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EMPLOYMENT ARBITRATION REFORM: PRESERVING THE RIGHT TO CLASS PROCEEDINGS IN WORKPLACE DISPUTES

Javier J. Castro*

The recent judicial enforcement of class waivers in arbitration agreements has generated ample debate over the exact reach of these decisions and their effects on the future of collective action for consumers and employees. In AT&T Mobility v. Concepcion, a 5-4 majority of the Supreme Court majority held that the Federal Arbitration Act (FAA) preempted state laws prohibiting companies from incorporating class action waivers into arbitration agreements. The Court upheld such waivers on the grounds that they are consistent with the language and underlying purpose of the FAA. Most courts across the country have since reinforced the strong federal policy favoring arbitration. This, in turn, has made it more difficult for employees—most of whom do not enjoy the benefit of union representation and must therefore arbitrate their claims as individuals—from engaging in class proceedings. Faced with this dire judicial landscape, employees must turn to Congress to limit the scope of compulsory arbitration and secure recognition of the right to class proceedings.

This Note advocates for legislative reform of federal arbitration law. Specifically, it argues for an amendment to the FAA that invalidates class waivers in mandatory arbitration agreements and applies only in employment disputes. Such a reform would help preserve important employee protections under federal labor law and would allow nonunion workers, in particular, to fully exercise their fundamental right to collective action.

INTRODUCTION

At the intersection of federal arbitration and labor law lies a critical question: To what extent do class waivers in predispute arbitration agreements affect—or rather, constrain—the substantive rights of nonunion employees under federal labor law?¹ The National Labor Relations Board (NLRB or Board) partially addressed this issue in December 2012, when it considered whether

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1. See Jay W. Waks & Carlos L. Lopez, *Challenging AT&T Mobility v. Concepcion: Employment Class Action Waivers and Federal Statutory Rights*, 67 APR DISP. RESOL. J. 6, 76-79 (2012) (discussing the impact of class action waivers in arbitration agreements on the rights of employees).

an employer may require employees, as a condition of employment, to agree to arbitrate all employment on an individual basis. In *D.R. Horton, Inc.*,² the Board determined that the National Labor Relations Act (NLRA)³ protects employees' right to file or participate in a class or collective action,⁴ notwithstanding the broad federal policy favoring individual arbitration. The Board reasoned that the NLRA is consistent with the Federal Arbitration Act (FAA)⁵ because it does not preclude arbitration agreements, so long as such agreements do not bar employees from vindicating their right to engage in concerted activity in either an arbitral or judicial forum.⁶ Recognizing the right of employees to engage in "concerted activities" for purposes of "mutual aid or protection,"⁷ the NLRB asserted its continued authority in resolving labor disputes and thereby sought to preserve the continuity of collective action in the post-*Concepcion* era,⁸ even amid the decline of union representation and the growing isolation of collective bargaining.⁹

By invalidating a mandatory arbitration clause barring class actions, the NLRB created a stir within labor and employment circles. Many viewed *D.R. Horton* as a challenge to the Supreme Court's latest rulings supporting the broad enforceability of arbitration clauses.¹⁰ Federal courts since, however, have generally declined to defer to the NLRB's reasoning and have responded by enforcing class waivers in employment arbitration agreements.¹¹ The Fifth Circuit recently delivered a serious blow to the Board's authority when it overturned *D.R. Horton* on appeal, thereby encouraging businesses to continue using mandatory arbitration agreements as a

2. *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (Jan. 3, 2012).

3. 29 U.S.C. § 151-69 (2012).

4. 29 U.S.C. § 157 (2012).

5. 9 U.S.C. § 2 (2012).

6. *D.R. Horton*, *supra* note 2, at *17-18.

7. 29 U.S.C. § 157 (2012).

8. See Craig Becker, *The Continuity of Collective Action and the Isolation of Collective Bargaining: Enforcing Federal Labor Law in the Obama Administration*, 33 BERKELEY J. EMP. & LAB. L. 401, 405-11 (2012).

9. See Robert A. Gorman & Matthew W. Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. PA. L. REV. 286, 287-88 (1981) (observing the decline in union representation of private-sector employees over the past two decades).

10. See, e.g., William J. Emanuel & Henry D. Lederman, *NLRA Versus FAA: Why the NLRB Got It Wrong in D.R. HORTON*, LITTLER MENDELSON P.C. (July 18, 2012), <http://www.littler.com/publication-press/press/nlra-versus-faa-why-nlr-b-got-it-wrong-dr-horton-july-2012> (arguing that the Board's decision in *D.R. Horton* infringes on a clear congressional directive to enforce arbitration agreements according to their terms).

11. See discussion *infra* Part II.A.

means of getting their employees to sign away their right to concerted activity.¹² Further, this ruling signals to employees that if they hope to preserve that right, they must seek reform not in the courts but through the legislature.

This Note argues that Congress should enact a statutory amendment to the FAA that bans enforcement of class waiver provisions in mandatory arbitration agreements, which prevent employees from aggregating their claims in any forum. Part I explains the statutory and doctrinal development that makes such reform necessary. It traces the rise of national labor policy in the twentieth century, culminating with the passage of the NLRA, which fundamentally transformed labor-management relations. The discussion then shifts to focus on the development of federal arbitration policy and the enactment of the FAA, which was designed to encourage private dispute resolution. After analyzing the differences between the NLRA and the FAA, this section highlights a number of key Supreme Court rulings that have broadened the applicability of the FAA in resolving consumer and employment disputes.

Part II addresses the apparent conflict between the courts and the NLRB over the enforceability of binding arbitration agreements in the nonunion workplace. While the Supreme Court and lower federal courts in recent years have strengthened the ability of employers to compel individual arbitration in the consumer contexts,¹³ the NLRB has continued its longstanding practice of defending the substantive right of employees to engage in concerted activity for the purpose of “mutual aid or protection.”¹⁴ This section concludes by emphasizing the need for congressional action as a means of restoring the status of national labor law and salvaging basic protections for nonunion employees. The focus throughout centers on nonunion employees—who make up a vast majority of the private sector workforce¹⁵—because they are often unable to bargain with their employer, compared to their unionized counterparts who benefit from having a union that can negotiate on their behalf.

12. D.R. Horton v. NLRB, 737 F.3d 344, 345 (5th Cir. 2013).

13. See Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 771-776 (2012) (analyzing Supreme Court decisions concerning class waivers and disputes arising from consumer and employment contracts).

14. See Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013, 1024-29 (2013); 29 U.S.C. § 157 (2012).

15. According to the Bureau of Labor Statistics, in 2013, private-sector employees had a union membership rate at about 6.7 percent. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, UNION MEMBERS SUMMARY (Jan. 24, 2014), <http://www.bls.gov/news.release/union2.nr0.htm>.

Finally, Part III discusses a number of existing proposals that attempt to make the current system of employment arbitration more conducive to the needs of employees.¹⁶ After examining the merits and drawbacks of each of these proposals, this Part emphasizes the need for legislative reform that enables employees to engage in class proceedings. Specifically, it argues in favor of an amendment to the FAA that invalidates class waivers in mandatory arbitration agreements, which bar employees from aggregating their claims in any forum.¹⁷ This Part then justifies this proposed amendment in light of the social policies it serves.¹⁸

As union membership declines precipitously across the country,¹⁹ many companies have turned to arbitration contracts to prevent nonunion employees from asserting their right to collective action.²⁰ An amendment to the FAA would help stem the ongoing erosion of employee rights. It would also represent an important step toward achieving Congress's goal of remedying the "inequality of bargaining power" between employers and employees, a principle enshrined in the opening lines of the NLRA.²¹

I. STATUTORY AND JUDICIAL BACKGROUND OF EMPLOYMENT ARBITRATION

To understand the contemporary debate over whether the FAA applies to nonunion employees and their right to collective action in arbitration, it is useful to begin by examining both the key federal statutes governing labor-management relations and arbitration agreements, the NLRA and the FAA, and the relevant interpretations of those statutes by federal courts and the NLRB. Whereas the NLRA instituted important protections for the substantive rights of employees, the FAA granted companies the right to seek enforcement of contracts requiring private resolution of disputes. But in a

16. See discussion *infra* Part III.A.

17. See discussion *infra* Part III.B.1.

18. See discussion *infra* Part III.B.2.

19. Steven Greenhouse, *Share of the Workforce in a Union Falls to a 97-Year Low, 11.3%*, N.Y. TIMES, Jan. 23, 2013, available at <http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth.html>.

20. Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 883 (2008) (reporting that 92.9% of employment contracts contain arbitration clauses).

21. 29 U.S.C. § 151 (2012) ("Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by . . . restoring equality of bargaining power between employers and employees.").

number of recent decisions, the Supreme Court has authorized a liberal interpretation the FAA. Taken together, these decisions illustrate the strong judicial endorsement of arbitration.

A. The NLRA and the Development of Protected Employee Conduct

The mid-1930s were a decisive period in the history of American trade unionism. Following the collapse of the stock market, Congress searched for ways to end the deepening depression and stimulate the economy.²² Congress recognized that safeguarding the right to organize and bargain collectively would promote the free flow of commerce by removing certain “sources of industrial strife,” encouraging the friendly adjustment of labor disputes and restoring the “equality of bargaining power between employers and employees.”²³ As the middle class became more sympathetic to the goals of organized labor, the federal government began to encourage unionization and collective bargaining.²⁴

i. Text and Purpose of the NLRA

In 1935, Congress passed the NLRA (also known as the Wagner Act)²⁵ establishing legal protections for private-sector employees to organize and bargain collectively over the terms and conditions of employment,²⁶ and creating the NLRB²⁷ to administer²⁸ and enforce those legal protections should an employer’s conduct constitute an unfair labor practice.²⁹

22. Amanda L. Ireland, Note, *Notification of Employee Rights Under the National Labor Relations Act: A Turning Point for the National Labor Relations Board*, 13 NEV. L.J. 937, 941 (2013).

23. See 29 U.S.C. § 151 (2012).

24. ARCHIBALD COX ET AL., LABOR LAW: CASES AND MATERIALS 42 (Foundation Press, 15th ed. 2011).

25. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69 (2012)). See Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1385–86 (1993). The Wagner Act was named after progressive New York Democrat and principal architect of the legislation, Senator Robert F. Wagner. *Id.* at 1390.

26. COX, *supra* note 24, at 43.

27. 29 U.S.C. § 153(a)–(b) (2012).

28. *Id.* § 159; see also David P. O’Gorman, *Construing the National Labor Relations Act: The NLRB and Methods of Statutory Construction*, 81 TEMP. L. REV. 177, 181–83 (2008).

29. *Id.* § 158(a)(1) (forbidding an employer from “interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of rights guaranteed” by Section 157.).

The core of the NLRA is Section 7,³⁰ which guarantees 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.”³¹ Section 7 grants employees the right, not just to form or join labor organizations, but also to engage in a broad array of concerted activities.

To be entitled to protection under this section, an employee must satisfy two requirements. First, the conduct must be “concerted.” In other words, it must be “undertaken together by two or more employees or undertaken by one on behalf of others.”³² Second, employee conduct must be “for mutual aid or protection.”³³ Analyzing the kinds of activities covered under Section 7 will aid in determining when lawsuits to enforce statutory rights constitute protected activity.

ii. Application of the NLRA in the NLRB and the Courts

The National Labor Relations Board and the courts have broadly construed the types of activities that meet the “concerted” requirement of Section 7 conduct.³⁴ Concerted activity clearly encompasses situations where “two or more employees assert legal rights against their employer.”³⁵ The Board in *Meyers Industries, Inc.* expressed a narrow reading of the term “concerted,” when it stated that only “group” activity was protected, not activity undertaken by and on behalf of the employee himself.³⁶ But, in addition to group activity

30. See, e.g., *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 835-36 (1984) (observing that Section 7 represents the primary means by which Congress implemented its purpose of achieving industrial peace); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945) (noting that a dominant purpose of the NLRA is to foster “the right of employees to organize for mutual aid without employer interference”); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33-34 (1937) (holding that employees have a “fundamental right” to organize and Section 7 is meant to safeguard this right).

31. 29 U.S.C. § 157 (2012).

32. JOHN E. HIGGINS, JR., *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT* 83-84 (6th ed. 2012).

33. For a general discussion of these two requirements, see Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 WAKE FOREST L. REV. 173, 187-200 (2003); see also William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. OF EMP. & LAB. L. 259, 279-83 (2002).

34. See Michael D. Schwartz, Note, *A Substantive Right to Class Proceedings: The False Conflict Between the FAA and the NLRA*, 81 FORDHAM L. REV. 2945, 2963-64 (2013).

35. John B. O’Keefe, Note, *Preserving Collective-Action Rights in Employment Arbitration*, 91 VA. L. REV. 823, 833 (2005).

36. 281 N.L.R.B. No. 882, 886 (1986).

undertaken “in order to achieve common goals,”³⁷ the Supreme Court in *NLRB v. City Disposal Systems, Inc.* affirmed that concerted activity includes individual employee conduct which “intends to induce group activity,” or conduct by an individual employee who “acts as a representative of at least one other employee.”³⁸ In justifying this broad reading, the Court explained that “[t]here is no indication that Congress intended to limit this protection to situations in which an employee’s activity and that of his fellow employees combine with one another in any particular way.”³⁹ Nevertheless, an individual employee cannot claim statutory protection for activity undertaken solely “by and on behalf of the employee himself.”⁴⁰

With regard to the “mutual aid or protection” prong, the Supreme Court endorsed an expansive reading of this provision in *Eastex, Inc. v. NLRB*.⁴¹ The case involved a paper products manufacturer that had denied the union permission to distribute a newsletter urging employees to support union membership and oppose the incorporation of the state “right-to-work” statute into a revised state constitution.⁴² Upon determining that the distribution of the newsletter was a protected action, the Court held that employees act for the purpose of “mutual aid or protection” whenever their efforts are aimed at improving the terms and conditions of employment, even if their conduct occurs outside the immediate employer-employee relationship.⁴³ The Court held that a narrower interpretation of employee protections would “frustrate the policy of the [NLRA] to protect the right of workers to act together to better their working conditions.”⁴⁴

In sum, Section 7 embodies the substantive right of employees to act collectively to improve their working conditions.⁴⁵ Courts have generally found that this right to collective action enables employees to bring lawsuits challenging working conditions on a joint or collective basis.⁴⁶

37. 465 U.S. 822, 831 (1984).

38. *Id.*

39. *Id.* at 835.

40. *Meyers Indus.*, 281 N.L.R.B. at 885.

41. 437 U.S. 556 (1978).

42. *Id.* at 559–61.

43. *Id.* at 565–66. (providing that employee conduct is protected when it seeks “to improve working conditions through resort to administrative and judicial forums” and through appeal to legislators.)

44. *Id.* at 567 (quoting *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962)).

45. See Katherine V. W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration Under the Labor Law*, 61 UCLA L. REV. DISCOURSE 164, 173–77 (2013).

46. See, e.g., *Brady v. Nat’l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) (affirming that “a lawsuit filed in good faith by a group of employees to achieve more favorable terms or

A related question concerns whether individual employees can waive their right to engage in concerted activity by entering into a contract with their employer. The Supreme Court resolved this issue in *National Licorice Co. v. NLRB*.⁴⁷ The employment contract in that case contained a provision that violated “the employees’ rights to organize and bargain collectively guaranteed by §§ 7 and 8” of the NLRA.⁴⁸ The Court invalidated the provision and held that “employers cannot set at naught the [NLRA] by inducing their workmen to agree not to demand performance of the duties which it imposes.”⁴⁹ Similarly, the Court in *J.I. Case Co. v. NLRB* determined that employers cannot use individual employment contracts as a basis for waiving Section 7 rights.⁵⁰ It ultimately concluded that “[w]herever private contracts conflict with [the NLRA’s] functions, they obviously must yield or the [the NLRA] would be reduced to a futility.”⁵¹

As the preceding discussion suggests, the courts and the Board have long endorsed a policy of broad enforcement of Section 7 rights. This policy has been contested by recent Supreme Court decisions that have strengthened the right of companies to compel individual arbitration in consumer disputes. The following discussion will address the evolving federal law on arbitration, focusing primarily on the text, purpose, and application of the FAA.

