver and found it illegal under the NLRA and therefore unenforceable under the FAA. The decision created an important circuit

---

6. *Id.* § 157 (emphasis added).

7. *Id.* § 158(a)(1).

8. *See, e.g.*, *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2289 (2012); *Murphy Oil USA, Inc.*, 361 N.L.R.B. 1, 8 (2014). Because the NLRB is tasked with administering the NLRA, its interpretations are entitled to *Chevron* deference. This Note does not address that argument because the courts have already made it well. *See, e.g.*, *NLRB v. Alt. Entm't, Inc.*, 858 F.3d 393, 404 (6th Cir. 2017) (giving deference to NLRB's interpretation).

9. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

10. 9 U.S.C. § 2 (2012) (emphasis added).

11. *See, e.g.*, *Concepcion*, 563 U.S. at 347.

12. 357 N.L.R.B. 2277 (2012).

13. *See* Stephanie Greene & Christine Neylon O'Brien, *The NLRB v. the Courts: Showdown over the Right to Collective Action in Workplace Disputes*, 52 AM. BUS. L.J. 75, 99–100 (2015).

14. 823 F.3d 1147, 1158 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017) (No. 16-285).

split that has since grown.[15] The Supreme Court granted certiorari and consolidated the *Lewis* case with others from the Fifth and Ninth Circuits.[16] Oral arguments took place on October 2, 2017, as this Note went to the printer.[17] The Court will consider whether an agreement that requires an employer and an employee to resolve employment-related disputes exclusively through individual arbitration and that bars all varieties of collective proceedings, is enforceable pursuant to the FAA, notwithstanding the provisions of the NLRA.[18]

This Note argues that the Court should affirm the Seventh Circuit's decision to accept the NLRB's position and end what one commentator called "the [a]rbitral [t]hreat to the NLRA."[19] The Seventh Circuit properly determined that collective action waivers in employment contracts are unenforceable under the NLRA, notwithstanding the FAA, because such waivers illegally deprive employees of collective substantive rights.[20] Unlike the circuit courts that adopted the competing view, the Seventh Circuit viewed the application of the FAA more critically and sought to reconcile the NLRA and FAA. The Seventh Circuit critically engaged with FAA precedent and rightly determined that the FAA could not wholly displace significant portions of the NLRA. Although this Note largely agrees with the Seventh Circuit's analysis, it seeks to fill the gaps in the court's opinion and engage more fully with the arguments made by the circuit courts that came out the other way. Specifically, this Note tests the validity of the manner in which the lower courts have applied the Supreme Court's arbitration jurisprudence to the labor and employment context. It argues that the Court's FAA precedents do not support the dismantling of federal labor law under the guise of arbitration enforcement.

Part I addresses the NLRB's solution of accommodating both the NLRA and FAA, explains the distinction between substantive and procedural rights, and traces the ascendant power of the FAA's command in the Supreme Court's recent jurisprudence. Part II argues that employees' rights under § 7 of the NLRA are substantive, that

15. The circuit split pits the Sixth, Seventh, and Ninth Circuits, which sided with the NLRB's decision in *D.R. Horton*, against the Second, Fifth, and Eighth Circuits, which rejected the NLRB's arguments. 357 N.L.R.B 2277, 2278–79, 2281; Greene & O'Brien, *supra* note 13, at 79, 101, 102.

16. *Epic Sys. Corp. v. Lewis*, 137 S. Ct. 809 (2017).

17. *Epic Systems Corp. v. Lewis*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/epic-systems-corp-v-lewis/ [https://perma.cc/U3BL-VCBP].

18. *Id.*

19. *See* Nicole Wredberg, Note, *Subverting Workers' Rights: Class Action Waivers and the Arbitral Threat to the NLRA*, 67 HASTINGS L.J. 881, 881 (2015).

20. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1151–58 (7th Cir. 2016).

other circuit courts have interpreted the Supreme Court's recent arbitration jurisprudence overly broadly, and that the Seventh Circuit appropriately harmonized the NLRA and the FAA. Finally, the Conclusion suggests that the *Lewis* case provides the Supreme Court with an ideal vehicle to refine its arbitration jurisprudence and explain whether the lower courts have been correct in enforcing arbitration agreements in all manner of contexts.[21] It also provides an outlook for future practice depending on how the Court rules.

I. THE NATURE OF RIGHTS UNDER THE NLRA AND THE SCOPE OF THE FAA

The circuit courts have divided as to what kinds of rights the NLRA confers on workers and whether the FAA's mandate somehow trumps the NLRA. This Part establishes the tension between courts' decisions to either protect workers' § 7 rights or enforce class and collective action waivers pursuant to the FAA. First, this Part examines the NLRB's view of § 7 rights and explains the procedural/substantive rights distinction, which is critical to understanding how courts analyze the tension between the NLRA and FAA. It then describes how the Supreme Court has used the FAA in talismanic fashion to enforce arbitration agreements in various contexts. Finally, this Part briefly examines the FAA's "savings clause," which appears to provide a simple means to harmonize the NLRA and FAA.

A. NLRA §§ 7–8 and the Procedural/Substantive Rights Distinction

The NLRB's position on collective action waivers is informed by a broad view of § 7, which, according to the NLRB, grants substantive collective rights.[22] The Supreme Court has held that "contracts 'stipulat[ing] . . . the renunciation by the employees of rights guaranteed by the [NLRA]' are unlawful and may be declared to be unenforceable by the [NLRB]."[23] Of particular importance to the

21. Although this Note focuses extensively on the appellate courts, it is also worth noting that the Supreme Court's arbitration jurisprudence has failed to provide the lower courts with sufficient guidance. *See* David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1244 (2013) ("*Concepcion* has sown confusion about the degree to which judges remain free to find arbitration clauses unconscionable."). For a more thorough discussion of how the lower courts have treated the NLRB's decision in *D.R. Horton*, see Greene & O'Brien, *supra* note 13, at 104. According to Greene and O'Brien, the majority of district courts have rejected *D.R. Horton*. *Id.* at 98 & n.146.

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

23. *Lewis*, 823 F.3d at 1158, *cert. granted*, 137 S. Ct. 809 (U.S. Jan. 13, 2017) (No. 16-285) (quoting *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 361 (1940)).

enforceability of collective action waivers is the language in § 7 that specifies a "right . . . to engage in other concerted activities . . . for the purpose of collective bargaining or other mutual aid or protection."[24] The Supreme Court has interpreted the phrase "[to] engage in concerted activities" to encompass employees' use of "administrative and judicial forums" for the *broad* purpose of "mutual aid or protection."[25] Although the NLRA does not define "concerted activities," the NLRB's interpretation of the phrase as encompassing collective or class legal actions "fit[s] well within the ordinary understanding of 'concerted activities.'"[26] It follows from the NLRB's interpretation of § 7, then, that any arbitration agreement that includes a collective action waiver illegally waives a substantive § 7 right.[27] Section 8 of the NLRA restrains employers from interfering with § 7 rights, and therefore, these waivers constitute an unfair labor practice that violates NLRA § 8.[28]

The NLRB's position relies on a conception of § 7 rights as substantive—in particular, the right to seek relief in an administrative or judicial forum as a class or collective unit. However, three circuit courts have ruled against the NLRB. Under their analyses, the NLRB's conception of § 7 transforms a procedural right into a substantive one.[29] In particular, the circuit courts that have sided against the NLRB on this issue have uniformly rejected the idea of any substantive right to a class or collective legal proceeding because of Federal Rule of Civil Procedure 23 (Rule 23) as a procedural device.[30] This view suggests that the "use of class action procedures . . . is not a substantive right" under NLRA § 7, and an arbitration agreement including a collective action waiver does not constitute an unfair labor practice.[31]

24. Section 7 provides 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* . . . ." 29 U.S.C. § 157 (2012) (emphasis added).

25. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564–66 (1978); 29 U.S.C. § 157.

26. *Lewis*, 823 F.3d at 1153.

27. 29 U.S.C. §§ 157–58.

28. *Id.* at 158.

29. *See Morris v. Ernst & Young, LLP*, 834 F.3d 975, 992, 995 (9th Cir. 2016) (Ikuta, J., dissenting); *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 774–76 (8th Cir. 2016); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1019–21 (5th Cir. 2015); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 361 (5th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 295 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–54 (8th Cir. 2013).

30. *See, e.g.*, *D.R. Horton*, 737 F.3d at 357 ("The use of class action procedures, though, is not a substantive right.").

31. *Id.* at 357, 360–62.

Supreme Court precedent further clarifies that substantive rights are the essential, operative protections in a statute.[32] Procedural rights, on the other hand, are the ancillary remedial tools that litigants use to secure or vindicate their substantive rights.[33] While litigants can waive procedural rights, they generally cannot waive substantive ones.[34] The conclusion that any § 7 rights as to collective legal proceedings must be procedural leads these courts into an analysis of collective action waivers under the statutory framework of the FAA.

B. The Supreme Court's Pro-Arbitration Regime

If this Note—and the debate around the enforceability of collective action waivers—addressed only the NLRA and federal labor law, the discussion might end with the substantial/procedural distinction. The NLRB's position on § 7 and collective action waivers is clear, and because the agency is tasked with administering the NLRA, its view might command some degree of deference from Article III courts were it not for another statute: the FAA.[35] In fact, the NLRB's leading decision on this issue carefully minded the need to accommodate other federal statutory schemes.[36] However, the Supreme Court's recent FAA cases, and the lower courts' applications of the Supreme Court's doctrinal approach to arbitration clauses are absolutely breathtaking in their scope—enforcing arbitration clauses without much consideration and regardless of context. Under this view, there is almost an inherent conflict between the FAA and the substantive provisions of other

---

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

33. *Id.*

34. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1160 (7th Cir. 2016); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

35. Because the NLRB is not charged with administering the FAA, its legal conclusions as to the FAA are not entitled to *Chevron* deference. "[W]e have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA." *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 356 (5th Cir. 2013) (quoting *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002)).

36. ". . . [T]he [NLRB] must be and is mindful of any conflicts between the . . . [NLRA] and . . . other federal statutes, including the FAA. Where a possible conflict exists, the [NLRB] is required . . . to undertake a 'careful accommodation' of the two statutes. That does not mean . . . that the Act must automatically yield to the FAA—or the other way around. Instead, when two federal statutes 'are capable of co-existence,' both should be given effect 'absent a clearly expressed congressional intention to the contrary.'" *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2284 (2012) (quoting *S. S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942); and then quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). The Fifth Circuit overlooked the NLRB's circumspect approach and implicitly accused the NLRB of tunnel vision in administering the NLRA. *D.R. Horton*, 737 F.3d at 356 (quoting *S. S.S. Co.*, 316 U.S. at 47).

statutes like the NLRA. The Court has taken a short and simple statute and constructed an unjustifiably imposing structure from the statute's far more limited command.[37]

The seminal case—the one that buttresses the entire artificial arbitral supremacist structure—is *AT&T Mobility LLC v. Concepcion*.[38] One of its primary effects has been to thwart the labor and employment class or collective action.[39] In *Concepcion*, the Supreme Court declared that the FAA's "overarching purpose . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."[40] This innocent-looking purpose-driven analysis of the FAA, far from simply ensuring that arbitration agreements are enforced, has instead created a strongly pro-arbitration regime.[41] Following *Concepcion*, arbitration jurisprudence has become untethered from the FAA's text, history, and purpose, and it now poses a serious threat to employees' collective rights under the NLRA.

Courts have also seized on dicta in *Concepcion*, stating that the class procedural mechanism "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[42] The Second, Fifth, and Eighth Circuits extend this reasoning from the context of consumer contracts to employment agreements and conclude that the NLRB's view of § 7 is inconsistent with the pro-arbitration framework established by the FAA.[43] In spite of the Second, Fifth, and Eighth Circuits' rejection of its view, the NLRB has refused to acquiesce to appellate rulings and remains committed to the position that § 7 grants employees a substantive right to collective action. For example, the NLRB found a collective action waiver unlawful in *Murphy Oil USA, Inc.*,[44] disregarding the Fifth Circuit's contrary ruling

37. Although *Concepcion* is the modern case, Justice O'Connor sagely wrote of the Court's FAA jurisprudence in 1995, "[y]et, over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

38. 563 U.S. 333 (2011).

39. *See* Horton, *supra* note 21, at 1242.

40. 563 U.S. at 344.

41. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 131–32 (2001) (Stevens, J., dissenting).

42. 563 U.S. at 344.

43. See *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 776 (8th Cir. 2016); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 359–60 (5th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1054–55 (8th Cir. 2013).

44. 808 F.3d 1013 (5th Cir. 2015).

just two years prior in *D.R. Horton*.[45] For its part, the Fifth Circuit took the opportunity in *Murphy Oil* to reaffirm *D.R. Horton*.[46] Whereas these circuit courts focus on the "valid, irrevocable, and enforceable" language, the NLRB's reasoning relies on the equally important language that follows: "save upon such grounds as exist at law or in equity for the revocation of any contract."[47]

C. The Scope and Purpose of the FAA's "Savings Clause"

In making its decision that the NLRA and FAA could be harmonized, the NLRB was mindful of the Supreme Court's decision in *Concepcion* and relied on the FAA's "savings clause" to strike a balance between the NLRA and FAA.[48] Under the savings clause, arbitration agreements "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*."[49] The NLRB's position is that § 7 provides the grounds at law—employees' substantive rights to "engage in other concerted activities"—that brings the collective action waiver within the ambit of the savings clause.[50] The Second, Fifth, and Eighth Circuits, however, denied the applicability of the savings clause, arguing that the Supreme Court's FAA jurisprudence does not apply the savings clause to federal statutes.[51] Instead, courts must enforce arbitration clauses under the FAA unless Congress has given a contrary command.[52] The "contrary command" analysis, rather than closely examining the text of the statutes, virtually always ends in an unprincipled application of the FAA.[53]

In *Lewis*, the Seventh Circuit endorsed the application of the savings clause, arguing that it allows "the NLRA and FAA to work

45. 361 N.L.R.B. 72 (2014).

46. *Murphy Oil*, 808 F.3d at 1018.

47. 9 U.S.C. § 2 (2012).

48. "The FAA permits the enforcement of private arbitration agreements, but those agreements remain subject to the same defenses against enforcement to which other contracts are subject. An agreement falling within the terms of the FAA may provide for arbitration of federal statutory claims." *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2284 (2012).

49. 9 U.S.C. § 2 (emphasis added).

50. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1157 (7th Cir. 2016).

51. *See, e.g.*, *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 359–60 (5th Cir. 2013).

52. *Id.* at 360.

53. *See, e.g.*, *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 992 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (U.S. Jan. 13, 2017) (No. 16-300) (Ikuta, J., dissenting) (applying "contrary command" analysis and finding arbitration agreement enforceable). *But see* Greene & O'Brien, *supra* note 13, at 123–24 (arguing that the NLRA does contain a contrary congressional command).

hand in glove."[54] The savings clause exists precisely for this kind of situation: it operates to prevent the enforcement of illegal contracts, and any contract term that violates § 7 is illegal.[55] Judge Wood criticized the other circuits for rushing to find a conflict between two federal statutes, rather than working to harmonize them, as courts are supposed to do.[56] The Fifth Circuit, for example, proceeded with "a healthy regard for the federal policy favoring arbitration."[57] For its part, the Supreme Court has never explicitly addressed the enforceability of collective action waivers in employee arbitration agreements or the applicability of the savings clause to a statute like the NLRA.

II. HARMONY BETWEEN THE NLRA AND FAA: PROTECTING WORKERS' SUBSTANTIVE RIGHTS FROM ARBITRAL SUPREMACY

This Part assesses the debate over § 7 rights as being substantive or procedural, evaluates the proper scope of the Supreme Court's recent arbitration jurisprudence, as applied to the labor and employment context, and examines how to harmonize the statutory commands of both the NLRA and the FAA. First, this Part analyzes the language of § 7, its history, and its purpose. It then argues that § 7 rights are substantive and looks at how recent decisional law addresses the substantive and procedural divide. Next, this Part argues that recent case law finding a conflict between the FAA and the NLRA misunderstands the Supreme Court's recent arbitration decisions by misapplying those precedents in the labor and employment context. Finally, this Part endorses the Seventh Circuit's harmonization of the FAA and the NLRA and argues that the Seventh Circuit's reading gives the intended and proper effect to both statutory schemes, whereas opposing circuit court approaches unnecessarily create violence between the two statutes.

A. Collective Action as a Substantive Right

The distinction between § 7 as a source of substantive rights and § 7 as a source of procedural rights is the keystone of the conflict over enforcement of collective action waivers. A conception of § 7 rights as being merely procedural causes the entire edifice of the NLRA to crumble. Once a court fails to recognize that § 7 rights are substantive,

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

55. *Id.*

56. *Id.* at 1158.

57. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 360 (5th Cir. 2013) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

the conclusion that a collective action waiver is enforceable follows irresistibly. On the other hand, substantive rights may not be waived in arbitration agreements, so if a court finds that § 7 rights are substantive, it necessarily follows that the collective action waiver is unenforceable.[58] An examination of the text, history, and purpose of § 7 reveals that its guarantees are substantive and therefore not subject to waiver.

1. TEXT, HISTORY, AND PURPOSE OF § 7

The text, history, and purpose of § 7 all support the position that it grants substantive rights and that employers cannot interfere with these rights using any type of mechanism—including a collective action waiver. Section 7 guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[59] A plain reading of § 7 suggests that employee activity is protected if (1) it is "concerted"—"mutually contrived or agreed on;"[60] (2) "it is for 'mutual aid'—relate[ed] to wages, hours, or terms and conditions of employment;"[61] and (3) "it is 'protected'—i.e., neither disloyal, indefensible, violent, unlawful, or in breach of contract."[62] A collective legal proceeding fits within the common understanding of an "activity"— "a pursuit in which a person is active;" "an organizational unit for performing a specific function."[63] And nowhere in the NLRA is there any qualifying language indicating that the rights granted are procedural, rather than substantive.

The history and purpose of § 7 and the NLRA as a whole also support the view that § 7 rights are substantive and that the phrase "concerted activities" encompasses collective legal proceedings. Prior to the enactment of the NLRA, "a single employee was helpless in dealing with an employer," and "union was essential to give laborers

58. *Compare Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) (noting the ability of an employee to proceed collectively under FLSA is procedural), *and Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015) (reaffirming a decision that emphasized the right to act collectively as procedural), *with Lewis*, 823 F.3d at 1160 (finding that § 7 rights are necessarily substantive to effect the purpose of the NLRA), *and Morris*, 834 F.3d at 979 (same).

59. 29 U.S.C. § 157 (2012).

60. *Concerted*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/concerted [https://perma.cc/6UHN-YPC2].

61. MARION G. CRAIN ET AL., WORK LAW 543 (3d ed. 2015).

62. *Id*.

63. *Activity*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/activity 1 [https://perma.cc/LQ87-JS5D].

opportunity to deal on an equality with their employer."[64] When it passed the NLRA, Congress's overarching purpose was "to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment."[65] Congress gave "no indication that [it] intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way."[66] In effect, the NLRA restructured the employee/employer relationship to guarantee labor its *fundamental right* to self-organization and collective bargaining.[67] It is of no consequence that the collective legal proceeding is not undertaken by a union, as the latter activities tend to be, because the NLRA extends to non-union employees.[68]

Given the foregoing legislative history, the only way to give effect to Congress's intent and the NLRA's purpose is to interpret § 7 as conferring substantive rights. Collective actions and remedies allow employees to band together and thereby equalize bargaining power.[69] From a textual perspective, nothing in § 7's broad language suggests that collective remedies are somehow excluded from its reach. Rather, the text of § 7 and § 8, taken together, strongly supports the view that the rights listed in § 7 are substantive, not procedural. Section 8 states, "it shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the *rights guaranteed* in section 157 . . . ."[70] If § 7 is viewed as procedural, this language in § 8 makes little sense because procedural rights may generally be waived and are not guaranteed. The Act's other enforcement sections similarly make no sense if the rights established in § 7 are procedural and not substantive.[71] The relationship between § 7 and the rest of the Act permits the inference that Congress intended for § 7 rights to be the "primary substantive provision" of the NLRA.[72] In

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

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

66. *Id.*

67. *Jones & Laughlin Steel*, 301 U.S. at 33.

68. *See Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1153 (7th Cir. 2016) (noting that "[t]here is no hint that it is limited to actions taken by a formally recognized union").

69. *Id.* (citing *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 809 (1985); Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941)).

70. 29 U.S.C. § 158 (2012).

71. *See, e.g.*, 29 U.S.C. § 160 (providing powers to prevent interference with rights in § 7).