B. The FAA and the Development of Private Dispute Resolution

Studies suggest that as of 2003, nearly one quarter of private-sector nonunion employees were subject to arbitration agreements.⁵² Despite the prevalence of arbitration today, throughout the nineteenth and early twentieth centuries, courts carefully scrutinized predispute arbitration agreements and often declined to enforce them.⁵³

conditions of employment is ‘concerted activity’ under § 7”); *Leviton Mfg. Co., Inc. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (declaring that “the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7, unless the employees acted in bad faith”).

47. 309 U.S. 350 (1940).

48. *Id.* at 360.

49. *Id.* at 364.

50. 321 U.S. 332, 339 (1944).

51. *Id.* at 337.

52. See Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL’Y J. 405, 410 (2007) (reporting that 22.7% of private nonunion employees were subject to arbitration in 2003).

53. See Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1140 (2011).

i. Text and Purpose of the FAA

In response to “widespread judicial hostility to arbitration agreements,”⁵⁴ Congress enacted the Federal Arbitration Act in 1925.⁵⁵ The drafters intended the FAA to establish procedural rules that would not affect the substantive rights of parties in a contractual dispute.⁵⁶ The main purpose of the law “was to make arbitration agreements as enforceable as other contracts, but not more so.”⁵⁷ Section 2 of the FAA declared that written arbitration provisions involving commercial or maritime matters “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁵⁸ If a contract provided that future disputes be exclusively resolved through arbitration, then under the Act, courts reviewing that contract were required to enforce the contract on its terms.⁵⁹

Congress intended the statute to govern disputes between merchants “presumed to be of approximately equal bargaining strength.”⁶⁰ Acknowledging union concerns that the law would compel arbitration in the employment context, the drafters of the FAA emphasized that it is “not intended that [the Act] shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it.”⁶¹ The legislative history of the FAA suggests that Congress did

54. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011).

55. Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16 (2012)).

56. H.R. REP. NO. 68–96, at 1 (1924); *Arbitration of Interstate Commercial Disputes: J. Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 37–38 (statement of Julius Henry Cohen, General Counsel for the New York State Chamber of Commerce).

57. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967); *see also* H.R. REP. NO. 68–96, at 1 (“An arbitration agreement is placed upon the same footing as other contracts.”).

58. 9 U.S.C. § 2 (2012).

59. *See* Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 772 (2012) (“A fundamental principle underlying the FAA is to respect freedom of contract.”).

60. Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 101, 106, 113 (2006) (arguing that the Supreme Court has engaged in “judicial lawmaking” in the last quarter century by overly extending the scope of the FAA in a manner that “reflects judicial policy preferences”).

61. *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Comm. on the Judiciary*, 67th Cong. 9 (1923) (statement of W.H.H. Piatt, chair of the American Bar Association Committee that drafted the bill).

not mean to create a system in which plaintiffs would be forced to arbitrate their claims on an individual basis.

ii. Application of the FAA in the Courts

Although the Supreme Court's interpretation of the FAA was initially narrow, in the late twentieth century, the Court began to expand the scope of the FAA. For example, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court decided to uphold a predispute arbitration clause.⁶² The case involved a claim brought under the Sherman Antitrust Act over a dispute arising from a franchise agreement that contained a mandatory arbitration provision.⁶³ Recognizing “[t]he ‘liberal federal policy favoring arbitration agreements,’ ” the Court decided to enforce the arbitration clause.⁶⁴ Nonetheless, the Court emphasized that a party compelled to arbitration “does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”⁶⁵ In doing so, the Court recognized that arbitration is merely a procedural device, which should not be used to deprive employees from effectively vindicating their substantive rights.

The Court in the 1991 case, *Gilmer v. Interstate/Johnson Lane*, further broadened the reach of the FAA when it concluded that the FAA required the arbitration of a claim brought under a federal employment discrimination statute.⁶⁶ In that case, an employee filed a claim against his former employer, alleging a violation of the Age Discrimination in Employment Act (ADEA).⁶⁷ The Court upheld the contract after finding that “neither the text nor the legislative history of the ADEA explicitly precludes arbitration.”⁶⁸ In addition, the Court rejected the employee's concerns over bias in arbitration proceedings, limited amount of discovery, lack of written opinions, inequality in bargaining power, and absence of class action relief.⁶⁹ Still, as in *Mitsubishi*, the Court acknowledged that

62. 473 U.S. 614, 615 (1985).

63. *Id.* at 619–20.

64. *Id.* at 625 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

65. *Id.* at 628.

66. 500 U.S. 20 (1991).

67. *Id.*

68. *Id.*

69. *See id.* at 30–33.

arbitration does not prevent employees from vindicating their statutory rights.⁷⁰

While the Supreme Court in *Gilmer* found that a claim under an employment discrimination statute can be subjected to compulsory arbitration,⁷¹ the Court in *Circuit City Stores, Inc. v. Adams* addressed whether and to what extent Section 1 of the FAA—which excludes “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce”—covers private sector employees.⁷² The key issue centered on the scope of the exempted “class of workers engaged in foreign or in interstate commerce.”⁷³ In resolving this issue, the Court could have read the exemption broadly to encompass most employment agreements or narrowly to exclude only contracts involving transportation workers.⁷⁴ It ultimately held that “the text of the FAA forecloses the construction of § 1 . . . which would exclude all employment contracts from the FAA.”⁷⁵ The Court reasoned that the preceding references to two specific categories of workers—“seamen” and “railroad employees”—suggest that Congress intended to limit the exemption to those workers engaged in transportation.⁷⁶ This decision brought a wide array of employment contracts under the scope of the FAA, which, in turn, made disputes arising from such contracts subject to arbitration.

The Supreme Court reinforced its commitment to enforcing arbitration agreements in the consumer context in *CompuCredit Corp. v. Greenwood*.⁷⁷ There, the Court considered whether a claim brought under the federal Consumer Repair Organization Act must be resolved in arbitration, as required by an arbitration clause of the consumer contract.⁷⁸ In the end, the Court adhered to the presumption that “the FAA requires the arbitration agreement to be enforced according to its terms.”⁷⁹ It further added that this presumption applies “even when the claims at issue are federal statutory claims, unless the FAA’s mandate has been ‘overridden by

70. *Id.* at 26 (quoting *Mitsubishi*, 473 U.S. at 628) (“By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute.”)

71. *Id.* at 26–27.

72. 532 U.S. 105, 105 (2001) (quoting FAA, 9 U.S.C. § 1 (1925)).

73. *Id.* at 109.

74. *See id.* at 114–18.

75. *Id.* at 119.

76. *Id.* at 121.

77. 132 S. Ct. 665, 673 (2012).

78. *Id.* at 668–73.

79. *Id.* at 673.

a contrary congressional command.’⁸⁰ Thus, barring a clear congressional statement to the contrary, courts were to ensure the enforcement of arbitration agreements according to their terms.

With regard to contracts that are silent on the issue of class arbitration, the Supreme Court ruled in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* that imposing class arbitration on parties who have not agreed to such a proceeding is inconsistent with the FAA.⁸¹ The Court began by acknowledging the basic principle “that arbitration ‘is a matter of consent, not coercion.’”⁸² Because “parties are ‘generally free to structure their arbitration agreements as they see fit,’”⁸³ and “may also specify *with whom* they choose to arbitrate,”⁸⁴ the Court reasoned that the absence of explicit contractual language on the subject of class arbitration indicates that the parties in this case did not consent to such a proceeding.⁸⁵ Ultimately, the Court concluded that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.”⁸⁶

These developments in the Supreme Court’s FAA jurisprudence reveal the growing ascendancy of arbitration in the employment context. A few general conclusions can be drawn in light of these key developments. First, federal statutory claims are subject to arbitration where parties have entered into predispute arbitration agreements, provided that parties are able to vindicate their substantive rights. Second, the FAA governs arbitration agreements involving most classes of employees, except for transportation workers. Third, arbitration agreements are generally enforceable unless Congress has clearly given pronouncements to the contrary. Finally, neither courts nor arbitrators can impose class arbitration on parties who have not explicitly agreed to it. As this judicial trend toward the broad enforcement of arbitration agreements empowers employers to use them to minimize their exposure to liability, it impedes nonunion employees from exercising their fundamental right to engage in collective action.