72. *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 986 (9th Cir. 2016).

fact, § 7 is the *only* substantive provision in the NLRA, and every other section of the Act relates to its enforcement.[73] From a structural perspective, the relationship between § 7 and the Act's other sections strongly suggests that § 7 is substantive.[74]

Nevertheless, opponents of this view insist not only that § 7 rights should be viewed as procedural, but also that § 7 doesn't convey a right to any collective action.[75] They argue first that § 7's language does not mention a collective right to bring claims.[76] Second, they confusingly assert that if § 7 grants substantive rights, other language in § 7 provides a substantive right *not* to engage in § 7 activities, meaning that signing a collective action waiver is somehow protected employee activity.[77] The first argument is erroneous, and the second is the height of irony. Although § 7 does not expressly mention a collective right to legal action, there is overwhelming authority to support the proposition. Case law and the NLRB's decisions strongly suggest that collective legal proceedings fit within the ordinary definition of "concerted activities."[78] And had Congress specified what "concerted activities" are with specificity, it would have greatly circumscribed § 7 because an enumeration of a particular type of "concerted activity" would lead courts to conclude other "concerted activities" were unprotected.[79]

The second argument—that § 7 protects a substantive right not to engage in § 7 activities—also falls flat, both as a matter of textual interpretation and as a matter of law. The argument gives undue weight to the latter text of § 7, which specifies that "employees . . . shall also have the right to refrain from any or all of such activities."[80] Under this view, even if § 7 rights are substantive, workers have an equally valid substantive right to refrain from § 7 activities, and thus can sign waivers, which courts must enforce under the FAA.[81]

---

73. *Compare* 29 U.S.C. § 157, *with* §§ 151–169.

74. *NLRB v. Alt. Entm't, Inc.*, 858 F.3d 393, 403 (6th Cir. 2017).

75. Brief of Defendant-Appellant Epic Sys. Corp. at 37, *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016) (No. 15-2997), 2015 WL 7204234.

76. *Id.*

77. *Id.* This argument also concedes the important point that § 7 rights are substantive.

78. *See Eastex, Inc. v. NLRB.*, 437 U.S. 556, 565–66 (1978); *Lewis*, 823 F.3d at 1152; *Brady v. Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011); *D.R. Horton*, 357 N.L.R.B. 2277, 2278–79 (2012).

79. *See* Wredberg, *supra* note 19, at 910. Thus, this Note does not propose a statutory fix because it would merely trade one problem of statutory interpretation for another. Furthermore, the current text of § 7 readily encompasses various kinds of collective proceedings.

80. *See* Reply Brief of Defendant-Appellant Epic Sys. Corp. at 18, *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016) (No. 15-2997), 2016 WL 106432 (C.A.7) (discussing the "refrain" portion of 29 U.S.C. § 157).

81. *Id.*

Textually, the argument fails by drawing a false equivalency between the act of refraining and the act of waiver. Refraining is a passive act. Refrain is an intransitive verb, and to refrain is "to keep oneself from doing."[82] To waive is "to relinquish voluntarily."[83] Refraining from participation in a collective action is fundamentally different from waiving the right to participate in a collective action. For example, the *Lewis* lawsuit involves a collective, opt-in proceeding, meaning that employees who wish to exercise their right to refrain from joining in § 7 activities simply should not opt-in.[84] A waiver, on the other hand, operates to extinguish a right. In effect, the argument asks that an individual employee should be allowed to use her individualized right to refrain from § 7 activities to extinguish any future possibility of joining in the exercise of collective rights elsewhere in § 7. It is a tortured reading of § 7 that essentially results in the statute swallowing itself. A much more reasonable reading is that individual employees can—as the statute says—"refrain" from participating in the collective actions.

Finally, the argument fails as a matter of law. Congress enacted the NLRA to restrain employers, not employees.[85] If the argument is accepted, however, employees are essentially permitted to waive § 7 rights, whether the waiver is purely voluntary or made under pressure from employers. Thus, the argument ignores the clear prohibitions of § 8, which forbids employers from interfering with, restraining, or coercing employees exercising § 7 rights.[86]

2. CONFLICT OVER THE SUBSTANTIVE/PROCEDURAL DISTINCTION

Courts supporting the view of § 7 rights as procedural ignore the plain meaning, history, and purpose of § 7. They isolate and seize upon the notion that class legal proceedings are procedural in nature and incorrectly conflate Federal Rule 23 with "other concerted activities."[87]

82. *Refrain*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/refrain [https://perma.cc/VCP7-V7LA].

83. *Waive*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/waive [https://perma.cc/QNA9-5Q3L].

84. *Arbitration and Collective Actions — National Labor Relations Act — Seventh Circuit Invalidates Collective Action Waiver in Employment Arbitration Agreement*.—Lewis v. Epic Systems Corp., *823 F.3d 1147 (7th Cir. 2016)*, 130 HARV. L. REV. 1032, 1039 (2017).

85. 29 U.S.C. §§ 157–58 (2012). *See also Lewis*, 823 F.3d at 1159 (7th Cir. 2016) ("Sections 7 and 8 stay *Epic's* hand.") (emphasis in original).

86. 29 U.S.C. § 158.

87. 29 U.S.C. § 157; FED. R. CIV. P. 23.

The most recent example of this argument is Judge Ikuta's forceful but mistaken dissent in *Morris v. Ernst & Young*. Judge Ikuta argues:

> [N]othing in the NLRA suggests that this protection includes the right to resolve disputes using a particular legal procedure. The majority's attempt to equate a substantive right to concerted action with a legal procedural mechanism for resolving disputes has no basis in history or Supreme Court precedent. To the contrary, the Court has held that "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."[88]

This argument is appealingly simple but flawed. The first problem with the argument is that it draws a false equivalency between "other concerted activities" and use of Rule 23.[89] Although a class action proceeding under Rule 23 is an "other concerted activit[y]," the point of § 7 is not to guarantee employers the opportunity to litigate using Rule 23—if that were the argument here—it would be a losing one.[90] But the argument is that the NLRA forbids employer interference with employees' right to "other concerted activities," not that employees have a right to use Rule 23 as a procedural device to vindicate some *other* statutory right.[91] As the *Lewis* court appropriately notes, Rule 23 is not the source of the collective right at issue—§ 7 is.[92]

Invocation of Rule 23 only confuses the issue at hand. Even the *D.R. Horton* court, which upheld the collective action waiver at issue, acknowledged that the NLRA, rather than Rule 23, is the source of the right to collective action.[93] However, the court proceeded to analyze and rely on *other* federal labor laws in reaching its conclusion that collective activity is procedural.[94] Section 7 does not guarantee

---

88. *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 996 (9th Cir. 2016) (Ikuta, J., dissenting).

89. *Compare* FED. R. CIV. P. 23, *with* 29 U.S.C. § 157. Section 7 clearly makes no mention of procedural rights, and the argument against blanket collective action waivers is not an argument for (or against) class actions.

90. 29 U.S.C. § 157.

91. *Id.*

92. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1161 (7th Cir. 2016).

93. "[T]here are numerous decisions holding that there is no right to use class procedures under various employment-related statutory frameworks. For example, the Supreme Court has determined that there is no substantive right to class procedures under the Age Discrimination in Employment Act despite the statute providing for class procedures. Similarly, numerous courts have held that there is no substantive right to proceed collectively under the FLSA." *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 357 (5th Cir. 2013) (internal citations omitted).

94. *Id.* But just as the NLRA right to "other concerted activities" is not the same thing as a right to use Rule 23, the NLRA is plainly not the same thing as either the Age Discrimination in Employment Act or the Fair Labor Standards Act, which

employees any kind of procedure, but it *does* guarantee them some kind of associational, collective process[95] and that—not use of Rule 23—is precisely what many collective action waivers forbid outright.[96] Thus, while a waiver that permits the use of collective arbitration would not interfere with § 7 rights, a blanket waiver of all collective remedies necessarily violates § 7 because such a waiver strikes at the NLRA's core guarantee—collective action and process.[97] The NLRB itself limited its ruling in *D.R. Horton* to reach only employment agreements, and it carefully circumscribed its decision by stating that a collective action waiver did not violate § 7 rights so long as it preserved some collective means—for example, if it restricted class-wide litigation in court but preserved class or collective arbitration, or vice versa.[98]

Employers similarly have argued that because the "Rule 23 class action procedure did not exist in 1935 when the NLRA was passed, the Act could not have been meant to protect employees' rights to class remedies."[99] The argument is also appealing in its simplicity, but it also has a major flaw in that it neglects important language in § 7, which protects not only the explicitly named collective activities, such as collective bargaining, but also "*other* concerted activities for the purpose of . . . other mutual aid or protection."[100] Simply put, § 7's broad text signals that the activities protected are to be construed broadly.[101] Thus, § 7 might not guarantee use of a particular type of collective legal action but collective legal actions generally fit within the definition of "concerted activity."[102]

leaves the Fifth Circuit's conclusion in this case both unsatisfactory and baseless. *See Lewis*, 823 F.3d at 1161.

95. 29 U.S.C. § 157.

96. The collective action waiver in *Lewis*, for example, required waiver of virtually any collective device: "[By acknowledging the agreement, employees] waived 'the right to participate in or receive money or any other relief from *any* class, collective, or representative proceeding.'" *Lewis*, 823 F.3d at 1151 (emphasis added). Similarly, the collective action waiver in *Sutherland* required that "Covered Disputes pertaining to different [e]mployees will be heard in *separate* proceedings." *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 294 (2d Cir. 2013) (emphasis added).

97. *Cf. CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 103 (2012) (denying that CROA contained a guaranteed right to bring an action that it did not in fact contain).

98. Greene & O'Brien, *supra* note 13, at 95–96.

99. *E.g.*, *Lewis*, 823 F.3d at 1154. *See also Morris v. Ernst & Young, LLP*, 834 F.3d 975, 994 (9th Cir. 2016) (Ikuta, J., dissenting).

100. 29 U.S.C. § 157 (emphasis added).

101. *Lewis*, 823 F.3d at 1153; *see also NLRB. v. City Disposal Sys. Inc.*, 465 U.S. 822, 834–35 (1984).

102. *See supra* Part II.A.1.

B. The Scope of the Supreme Court's Arbitration Jurisprudence in the Employment Context

If there were only federal labor law, and no federal arbitration law, a showing that § 7 rights are substantive would end the discussion. Employment arbitration agreements that require the waiver of collective rights covered by the "other concerted activities" language would "run[] straight into the teeth of Section 7" and thus constitute an unfair labor practice under § 8.[103] However, under the pro-enforcement view, the FAA essentially overrides the NLRA's statutory guarantees and requires enforcement of arbitration clauses as written.[104] According to proponents of this view, enforcement of collective action waivers follows irresistibly from Supreme Court precedent.[105] The pro-enforcement camp's view is traceable to a recent line of Supreme Court cases, beginning with *Concepcion*, that have elevated the command of the FAA above that of virtually all other statutes, including the NLRA.[106] Lower courts are uncritically extending this logic into contexts that the Supreme Court never explicitly addressed.[107] The implications of this view, taken to its extreme, cannot be understated, particularly in contexts—like labor and employment—where individual claims come in low dollar amounts.[108] Its truth needs to be tested.

1. TEXT, HISTORY, AND PURPOSE OF THE FAA

The FAA provides, in relevant part, that agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as

---

103. *Lewis*, 823 F.3d at 1155.

104. *See Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 774–76 (8th Cir. 2016); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1019–21 (5th Cir. 2015); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 361 (5th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 295 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–54 (8th Cir. 2013).

105. *See, e.g.*, *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 996 (Ikuta, J., dissenting) ("This decision is breathtaking in its scope and in its error; it is directly contrary to Supreme Court precedent and joins the wrong side of a circuit split.").

106. *Id.* at 988–89.

107. "[W]hile it has been less than a year since the Court issued *Concepcion*, the results in its wake already look grim for the future of . . . employment class actions. Most courts are rejecting all potential distinctions and are instead applying *Concepcion* broadly as a 'get out of class actions free' card. . . . Specifically, they have found that suits must proceed in individualized arbitration . . . in cases brought regarding . . . violations of federal and state wage and hour legislation . . . . As interpreted by most courts, *Concepcion* is destroying virtually all possible attacks on arbitral class action waivers." Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 708–09 (2012) (internal citations omitted).

108. *Id.*

exist at law or in equity for the revocation of any contract."[109] The first portion of § 2 gives operative effect to arbitration agreements as written.[110] The language of § 2 is forceful and "manifest[s] a 'liberal federal policy favoring arbitration agreements.'"[111] As the Supreme Court has repeatedly explained, the FAA was enacted to overcome "widespread judicial hostility to arbitration agreements."[112] But the judicial landscape has changed since the FAA's enactment, and uncritical, automatic enforcement of arbitration agreements is the new normal.[113] The Supreme Court's recent cases have "repeatedly described the Act as 'embod[ying] [a] national policy favoring arbitration.'"[114] Courts that have relied on the FAA in enforcing collective action waivers have seized on this language but paid little attention to another important story in the legislative history of the FAA. Justice Stevens' dissent in *Circuit City Stores, Inc. v. Adams*[115] shows that the FAA's drafters did not intend employment contracts to fall within the FAA's scope:

> [T]he original bill was opposed by representatives of organized labor . . . because of their concern that the legislation might authorize federal judicial enforcement of arbitration clauses in employment contracts and collective-bargaining agreements. In response to those objections, the chairman of the ABA committee that drafted the legislation emphasized . . . that "[i]t is not intended that this shall be an act referring to labor disputes, at all," but he also observed that "if . . . there is any danger of that, they should add to the bill the following language, 'but nothing herein contained shall apply to seamen or any class of workers in interstate and

109. 9 U.S.C. § 2 (2012); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

110. The second half of 9 U.S.C. § 2, known as the savings clause, is discussed more fully in Section C, *infra*. In a word, though, the savings clause operates as a kind of safety valve to release tension between the FAA and any other federal statutes with which it might clash.

111. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

112. *Concepcion*, 563 U.S. at 339.

113. "Times have changed. Judges in the 19th century disfavored private arbitration. The 1925 Act was intended to overcome that attitude, but a number of this Court's cases decided in the last several decades have pushed the pendulum far beyond a neutral attitude and endorsed a policy that strongly favors private arbitration." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 131–32 (2001) (Stevens, J., dissenting).

114. *Concepcion*, 563 U.S. at 346 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

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

> foreign commerce.'" Similarly, another supporter of the bill, then Secretary of Commerce Herbert Hoover, suggested that "[i]f objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.'" The legislation was reintroduced in the next session of Congress with Secretary Hoover's exclusionary language added to § 1, and the amendment eliminated organized labor's opposition to the proposed law.[116]

Notably absent from any recent circuit court analysis is this legislative history, which demonstrates the uniqueness of the labor and employment sphere. Given this reality, the challenge lies in distinguishing the application of the FAA in the narrow space where arbitration is at odds with the collective substantive rights conferred in the NLRA.