80. *Id.* at 669 (quoting *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

81. 559 U.S. 662, 687 (2010).

82. *Id.* at 664 (quoting *Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

83. *Id.* at 664 (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)).

84. *Id.* at 664 (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002)).

85. *Id.* at 664–65.

86. *Id.* at 664.

II. THE TENSION BETWEEN THE ENFORCEMENT OF CLASS WAIVERS
AND THE PROTECTION OF EMPLOYEES'
SUBSTANTIVE RIGHTS

The Supreme Court's broad enforcement of arbitration has given businesses added incentive to mandate private dispute resolution, as evidenced by the growing prevalence of predispute arbitration agreements.⁸⁷ Two recent decisions, *AT&T Mobility v. Concepcion*⁸⁸ and *American Express Co. v. Italian Colors Restaurant*,⁸⁹ have enlarged the scope of the FAA and enabled businesses to prevent consumers and employees from aggregating their claims. Against this backdrop of judicial support of arbitration, the NLRB's decision in *D.R. Horton* has reinforced protections for employees' right to collective action under the NLRA. Since the Board's ruling, four federal circuit courts⁹⁰ and numerous district courts⁹¹ have held that the FAA compels the enforcement of class waivers in employment contracts. And, most recently, the Fifth Circuit overturned *D.R. Horton* in December 2013.⁹²

This Part addresses the "showdown" between the courts and the NLRB over the enforceability of class waivers in employment contracts.⁹³ First, it analyzes the rulings in *Concepcion* and *Italian Colors*, which espouse the "liberal federal policy favoring arbitration."⁹⁴ Second, this Part examines the Board's latest effort to preserve the "concerted pursuit of workplace grievances."⁹⁵ Third, it considers the four circuit court decisions that have both adopted the Court's pro-arbitration stance and limited the Board's authority over labor disputes. Finally, this Part highlights the need for reconciling the FAA and the NLRA in a manner that conforms to the underlying purposes of the two statutes. This statutory tension carries far-reaching implications for the continuing relevance of the NLRA and for the ability of employees to vindicate their rights.

87. See Eisenberg, Miller & Sherwin, *supra* note 20, at 883 (revealing that 92.9% of firms incorporated arbitration clauses into their employment contracts); see also Colvin, *supra* note 52, at 408–11.

88. 131 S. Ct. 1740 (2011).

89. 133 S. Ct. 2304 (2013).

90. See discussion *infra* Part II.C.

91. For references to some of these cases, see *infra* note 138.

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

93. 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. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2406577##.

94. *Concepcion*, 131 S. Ct. at 1745 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

95. *D.R. Horton*, *supra* note 2, at *4.

A. *The Supreme Court Enforces Class Waivers in
Mandatory Arbitration Agreements*

In the 2011 case, *AT&T Mobility LLC v. Concepcion*, the Court upheld a class action waiver clause in a cell phone contract against a challenge that the waiver violated state contract law.⁹⁶ The case was brought by a pair of customers, the Concepcions, who filed a complaint against AT&T, alleging that its offer of a free phone to anyone who signed up for its service was fraudulent because the company charged a sales tax based on the phone's retail value.⁹⁷ In response, AT&T moved to compel arbitration, pursuant to the mandatory arbitration provision in the contract.⁹⁸ The Concepcions opposed the motion, contending that the arbitration agreement was unconscionable, and thus unenforceable, under California law because it precluded them from invoking class proceedings.⁹⁹ They argued that a finding of unconscionability falls under the saving clause in Section 2 of the FAA, which permits courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract."¹⁰⁰

In a 5-4 decision, the Supreme Court held that the FAA preempts the California judicial rule that barred enforcement of arbitration on grounds of unconscionability.¹⁰¹ Justice Scalia, writing for the majority, explained that the overarching purpose of the FAA "is to 'ensure that private arbitration agreements are enforced according to their terms.'" ¹⁰² Finding that "nothing in the [FAA] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives,"¹⁰³ Justice Scalia concluded that the provision mandating individual arbitration was valid and enforceable.¹⁰⁴ Although the Supreme Court broadly endorsed the validity of class waivers in arbitration agreements, it neglected to decide whether this holding extended to employment disputes

96. *Concepcion*, 131 S. Ct. at 1742-43.

97. *Id.* at 1744.

98. *Id.*

99. *Id.* at 1745.

100. *Id.* at 1746 (quoting 9 U.S.C. § 2. *See also* *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 855 (9th Cir. 2009), *rev'd sub nom. Concepcion*, 131 S. Ct. 1740 (2010) (invalidating the class action waiver in the cell phone contract because it was unconscionable).

101. *Concepcion*, 131 S. Ct. at 1747.

102. *Id.* at 1748 (quoting *Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) and *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 664 (2010)).

103. *Id.*

104. *See id.* at 1753.

or whether class waivers should be enforced when they prevent parties from effectively vindicating their rights.¹⁰⁵

The Supreme Court addressed the latter question in June 2013 when it decided *American Express Co. v. Italian Colors Restaurant*.¹⁰⁶ In that case, the Court enforced a class action waiver in a mandatory arbitration provision of an agreement between merchants and a major credit card company.¹⁰⁷ The merchants, suing in a class action, claimed that the credit card company violated the Sherman Antitrust Act by forcing an unlawful tying arrangement on them.¹⁰⁸ The company responded by filing a motion to compel individual arbitration under the FAA.¹⁰⁹ Prior to the dispute, the merchants had signed a contract requiring arbitration of all future disputes and a waiver precluding the parties from aggregating their claims.¹¹⁰ The plaintiffs contended that a judge-made exception to the FAA allows courts to invalidate a contractual waiver of class arbitration on the ground that the expense of individually arbitrating a claim under a federal statute exceeds the potential recovery.¹¹¹

As in *Concepcion*, Justice Scalia wrote the majority opinion. Relying on *CompuCredit*, Justice Scalia emphasized that claims alleging a violation in a federal statute are subject to the same conditions, “unless the FAA’s mandate has been ‘overridden by a contrary congressional command.’”¹¹² Upon finding no congressional intent that would require rejecting the class arbitration waiver, the Court upheld the class action waiver.¹¹³ In addition, the Court ruled that the effective-vindication doctrine does not constitute an adequate basis for refusing to enforce the arbitration agreement.¹¹⁴ Justice Scalia stated that “the fact that it is not worth the expense

105. For a review of recent developments in the law of class actions and a discussion of their potential implications, see Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 639–47 (2012).

106. See *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2304 (2013). For a thorough analysis of *Italian Colors*, see Case Note, *Class Action—Class Arbitration Waivers—American Express Co. v. Italian Colors Restaurant*, 127 HARV. L. REV. 278 (2013).

107. *Italian Colors*, 133 S. Ct. at 2306.

108. *Id.* at 2308. A tying arrangement is defined as “an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees he will not purchase the product from any other supplier.” *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5–6 (1958).

109. *Italian Colors*, 133 S. Ct. at 2308.

110. *Id.*

111. See *id.* at 2306.

112. *Id.* at 2306 (quoting *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 181 (2012)).

113. *Id.* at 2306, 2312.

114. *Id.* at 2310–11.

involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.¹¹⁵ By narrowing the effective-vindication exception to class waivers, this decision deters plaintiffs from seeking classwide relief and discourages them from exercising their statutory rights due to the high cost of arbitrating their claims individually.¹¹⁶

B. The NLRB Rules Class Waivers in Employment Arbitration Agreements Unenforceable

The Board has recently attempted to carve out an exception to the Supreme Court's general enforcement of predispute arbitration agreements. In *D.R. Horton*,¹¹⁷ the Board considered whether a home building company violates the NLRA when it requires its employees, as a condition of employment, to sign an agreement that compels individual arbitration of all employment-related disputes.¹¹⁸ A former employee, Michael Cuda, claimed that by misclassifying him as a supervisor, the company exempted him from the Fair Labor Standards Act (FLSA).¹¹⁹ Cuda initially sought to arbitrate his complaint along with a national class of former supervisors who claimed they had been similarly misclassified.¹²⁰ The company refused to arbitrate, citing the language of the mandatory arbitration agreement that precluded class arbitration.¹²¹ In response, Cuda filed an unfair labor practice charge before the NLRB, alleging that the employment contract interferes with his right under the NLRA to engage in collective action because it requires him to submit his claim to individual arbitration.¹²²

The Board agreed and provided three reasons to support its conclusion that the arbitration provision constituted an unfair labor

115. *Id.* at 2311 (emphasis in original).

116. *See id.* Italian Colors, 133 S. Ct. at 2307, 2310; *see also* Jerett Yan, Recent Case, *A Lunatic's Guide to Suing for \$30: Class Action Arbitration, the Federal Arbitration Act and Unconscionability after AT&T v. Concepcion*, 32 BERKELEY J. EMP. & LAB. L. 541, 552-53 (2011) (discussing how limiting the availability of class proceedings would effectively preclude consumers and employees from pursuing small dollar claims).

117. *See* *D.R. Horton*, *supra* note 2. For a thorough analysis of *D.R. Horton*, *see* Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013 (2013).

118. *D.R. Horton*, *supra* note 2, at *1-2.

119. *Id.* at *1; *see also* Fair Labor Standards Act, Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201-19 (2012)).

120. *D.R. Horton*, *supra* note 2, at *20.

121. *Id.* at *21.

122. *See id.* at *2.

practice.¹²³ First, it held that the mandatory arbitration agreement prohibited the exercise of substantive rights protected by Section 7 of the NLRA.¹²⁴ Quoting *Eastex*, the Board declared that “[i]t is well settled that ‘mutual aid or protection’ includes employees’ efforts to ‘improve terms or conditions of employment or otherwise improve their lot as employees through channels outside the employer-employee relationship,’ including administrative and judicial forums.¹²⁵ The Board determined that the employment contract in this case “clearly and expressly bars employees from exercising their substantive rights” by imposing on them the obligation “to refrain from bringing collective or class claims” either in court or in arbitration.¹²⁶

Second, the Board held that the employer violated Section 8(a)(1) by requiring employees to sign a binding arbitration agreement that precluded them from engaging in collective action.¹²⁷ The Board reflected on the broader concerns of federal labor policy and recognized that the NLRA expanded on the Norris-LaGuardia Act’s¹²⁸ prohibitions on “‘yellow-dog’-like” contracts, which were aimed at preventing employees from joining unions.¹²⁹ Consistent with the language and purpose of the Norris-LaGuardia Act, the Board reasoned that a predispute arbitration agreement imposed upon individual employees as a condition of employment cannot be enforced where it prohibits them from pursuing their claims collectively either in court or in arbitration.¹³⁰

Third, the Board found no conflict between the NLRA and the FAA.¹³¹ Even if the employment contract had said nothing about arbitration, the Board emphasized, it would equally violate the NLRA if it conditioned employment on an agreement to pursue claims in court solely on an individual basis.¹³² The Board then considered the Supreme Court’s ruling in *Gilmer*, where the Court enforced an agreement to arbitrate federal statutory claims, including employment claims, but made clear that “the agreement may

123. *See id.* at *16–17.

124. *See id.* at *2–5.

125. *Id.* at *2 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–66 (1978)).

126. *Id.* at *5.

127. *Id.* at *5–8. Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in” Section 7. *See* 29 U.S.C. § 158(a)(1) (2012).

128. 29 U.S.C. § 103 (2012) (banning “yellow-dog contracts,” in which the employee agrees, as a condition of employment, not to be a member of a labor union).

129. D.R. Horton, *supra* note 2, at *7–8.

130. *Id.* at *8.

131. *See id.* at *11–16.

132. *Id.* at 11.

not require a party ‘to forgo the substantive rights afforded by the statute.’”¹³³ Also, the Board noted that *Gilmer* involved an individual, rather than a class claim, and that the arbitration agreement in that case did not contain a class waiver.¹³⁴ Anticipating the objection that the Section 7 right to pursue collective action is merely procedural, the Board maintained that “[t]he right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA.”¹³⁵ For these reasons, the Board held that a ban on class proceedings in all forums abrogates employees’ fundamental rights under the NLRA.¹³⁶

C. Federal Courts Generally Enforce Class Waivers

Despite the NLRB’s attempt to preserve employees’ rights to seek collective redress of workplace grievances,¹³⁷ most federal courts have since ignored or rejected the Board’s rationale and have enforced class waivers in employment arbitration agreements.¹³⁸ Only one district court to date has applied *D.R. Horton* and refused to enforce the class arbitration waiver.¹³⁹ This Section will focus on four recent federal circuit court cases that deal with employment contracts containing class waivers, all of which have declared such agreements valid and enforceable.

In January 2013, the Eighth Circuit in *Owen v. Bristol Care, Inc.*, decided whether to allow a former employee to bring a class action

133. *Id.* at 12; see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991).

134. *D.R. Horton*, *supra* note 2, at *12.

135. *Id.* (emphasis in original).

136. *Id.*

137. See *id.*, at *2–4.

138. See, e.g., *Jasso v. Money Mart Express, Inc.*, 879 F. Supp. 2d 1038, 1048–49 (N.D. Cal. 2012) (holding that a class action waiver provision did not render an employment arbitration agreement unenforceable under California law); *Morvant v. P.F. Chang’s China Bistro, Inc.*, 870 F. Supp. 2d 831, 838–41 (N.D. Cal. 2012) (concluding that an arbitration agreement was neither procedurally nor substantively unconscionable, and thus not unenforceable, due to a class action waiver provision); *DeLock v. Securitas Sec. Servs. USA, Inc.*, 883 F. Supp.2d 784, 789–91 (E.D. Ark. 2012) (finding that a class action waiver in an employment contract was enforceable despite employee’s right under the NLRA to engage in collective action about workplace grievances). See also Michael D. Schwartz, Note, *A Substantive Right to Class Proceedings: The False Conflict Between the FAA and the NLRA*, 81 *FORDHAM L. REV.* 2945, 2973–77 (2013) (analyzing federal and state courts that have enforced class waivers in the employment setting since *D.R. Horton*).

139. *Herrington v. Waterstone Mortg. Corp.*, No. 11-cv-779-bbc, 2012 WL 1242318, *6–8 (W.D. Wis. Mar. 16, 2012) (invalidating a collective action waiver in an employment arbitration agreement); *id.* at *5 (“Particularly because defendant develops no argument that the Board has interpreted the NLRA incorrectly, I see no reason to question the Board’s judgment in this instance.”).

against a company, alleging violations of the FLSA.¹⁴⁰ Owen had signed a contract at the time of hiring, whereby she agreed to resolve all future claims in binding arbitration and to waive the right to bring claims on behalf of a class.¹⁴¹ She claimed that the passage of the NLRA “amounted to a congressional declaration that it was the ‘public policy of the United States’ . . . to protect workers’ rights to engage in concerted activities and that this declaration came ‘seven years after the passage of the FAA.’ ”¹⁴² Although the FAA was originally enacted in 1925, the court observed, it was reenacted in 1947—twelve years after the NLRA and nine years after the FLSA.¹⁴³

Owen also relied on the NLRB’s holding in *D.R. Horton* in asserting that “there is an inherent conflict between the FLSA and the FAA” and that class waivers infringe on rights protected by Section 7 of the NLRA.¹⁴⁴ But the court dismissed this argument, stressing it owed “no deference” to the Board’s “interpretation of Supreme Court precedent.”¹⁴⁵ Given the absence of any contrary congressional command from the FLSA that a right to pursue class claims overrides the FAA mandate in favor of arbitration, the court held that the mandatory arbitration agreement was enforceable.¹⁴⁶

Seven months later, in *Sutherland v. Ernst & Young, LLP*, the Second Circuit decided whether a class action waiver in an arbitration agreement may be invalidated where it eliminates the financial incentive to pursue statutory claims.¹⁴⁷ An accountant filed a class action, claiming that her former employer misclassified and excluded her from the FLSA’s overtime protections.¹⁴⁸ Sutherland had signed an agreement that mandated arbitration of all employment-related claims and that proscribed “any class or collective proceedings in the arbitration.”¹⁴⁹ The court began by finding no “contrary congressional command” under the FLSA that required it to reject the class arbitration waiver.¹⁵⁰ In addition, Sutherland argued the class waiver prevented her from vindicating her rights due

140. 702 F.3d 1050, 1051 (8th Cir. 2013).