2. RECENT CASE LAW ON THE FAA: THE DOMINANT VIEW AND ITS LIMITS

In *Concepcion*, the Supreme Court considered a consumer class action in which the plaintiffs attempted to aggregate many small economic injuries.[117] The Court examined the purpose of the FAA and reaffirmed the federal policy that favors arbitral resolution of disputes.[118] In dicta, the Court pointed out the disadvantages of collective proceedings and how they interfere with the FAA's pro-arbitral scheme.[119] Since then, the circuit courts ruling to enforce collective action waivers have uncritically extended *Concepcion*'s logic

---

116. *Circuit City Stores*, 532 U.S. at 126–27 (Stevens. J., dissenting) (internal citations omitted).

117. *Concepcion*, 563 U.S. at 337. The Concepcions entered into a cellular phone contract with AT&T that provided for individual arbitration between the two parties but forbade class-wide arbitration. *Id.* at 336–37. AT&T later charged the Concepcions a sales tax on the retail value of cell phones that were otherwise free under their contract. *Id.* at 337. In spite of the arbitration agreement in the contract, the Concepcions sued AT&T in federal district court. *Id.* The suit was later consolidated as part of a large consumer class action, and AT&T moved to compel the Concepcions into individual arbitration. *Id.*

118. *Id.* at 339.

119. Justice Scalia, writing for the five-Justice majority, noted three principal disadvantages to class arbitration. First, class arbitration slows down the arbitration process, increases costs, and increases the likelihood of procedural "morass." Second, class arbitration is more formal. Third, class arbitration is riskier for defendants. *Id.* at 348–50.

to an altogether different context.[120] Under the Supreme Court's watch, the FAA—originally passed to overcome judicial hostility to enforcing arbitration agreements—has instead become a sword.[121]

For example, none of the circuit courts have explicitly articulated why the Supreme Court's decisions in cases like *Concepcion* should extend to employment agreements. Circuit courts relying on the *Concepcion* decision have failed to explain why a case addressing contracts of adhesion given to potentially thousands of customers forced a binding determination in a case involving an employer, where the potential size of the class or collective proceeding is considerably more limited.[122] Judge Ikuta, for example, gives great attention to dicta within *Concepcion* stating that the principal advantages of arbitration are lost under collective proceedings and also misrepresents the extent to which the Supreme Court has addressed labor disputes in its arbitration jurisprudence.[123] As noted above, the Supreme Court has stated that arbitration has its advantages in the employment context, but it has never stated that arbitral procedures are somehow completely sufficient.[124] The Seventh Circuit correctly recognized that *Concepcion* does not mandate enforcement of every single arbitration clause as

120. *See, e.g.*, *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012); *Murphy Oil USA, Inc.*, 361 N.L.R.B. 72 (2014).

121. Justice Kagan points out that the Court's recent jurisprudence has departed from the FAA's original meaning, "The FAA, the majority says, so requires. Do not be fooled. Only the Court so requires; the FAA was never meant to produce this outcome. The FAA conceived of arbitration as a 'method of *resolving* disputes'—a way of using tailored and streamlined procedures to facilitate redress of injuries. In the hands of today's majority, arbitration threatens to become more nearly the opposite—a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability." *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting) (emphasis in original) (internal citations omitted).

122. Justice Scalia, writing for the *Concepcion* majority, argued that class arbitration created an intolerable risk for defendants. "But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable." *Concepcion*, 563 U.S. at 350.

123. "The majority's reasoning is likewise contrary to the Supreme Court's ruling that collective actions are not necessary to protect employees' federal statutory rights." *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 998 (9th Cir. 2016) (Ikuta, J., dissenting). In fact, the Supreme Court has never ruled that collective actions are not necessary to protect employees' federal statutory rights, and such a holding would be odd given the importance of collectivism in American labor and employment law. In the cases cited by Judge Ikuta, the Supreme Court upheld arbitration agreements and stated that in agreeing to arbitrate, a party does not forego her substantive statutory rights. *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). To characterize this statement as a ruling that collective actions are not necessary to protect employees' substantive rights is an unsupportable leap in logic.

124. *Circuit City Stores*, 532 U.S. at 123.

written.[125] An examination of the rationales behind the FAA precedents shows that the pro-arbitration arguments do not hold water in the employment context, where courts must also consider the fact that a federal statute provides for substantive rights.

Judge Ikuta's implicit reasoning is that allowing workers their rights to collective proceedings will also frustrate the FAA's pro-arbitration scheme to an unacceptable degree.[126] But there is little reason to believe that the concerns about the hypothetical class in *Concepcion*—a group that could have numbered tens of thousands —are similarly important in, for example, *Lewis*, where the collective action would be drawn from a division consisting of roughly 100 employees.[127] Neither Judge Ikuta nor any of the circuit courts that ruled the FAA's statutory command trumped the NLRA addressed this significant numerical discrepancy. They simply assumed that any sort of collective proceeding necessarily creates *Concepcion*'s contemplated procedural morass and does violence to the pro-arbitration regime.[128]

On the other hand, the NLRB convincingly distinguished the employment context in its *D.R. Horton* decision by pointing out that the three principal disadvantages to class arbitration pointed out by Justice Scalia[129] did not carry as much weight in the labor context as in the consumer context.[130] Class-wide arbitration for a group of employees would be "far less cumbersome and more akin to an individual arbitration proceeding" than the potentially massive hypothetical class imagined by Justice Scalia in *Concepcion*.[131] Thus, the effect of requiring class-wide arbitration in a typical employment case, which generally involves only a specific group of employees, did not amount to an "intrusion on the policies underlying the FAA."[132] As the NLRB's decision elucidates, it is difficult to see how the policy concerns outlined by the Supreme Court in *Concepcion* transfer readily to the

125. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1151 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (U.S. Jan. 13, 2017) (No. 16-285). *See also Morris*, 834 F.3d at 989 ("[N]othing in the Supreme Court's recent arbitration case law suggests 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.").

126. *See Morris*, 834 F.3d at 996, 997 (Ikuta, J., dissenting).

127. *Lewis v. Epic Sys. Corp.*, No. 15-CV-82-BBC, at *2 (W.D. Wis. Oct. 13, 2016).

128. *See, e.g.*, *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 359 (5th Cir. 2013) ("While the [NLRB's] interpretation is facially neutral—requiring only that employees have access to collective procedures in an arbitral or judicial forum—the effect of this interpretation is to disfavor arbitration.").

129. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

130. *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2287 (2012).

131. *Id.*

132. *Id.*

employment context, where the number of potential parties is far more circumscribed and the parties already have a clearly defined relationship. The numbers also tend to support the NLRB's view of the issue: enterprises with fewer than 500 employees—a far cry from Justice Scalia's hypothetical thousands—employ vast numbers of Americans.[133]

A further, related distinction between the procedural concerns in *Concepcion* and *Lewis* is that while *Concepcion* involved a class opt-out proceeding, the *Lewis* lawsuit involves a collective, opt-in proceeding.[134] While court supervision of a class proceeding in accordance with Rule 23 arguably creates inefficiency and drains valuable judicial resources, an opt-in collective proceeding does not "include[] absent parties[] [or] necessitat[e] additional and different procedures."[135] Therefore, at least two of the three concerns that Justice Scalia outlined in *Concepcion* are not as compelling in the *Lewis* case.[136] Simply put, the pro-enforcement courts have endorsed the application of *Concepcion*'s principles in the employment context without providing any compelling justifications, and they have failed to recognize that the Supreme Court's primary concerns in *Concepcion* do not transfer as readily to the employment context.[137] Without these

133. ANTHONY CARUSO, STATISTICS OF U.S. BUSINESSES EMPLOYMENT AND PAYROLL SUMMARY: 2012 38–40 (2015), https://www.census.gov/content/dam/Census/library/publications/2015/econ/g12-susb.pdf [https://perma.cc/4V9T-YJRC] (showing the number of business enterprises in each state with fewer than 500 employees). Admittedly, large enterprises (meaning enterprises that employ more than 500 employees) employed more than half of all employees for the sixth consecutive year at the time the data was collected, so there are many large-scale employers who have legitimate concerns about high-volume collective proceedings. But that alone seems an insufficient reason to interpret a statutory text to constitute a policy that permits employers to bar any type of collective action. Put differently, the risk of large, complicated lawsuits seems an insufficient reason to displace the text of a federal statute that has been on the books for the better part of the past century. A better solution is to give meaning to both statutes.

134. *Arbitration and Collective Actions — National Labor Relations Act — Seventh Circuit Invalidates Collective Action Waiver in Employment Arbitration Agreement*.—Lewis v. Epic Systems Corp., *823 F.3d 1147 (7th Cir. 2016)*, *supra* note 84.

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

136. *Id.* at 339. The requirement of "procedural formality" remains to some extent in a collective action because "procedural formality" exists in all civil litigation. But Justice Scalia's tripartite view of the drawbacks of class-wide arbitration falls flat when transferred directly into the labor and employment context.

137. The Court has been "clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context," but that is not the same thing as requiring that courts must always enforce the terms of employment contracts as written. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). Undoubtedly, arbitration has advantages, but it is not those advantages

justifications, it makes little sense to enforce arbitration agreements to the detriment of workers' statutory rights simply because of dicta in a five-member majority opinion.

Judge Ikuta's insistence that courts must enforce arbitration clauses as written in fact also clashes with a part of the Supreme Court's holding in *American Express v. Italian Colors Restaurant*.[138] There, the Court noted and approved of the "effective vindication" exception, a judge-made exception to the FAA that empowers courts to invalidate agreements that prevent the "effective vindication" of a federal statutory right.[139] Although the five-Justice majority declined to invoke the exception in *Italian Colors*, its decision not to reject the exception outright signals that in the right case, the Court might be willing to invoke the exception and strike down an arbitration agreement including a "prospective waiver of a party's *right to pursue* statutory remedies."[140] As this Note has demonstrated, the statutory remedies contemplated by the NLRA encompass collective action.[141] If the NLRA provides collective statutory remedies, it fits within the "effective vindication" exception because a collective action waiver operates to confer immunity from collective remedies upon the employer.[142] Indeed, § 7 rights would amount to little and could not possibly be effectively vindicated if they were subject to waiver at the behest of employers.[143]

C. Harmony Between the NLRA and FAA: the Savings Clause

Whereas the NLRB's own decisions and the decisions of the Sixth, Seventh, and Ninth Circuits attempt to give effect to both the NLRA and the FAA, the other circuit courts' decisions make little effort, if

---

that make an arbitration agreement enforceable by its terms, and the minority in *Concepcion* "cautioned against thinking that Congress' primary objective [in enacting the FAA] was to guarantee these particular procedural advantages" rather than to "secure the 'enforcement' of agreements to arbitrate." *Concepcion*, 563 U.S. at 360 (Breyer, J., dissenting).

138. 133 S. Ct. 2304, 2310 (2013).

139. *Id.*

140. *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 & n.19 (1985)). It is worth noting here that without overruling the exception, Justice Scalia nevertheless attacks it as having "originated as dictum," an accusation that could just as easily be leveled at the portions of his *Concepcion* opinion that have gained significant traction in the lower courts.

141. *See supra* Part II.A.

142. *Italian Colors Rest.*, 133 S. Ct. at 2318 (Kagan, J., dissenting).

143. *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 983 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (U.S. Jan. 13, 2017) (No. 16-300).

any, to harmonize the statutes.[144] The NLRB appears more willing than these courts to attempt to harmonize the statutes.[145] As the Seventh Circuit says in *Lewis*, those courts go "*looking* for trouble."[146] Their opinions read as though the FAA necessarily trumps the NLRA, rather than coexisting with it.[147] The courts are willing to go so far to ensure the enforcement of arbitration clauses as written that their decisions threaten to swallow up a significant portion of federal labor law.[148] And if § 7 rights are subject to arbitral waiver, the NLRA is left as a shell, a statute without any substance.[149]

The better approach—and one that still leaves plenty of room for arbitration as a mechanism for resolution of workplace grievances—is to harmonize the FAA and the NLRA.[150] While a regime that favors arbitration above all else threatens to destroy collective action—the entire basis of federal labor policy—a regime that bars enforcement of collective action waivers in some contexts does not eliminate arbitration as a form of dispute resolution or even necessarily frustrate the arbitral scheme favored by the FAA.[151] Holding collective action waivers unenforceable in the context of employment agreements does not at all lead to the conclusion that the entire pro-arbitration apparatus must fall.[152] As the Seventh Circuit notes in *Lewis*, "finding the NLRA in conflict with the FAA would be ironic considering that the NLRA is, in

144. *Compare D. R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), *with D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).

145. "The [NLRB] is responsible for administering the NLRA and enforcing the rights that the Act confers. But in doing so, the [NLRB] must be and is mindful of any conflicts between the terms or policies of the Act and those of other federal statutes, including the FAA. Where a possible conflict exists, the [NLRB] is required, when possible, to undertake a 'careful accommodation' of the two statutes." *D. R. Horton, Inc.*, 357 N.L.R.B. at 2284.

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

147. "Where statutes *irreconcilably* conflict, the statute later in time will prevail." *D.R. Horton*, 737 F.3d at 361 (emphasis added). The Fifth Circuit felt that the NLRA and FAA had an irresolvable conflict even though the savings clause provides a natural accommodation. However, the Supreme Court has previously instructed courts to interpret seemingly conflicting statutes in a way that makes them compatible. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995). This canon of construction also has the virtue of recognizing that Congress does not intend to contradict itself.

148. *See* Horton, *supra* note 21, at 1221 (arguing that *Concepcion* sounded the "death-knell" for employment class actions).

149. *See Morris v. Ernst & Young, LLP*, 834 F.3d 975, 983 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (U.S. Jan. 13, 2017) (No. 16-300).

150. *Lewis*, 823 F.3d at 1159; *Morris*, 834 F.3d at 989; *NLRB v. Alt. Entm't, Inc.*, 858 F.3d 393, 404 (6th Cir. 2017).

151. *Lewis*, 823 F.3d at 1158.