141. *See id.*

142. *Id.* at 1053.

143. *Id.*

144. *Id.*

145. *Id.* at 1054.

146. *Id.* at 1055.

147. 726 F.3d 290, 292 (2nd Cir. 2013).

148. *Id.*

149. *Id.* at 294.

150. *Id.* at 296.

to the prohibitive cost of resolving her claims via individual arbitration.¹⁵¹ But the court, relying on *Italian Colors*, held that the “effective vindication doctrine” cannot be invoked to invalidate the class action waiver.¹⁵² Like the Eighth Circuit, the court notably refused to follow *D.R. Horton* because, in its view, the Board had encroached upon federal statutes unrelated to the NLRA, namely the FAA.¹⁵³

Within two weeks of the Second Circuit’s ruling, the Ninth Circuit in *Richards v. Ernst & Young, LLP* determined the arbitrability of state wage and hour claims, where the plaintiff alleged to have been prejudiced as a result of her former employer’s delay in asserting its right. *Ernst & Young, LLP* determined the arbitrability of state wage and hour claims where the plaintiff alleged to compel arbitration.¹⁵⁴ Richards, who had contractually agreed to exclusively resolve all future disputes in individual arbitration, claimed that “she was prejudiced because there was litigation on the merits, and, as a result, some of her claims were dismissed” by the district court.¹⁵⁵ But the court rejected this argument on the ground that the dismissal without prejudice of the wage and hour claims was not a decision on the merits.¹⁵⁶

In addition, Richards urged the court to consider the NLRB’s decision in *D.R. Horton* to deny enforcement of the mandatory arbitration provision.¹⁵⁷ The court, however, declined to do so, noting that “the only court of appeals, and the overwhelming number of district courts, to have considered the issue have determined that they should not defer to the NLRB’s decision in *D.R. Horton* because it conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the [FAA].”¹⁵⁸ With its decision, the Ninth Circuit repudiated *D.R. Horton* and reinforced the uniformity among federal courts in consistently enforcing class waivers in employment arbitration agreements.

Finally, on December of 2013, the Fifth Circuit reversed the Board’s decision in *D.R. Horton*, holding that the Board did not give proper weight to the FAA.¹⁵⁹ Although the court recognized that collective and class claims constitute protected concerted activity

151. *Id.* at 298.

152. *See id.* at 298–99.

153. *See id.* at 297 n.8.

154. 734 F.3d 871, 871 (9th Cir. 2013).

155. *Id.* at 873.

156. *Id.*

157. *See id.* at 873–74.

158. *Id.*

159. *D.R. Horton*, 737 F.3d at 345.

under Section 7 of the NLRA, it emphasized that the “use of class procedures . . . is not a substantive right.”¹⁶⁰ The court also noted that the arbitration agreement did not fall within the savings clause and that the NLRA does not contain an express congressional command to override the FAA.¹⁶¹ Accordingly, the court determined that the arbitration agreement was enforceable according to its terms.¹⁶² This ruling represents a major setback for nonunion employees, as it makes filing joint, class, or collective employment-related claims in any forum increasingly difficult.

*D. The Need for Reform: Preserving Section 7 Rights in
the Wake of Concepcion*

To date, the Supreme Court has not weighed in on *D.R. Horton*. It is difficult to predict whether the NLRB will try to appeal the Fifth Circuit’s decision, particularly after its petition for rehearing en banc was denied.¹⁶³ The Board probably will not want to pursue this case to the Supreme Court and will choose instead to adhere to its holding in *D.R. Horton* until the high court resolves the matter. But even if the Board were to file a petition for appeal to the Supreme Court, it is doubtful the Court will grant certiorari anytime soon. This is especially so given the consistency and uniformity among federal courts in broadly recognizing and enforcing mandatory arbitration agreements.

The courts’ liberal interpretation of the FAA encourages businesses to draft employment contracts in a way that insulates them from potential liability.¹⁶⁴ Although *Concepcion* and *Italian Colors* both involved consumer contracts,¹⁶⁵ they have given employers added incentive to formulate agreements that either explicitly or

160. *Id.* at 357.

161. *Id.* at 358–60.

162. *Id.* at 362.

163. Several commentators covering the Fifth Circuit’s denial of the NLRB petition have speculated about the chances of further appeal to the Supreme Court. *See, e.g.*, Keith J. Brodie, *NLRB DR Horton Rehearing Denied*, LEXOLOGY, Apr.17, 2014, <http://www.lexology.com/library/detail.aspx?g=c0d01a65-23f7-4a45-b6f2-a9d4113e7eb4>; Ronald J. Kramer, *Rejected: Fifth Circuit Denied NLRB Petition for Rehearing En Banc in D.R. Horton*, LEXOLOGY, Apr. 16, 2014, <http://www.lexology.com/library/detail.aspx?g=9f36c866-dc7e-4b41-9696-11019790d29b>.

164. *See* Gilles & Friedman, *supra* note 105 at 627 (noting how the broad holding in *Concepcion* makes it likely that most arbitration agreements will be upheld).

165. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (cell phone contract); *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (credit card acceptance agreement)

implicitly preclude employees from invoking class proceedings.¹⁶⁶ Now that the Supreme Court has rejected the vindication of rights doctrine,¹⁶⁷ employees will largely be unable to pursue small-dollar claims, given the prohibitive expense of arbitrating on an individual basis.¹⁶⁸

Many commentators have pointed to evidence of bias in arbitration proceedings.¹⁶⁹ Because most employees are unfamiliar with arbitration, they are at a disadvantage relative to employers who may use the same arbitration provider repeatedly. Arbitration thus exhibits a “repeat player effect,” which allows employers and their attorneys to draw on the skill and expertise they have acquired in prior cases in developing a legal strategy, which they could use in defending against claims brought by their employees who lack similar sophistication.¹⁷⁰

This is particularly so when employers have contractually required employees to resolve common question claims in individual arbitration. There, the stakes of the employer and each employee differ dramatically, “as do their corresponding incentives to invest in making their cases on common questions.”¹⁷¹ While each plaintiff invests up to the expected recovery on his or her particular claims, the defendant invests in a way that “minimizes its classwide exposure to the costs of liability and litigation in the aggregate, not

166. See Rebecca Wolf, Comment, “To a Hammer Everything Looks Like a Nail”: The Supreme Court’s Misapplication of the Vindication of Rights Doctrine, 21 AM. U.J. GENDER SOC. POL’Y & L. 951, 992–93 (2013).

167. *Id.* at 993; see also *Italian Colors*, 133 S. Ct. at 2310–11.

168. See Wolf, *supra* note 166, at 993–94. For a detailed discussion of the costs of individually arbitrating employment disputes, see Michelle Eviston & Richard Bales, *Capping the Costs of Consumer and Employment Arbitration*, 42 U. TOL. L. REV. 903, 909–10.

[The American Arbitration Association (“AAA”)] uses the Commercial Fee Schedule for disputes arising out of individually-negotiated employment agreements and contracts. Here, however, the AAA does not provide any caps for small claims like it does for consumer disputes. Thus, if an employee sues his or her employer alleging a Title VII violation and seeking \$300,000 in actual damages, he or she would owe a \$2,800 filing fee and a \$1,250 case service fee.

Id. at 910. See also Christopher R. Drahozal, *Arbitration Costs and Contingency Fee Contracts*, 59 VAND. L. REV. 727, 736–42 (2006) (examining the cost structure of arbitration, as compared to litigation).

169. See, e.g., Lisa Bingham, *Unequal Bargaining Power: An Alternative Account for the Repeat Player Effect in Employment Arbitration*, PROCEEDINGS OF THE FIFTIETH ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION, Chicago, Ill., Jan. 3-5, 1998, at *35-37; David Korn & David Rosenberg, *Concepcion’s Pro-Defendant Biasing of the Arbitration Process: The Class Counsel Solution*, 46 U. MICH. J.L. REFORM 1151, 1158–70 (2013).

170. See Bingham, *supra* note 169, at *40.

171. Korn & Rosenberg, *supra* note 169, at 1153.

for any particular claim.”¹⁷² The resulting “asymmetry in stakes between the single-shot plaintiff and the repeat-player defendant” confers on the defendant a superior bargaining position relative to the plaintiff, skewing the outcome of individual arbitration in its favor.¹⁷³ Individual employment arbitration tends to inure to the benefit of employers—the repeat players—because arbitration providers have a strong incentive to rule in their favor in order to retain their business.¹⁷⁴ This systemic bias manifests itself particularly in the nonunion context, where individual employees cannot avail themselves of the protections provided by the collective bargaining agreement. In labor arbitration, by contrast, the union is typically a repeat player, so the bias in favor of the employer is offset by the bias in favor of the union.

In spite of the generally negative response to *D.R. Horton* by federal courts and the questions raised by *Concepcion* and *Italian Colors*, the enforceability of class waivers in predispute arbitration agreements remains a hotly contested issue. A number of NLRB administrative law judges (“ALJs”) have applied *D.R. Horton* to invalidate class action waivers, and accordingly, have struck down mandatory arbitration agreements that contain such waivers on the ground that they violate the NLRA. For example, on August 29, 2013, an ALJ found that an individual arbitration agreement was unlawful under *D.R. Horton*.¹⁷⁵

The company argued that *D.R. Horton* is void because the Board lacked a quorum when it issued the decision and, alternatively, that it was wrongly decided as evident from its poor reception among federal circuit and district courts.¹⁷⁶ But in a footnote, the ALJ dismissed those claims, affirming that it is “bound by Board precedent unless and until it is reversed by the Board itself or the Supreme Court.”¹⁷⁷ Prior to that decision, on August 19, 2013, another NLRB ALJ similarly rejected arguments concerning the validity of *D.R. Horton*.¹⁷⁸ The company in that case challenged *D.R. Horton* on the basis that it is inconsistent with the FAA and Supreme Court precedent.¹⁷⁹ Acknowledging that it “is undeniable that increasingly the

172. *Id.* at 1154.

173. Samuel Issacharoff, *Assembling Class Actions*, 90 WASH. U. L. REV. 699, 710 (2013).

174. Korn & Rosenberg, *supra* note 169 at 1159-61.

175. *Gamestop, Corp.*, Case 20-CA-080487, 2013 WL 4648418, at *10 (N.L.R.B. Div. of Judges, Aug. 29, 2013).

176. *See id.* at *10 n.3.

177. *Id.*

178. *Cellular Sales of Mo., LLC*, Case 14-CA-094714, 2013 WL 4427452, at *3 (N.L.R.B. Div. of Judges Aug. 19, 2013).

179. *See id.* at *5.

Supreme Court has shown great deference to enforcement of arbitration agreements,” the ALJ ultimately concluded that “the Supreme Court does not expressly overrule the finding in *D.R. Horton*.”¹⁸⁰ Given the widespread discordance between the NLRB and most federal courts about the continuing validity of *D.R. Horton*, the issue is expected to eventually make its way to the Supreme Court.¹⁸¹

As the practice of mandating individual arbitration becomes more prevalent, employees will face greater hurdles in accessing class proceedings—a result which would have dire consequences for employees seeking to vindicate their fundamental rights under the NLRA.¹⁸² To ensure that the right to collective action is not eviscerated, Congress must recognize the urgency of restoring the equality of bargaining power that the NLRA set out to accomplish, and it must respond accordingly by taking legislative action.

III. AVENUES FOR REFORM: THE FUTURE VIABILITY OF THE RIGHT TO COLLECTIVE LEGAL ACTION

The Fifth Circuit’s reversal of *D.R. Horton* and the Supreme Court’s FAA arbitration jurisprudence prompt grave concerns about the plausibility of reform through the courts. This judicial trend further highlights the urgency of a legislative solution to protect the rights of employees from being foreclosed by arbitration agreements containing class waivers. Congress, in response to public pressure, has started to consider proposals to amend the FAA and the rules governing arbitration. Most prominently, the Arbitration Fairness Act (AFA) was introduced for the first time in 2007 in response to Supreme Court decisions expansively interpreting the FAA.¹⁸³ Reactions to this measure have been mixed. Although some commentators have extolled the merits of this proposed reform,¹⁸⁴

180. *Id.* at *6.

181. See John Lewis & Todd A. Dawson, *Fifth Circuit Rejects NLRB’s D.R. Horton Decision—Too Soon For Champagne?*, MONDAQ, Dec. 9, 2013, <http://www.mondaq.com/unitedstates/x/279886/employment+litigation+%20tribunals/Fifth+Circuit+Rejects+NLRBs+DR+Horton+Decision+Too+Soon+For+Champagne>.

182. Yan, *supra* note 116, at 551–52.

183. Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007). “[N]o predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.” Arbitration Fairness Act of 2013, S. 878, 113th Cong. § 402 (2013).

184. See Richard M. Alderman, *Why We Really Need the Arbitration Fairness Act: It’s All About the Separation of Powers*, 12 J. CONSUMER & COM. L. 151, 157 (2009) (arguing that the AFA would restore consumers’ right to sue and should therefore be enacted by Congress).

others have expressed some concern that either it goes too far¹⁸⁵ or not far enough.¹⁸⁶

This Part will explore the AFA—which would essentially abolish compulsory arbitration in most contexts—and will analyze its benefits and drawbacks. In addition, this Part will highlight the critical importance of enacting statutory reform that codifies the NLRB’s decision in *D.R. Horton*. This proposed legislation would go a long way in restoring employees’ Section 7 rights to engage in concerted activity while at the same time preserving the advantages of speed, cost, and accessibility that individual arbitration provides. Such a law would enable employees to bring joint, or collective, claims against their employers in an arbitral or judicial forum, thereby giving them the opportunity to effectively vindicate their statutory rights. Finally, this Part will attempt to foresee the continuing relevance of mandatory employment arbitration, with the aim of forecasting the future of concerted activity in the years to come.

A. Existing Proposal for Reform: The Arbitration Fairness Act

In response to a series of judicial decisions that were seen to erode protections for consumers and employees, Senator Al Franken in 2013 put forth the most recent version of the AFA, which declares that “no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer, franchise or civil rights dispute.”¹⁸⁷ This bill has drawn considerable support in the Senate, yet it has so far been unable to obtain the requisite number of votes to get past committee.¹⁸⁸

185. See, e.g., Eviston & Bales, *supra* note 169 at 906–07 (arguing that the AFA attempts to address legitimate concerns relating to private arbitration but does little to consider the high costs of making arbitration optional); Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L.J. 289, 311–14 (2012) (arguing that the total prohibition of employer-imposed mandatory arbitration will thwart the ability of employees to access a forum in which to adjudicate their claims); Miles B. Farmer, Note, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2362–63 (2012) (arguing that the AFA would disproportionately impose costs on companies and on the judicial system, introduce transaction costs, and undermine the efficiency advantage that arbitration provides).

186. See Joshua T. Mandelbaum, Note, *Stuck in a Bind: Can the Arbitration Fairness Act Solve the Problems of Mandatory Binding Arbitration in the Consumer Context?*, 94 IOWA L. REV. 1075, 1100–02 (2009).

187. Arbitration Fairness Act of 2013, S. 878, 113th Cong. § 402 (2013); Arbitration Fairness Act of 2013, H.R. 1844, 113th Cong. § 402(2013).

188. See Bill Summary & Status: 113th Congress (2013-2014): S.878 CRS Summary (Libr. of Congress), <http://thomas.loc.gov/cgi-bin/query/z?c113:S.878>: (last visited Feb. 4, 2014). As of December 17, 2013, the AFA has 24 cosponsors in the Senate.