152. *Id.*

fact, *pro*-arbitration: it expressly allows unions and employers to arbitrate disputes between each other and to negotiate collective bargaining agreements that require employees to arbitrate individual employment disputes."[153] And while that kind of arbitration scheme would meet the NLRA's requirements, a scheme like the one in *Lewis*, which *totally* bars collective action of any sort, frustrates § 7.[154]

The drafters of the FAA contemplated that the statute could not be enforced in all instances.[155] It is for this reason that the FAA includes a savings clause, which provides that agreements to arbitrate are "valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*."[156] The plain language of the savings clause suggests that its purpose is to act as a limitation on the operative, first part of the statute. "Save upon" is linguistically equivalent to "save for," which means "except for"—a clear limitation on the preceding clause.[157] The text, therefore, suggests a much more prominent role for the savings clause than the pro-FAA courts have been willing to give. Furthermore, the drafters would have been aware of defenses to contract formation that could be used to defeat enforcement of an arbitration clause because of illegality, an equitable remedy that Justice Thomas approved of in *Italian Colors*.[158]

Yet the opposing view insists that the savings clause is inapplicable and that instead a "contrary congressional command" is required for the NLRA to displace the FAA.[159] Even if the Supreme Court has so held, that position is completely unmoored from the FAA's text—which says precisely nothing about a "contrary congressional command"—and it would render the savings clause superfluous.[160] Furthermore, the argument is not one for displacement, but for harmony and

153. *Id.*

154. 29 U.S.C. § 157 (2012).

155. In addition to conflicts with other federal statutes, David Horton has argued that public policy exceptions fit squarely within the meaning of the savings clause and would have been contemplated by the FAA's drafters. *See* Horton, *supra* note 21, at 1255.

156. 9 U.S.C. § 2 (2012) (emphasis added); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339–40 (2011).

157. *Save for*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/save%20for [https://perma.cc/X9PQ-e vMKQD].

158. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013) (Thomas, J., concurring) (noting that certain equitable defenses to contract formation, such as fraud or duress, block an order compelling arbitration under FAA). Thus, even Justice Thomas's rigid conception of the savings clause allows for a defense of illegality, and NLRA § 7 makes a collective action waiver illegal. *See also Lewis*, 823 F.3d at 1159.

159. *See, e.g.*, *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 992 (9th Cir. 2016) (Ikuta, J., dissenting), *cert. granted*, 137 S. Ct. 809 (U.S. Jan. 13, 2017) (No. 16-300).

160. *Hibbs v. Winn*, 542 U.S. 88, 89 (2004).

accommodation. Courts that have applied the "contrary command" analysis and rejected *D.R. Horton* ignore that the FAA cannot make otherwise illegal contractual terms legal. In other words, the FAA did not remove illegality as a defense to contract.[161] When the NLRA makes it illegal for an employer to restrain an employee from exercising her collective rights using an arbitration agreement, the FAA cannot "resuscitate[] . . . the arbitration apparatus."[162]

Here, the illegality exists by virtue of a federal law, the NLRA, which confers substantive rights and fits the language of the savings clause "hand in glove."[163] The Supreme Court's ruling in *Concepcion* suggests only that state law rules discouraging enforcement of arbitration agreements do not fall within the savings clause and therefore may not serve as obstacles to the FAA.[164] The opinion is notably silent on how the FAA interacts with other federal law. In short, the *Lewis* court's approach provides a common-sense solution that accommodates *both* statutory commands.[165]

The NLRA provides substantive, collective rights. Its unique statutory guarantee requires that employers not interfere with employees' abilities to act in concert. Thus, collective action waivers that forbid collective devices of any sort are illegal. In spite of the pro-arbitral command of the FAA and the Supreme Court's FAA jurisprudence, such blanket prohibitions must fall. This result does not preclude the use of arbitration as a more cost-efficient means of dispute resolution; it means only that arbitration cannot leave the NLRA a nullity and swallow the core principle of federal labor law: collective action.

CONCLUSION

This Note argued that the Seventh Circuit properly decided *Lewis v. Epic Systems*. Chief Judge Wood correctly concluded that § 7 rights are substantive, harmonized the NLRA and the FAA, and refused to enforce the collective action waiver in Lewis's employment agreement. In doing so, the Seventh Circuit reversed a growing tide of circuit courts of appeal that had uniformly—and uncritically—rejected the NLRB's commonsense position in *D.R. Horton*. The Supreme Court

161. *See supra* note 159.

162. *Lewis*, 823 F.3d at 1156.

163. *Id.* at 1157.

164. "Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011).

165. *Lewis*, 823 F.3d at 1158.

must now address whether the principles it articulated in *Concepcion*—a decision that suggested an extremely broad reach for the FAA but otherwise failed to give lower courts much guidance on what makes an arbitration agreement illegal—transfer directly to the employment context.

As this Note has argued, the plain language and purpose of both the NLRA and FAA compel affirmance of the *Lewis* court's decision. In their haste to follow *Concepcion*, the lower and circuit courts have extended its logic with little explanation as to why it merits an extension. The principles of *Concepcion*, while respectable theoretically, have now been stretched to a point such that they endanger the foundation of federal labor law. This shocking transformation in the arbitration law landscape has occurred in spite of the fact that the labor context is uniquely different from the consumer context at issue in *Concepcion*. If the Court chooses to reverse the Seventh Circuit, it would do well to explain why context is irrelevant to enforcement of collective action waivers and to its arbitration jurisprudence generally.

A favorable ruling would reinvigorate not only labor and employment practice, but also other fields of law where arbitration clauses have proliferated.[166] Furthermore, a favorable ruling would likely provide lower courts with a meaningful judicial standard for assessing arbitration agreements, a welcome development after the unprincipled approach of the past decade and a half. Given the recent proliferation of collective action waivers and arbitration clauses in all manner of contracts, an affirmative ruling would also almost certainly lead to more litigation. While that is typically not a good outcome, a rollback of FAA jurisprudence would not be creating new grievances or giving rise to more suits; rather, fields of law that have seen a decline in the wake of *Concepcion* could experience a renaissance.

An unfavorable ruling, on the other hand, will likely sound a "death-knell" for certain kinds of labor and employment practice as more and more disputes are funneled into individual arbitration.[167] Professional arbitration associations, on the other hand, would see continued growth in their caseloads.[168] If the Court rules in favor of employers, arbitration associations like the American Arbitration Association should exercise their additional power responsibly by undertaking reviews of labor arbitration rules and procedures to make collective arbitration proceedings more expeditious. Reform of this kind would go far to rein in the scope of the FAA, or, at the very least, afford would-be litigants with a less partisan forum and the possibility

166. *See* Sternlight, *supra* note 107, at 724.

167. *See* Horton, *supra* note 21, at 1221.

168. *See supra* note 4.

of meaningful remedies. Furthermore, even if the Court rules in favor of employers, it should use the opportunity to provide lower courts with indicia of what would make an arbitration agreement *illegal*. For instance, whether under the Court's existing precedents, there is *any* possible arbitration agreement that a court should refuse to enforce. If the Court fails in this regard, arbitration will continue to provide employers a mechanism with which to insulate themselves from liability.

From a strictly prudential standpoint, the Court might hesitate to encourage new litigation over the enforceability of collective action waivers, not to mention arbitration agreements generally. But if the Court does open the door, it will at least be resting on firm legal reasoning. Whatever the outcome, the decision will be far more satisfying if the Court does not simply stand on its own shoulders and precedents, as it has with its recent arbitration jurisprudence,[169] but instead, applies textualist and purposive interpretive principles to the NLRA and FAA.

169. *See Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).