The AFA has garnered support from those who seek an end to predispute arbitration both on empirical and egalitarian grounds.¹⁸⁹ Proponents argue that voluntary, post-dispute arbitration agreements are fairer to employees than binding predispute arbitration agreements, particularly where the party with a stronger bargaining position (typically the employer) exclusively determines whether to impose a mandatory arbitration regime.¹⁹⁰ Predispute agreements, on the one hand, tend to be executed when employees feel compelled to sign in order to obtain or maintain their jobs.¹⁹¹ On the other hand, post-dispute agreements are more likely to be voluntary in the sense that they take place when employees can make a more informed decision about the merits and drawbacks of arbitration as compared to litigation.¹⁹²

Yet in spite of those who favor making arbitration clauses unenforceable, a number of observers note that the AFA fails to address several of the problems endemic to the existing mandatory arbitration regime and would continue to allow companies to take advantage of consumers and employees.¹⁹³ The AFA has also been criticized for not dealing with the significant costs of arbitration and doing little to confront the problems of limited discovery or biased arbitrators.¹⁹⁴ Many commentators believe that the AFA proposes a broad array of changes that would effectively nullify the benefits of arbitration.¹⁹⁵ According to Theodore St. Antoine, the AFA “brings a hammer to bear on mandatory arbitration when the need is for a scalpel.”¹⁹⁶ Such critics refer to win rates in employment arbitration compared to those in litigation as a basis for contending that mandatory arbitration not only can be favorable to individual employees but also is often “their only feasible option.”¹⁹⁷

189. See, e.g., David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1331 (2009); Jean R. Sternlight, *Introduction: Dreaming About Arbitration Reform*, 8 NEV. L.J. 1, 3 (2007).

190. See Schwartz, *supra* note 189, at 1258–59.

191. See *id.*

192. Theodore J. St. Antoine, *Mandatory Employment Arbitration: Keeping it Fair, Keeping it Lawful*, 60 CASE W. RES. L. REV. 629, 635 (2010).

193. See Mandelbaum, *supra* note 186, at 1100–02.

194. See *id.*

195. See George Padis, Note, *Arbitration Under Siege: Reforming Consumer and Employment Arbitration and Class Actions*, 91 TEX. L. REV. 665, 669 (arguing that the AFA would effectively cancel the practical advantages of engaging in arbitration by rendering arbitration clauses nonbinding and unenforceable);

196. St. Antoine, *supra* note 192, at 644. (“Total prohibition of pre-dispute agreements to arbitrate . . . would pose a major obstacle to the real-life fulfillment of the purposes of antidiscrimination legislation for many, if not most, of the intended beneficiaries.”).

197. *Id.* at 640.

The AFA promises comprehensive reform that aims to achieve a more balanced system of arbitration, where the disadvantages fall disproportionately on various classes of plaintiffs. But in a Congress dominated by powerful special interest groups, such a broad and far-reaching proposal will likely fail to obtain substantial political support. A more narrowly-tailored approach to arbitration reform that focuses on a particular class of plaintiffs—in this case, nonunion employees—will not only be more politically feasible, but also more sensitive to concerns over preserving the advantages of arbitration.

Yet the pitfalls of the AFA go beyond the practical and normative challenges that stand in the way of its passage. The AFA also lacks strong legal underpinnings. By invalidating predispute arbitration agreements that require arbitration of antitrust, civil rights, consumer, and employment disputes, this proposed law encroaches on a host of federal statutes. Even if the AFA were enacted into law, it is foreseeable that it will face numerous challenges in the courts, which have tended to view arbitration as a favorable means of resolving disputes.

B. Amending the FAA to Address the Problem of Class Waivers

This Note proposes that Congress formulate an amendment to the FAA that invalidates employment arbitration agreements containing class waivers, where such waivers deny employees their substantive right to engage in concerted activity. Unlike the AFA, which would largely abolish predispute arbitration agreements in antitrust, civil rights, consumer, and employment disputes,¹⁹⁸ this reform is narrowly tailored to the goal of safeguarding specific rights under federal labor law. It would not require employers to depart from the common practice of mandating individual arbitration of all claims arising during the course of work.¹⁹⁹ Nor would it apply to a broad array of disputes and potentially infringe on a number of federal statutes.

Rather, this proposal calls for a statutory reform limited to the employment context. Such a reform would render class waivers in employment contracts unenforceable when they force nonunion

198. Arbitration Fairness Act of 2013, S. 878, 113th Cong. § 402(a) (2013). See also Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 458–59 (2011); Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267, 267–68 (2008); Malin, *supra* note 186 at 311–14.

199. See Eisenberg, Miller & Sherwin, *supra* note 20, at 883.

employees to give up their right to file joint or collective claims *both* in court *and* in arbitration.

i. A Proposal to Rescue *Horton*

This proposed amendment to the FAA would resuscitate the Board's holdings in *D.R. Horton*. Drawing on the basic structure of the AFA, this amendment would add a fourth chapter to the FAA entitled "Arbitration of Employment Disputes," which would provide that no predispute arbitration agreement shall be valid or enforceable if the following two conditions are met: (1) such agreement requires arbitration of an employment dispute, and (2) such agreement contains a waiver precluding parties from engaging in any class proceeding, either in an arbitral or judicial forum. These two conditions are essential to limit the scope of the amendment to cases in the employment context where employees are forced to accept class waiver provisions in mandatory arbitration agreements.

An amendment to the FAA would undoubtedly have significant implications, particularly for nonunion employees who often cannot access a negotiated grievance procedure or rely on representatives to bring claims on their behalf. To avoid any undue interference with union-management relations, this amendment would not apply to any arbitration provision in a collective bargaining agreement. Although this proposal would leave unionized workplaces largely unaffected, it would nonetheless secure to nonunion employees some of the basic protections afforded to employees under a collective bargaining regime. Allowing employees to seek class adjudication of claims before a court or arbitrator will help sustain a central feature of national labor policy: the right to seek collective legal redress of workplace grievances.²⁰⁰ That does not mean that this proposal would invalidate, or render unenforceable, all mandatory arbitration agreements in the employment context that contain class waivers. Rather, it would mean that such agreements cannot require employees to refrain from bringing collective claims in any forum. It would ensure, in other words, that employees are allowed to aggregate their claims in court or arbitration.

200. D.R. Horton, *supra* note 2, at *8–9 (discussing that the NLRA protects employees' ability to pursue workplace grievances collectively through litigation or in arbitration); *see also* Eastex, Inc. v. NLRB, 437 U.S. 556, 566 (1978) (noting that the NLRA "protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums").

By permitting plaintiffs to pursue a collective legal remedy, this statutory amendment would help reconcile the NLRA and the FAA. It would not bar employers from requiring employees to sign mandatory arbitration clauses and forgo access to a judicial forum. Neither Section 7 nor *D.R. Horton* necessarily guarantees employees access to a trial where they can resolve their employment-related claims.²⁰¹ As long as class arbitration is a viable option and genuine substitute for class action litigation, employers would be able to continue enforcing predispute arbitration agreements. Moreover, the proposed amendment would not interfere with the FAA's mandate to arbitrate contractual disputes nor would it flout the Supreme Court's arbitration jurisprudence as it relates to the employment context.²⁰² It would only codify what the case law supports—that arbitration agreements cannot be interpreted to abridge the substantive rights of employees under the NLRA.²⁰³ As has been emphasized throughout, foremost among these rights is the collective redress of workplace grievances.

ii. Justifications and Potential Criticisms of the Proposed Amendment

It is likely that this proposal will elicit some strong objections. Critics of this proposal may focus on the potentially adverse impact it will bear on employers. In the event that this reform is introduced in Congress, businesses across the country would likely try to prevent its passage. They would accordingly direct their lobbying efforts to prevent it from gaining political support and block it from passing to the floor of either house, as they have achieved with the AFA.²⁰⁴ But assuming the bill is enacted into law, companies would continue to mount obstacles to avoid being held accountable by their employees. After all, it is highly unlikely that management

201. *D.R. Horton*, *supra* note 2, at *17 (noting that “arbitration has become a central pillar of Federal labor relations policy” and explaining that its “holding rests not 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.”).

202. *See, e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (enforcing individual employees' agreements to arbitrate claims under the ADEA against their employer).

203. *Id.* at 26 (expressing the principle that arbitration clauses may not require a party to “forgo the substantive rights afforded by [a] statute”).

204. David Lazarus, *Bill Aims to Restore Consumers' Right to Sue*, LOS ANGELES TIMES (Oct. 28, 2011), <http://articles.latimes.com/2011/oct/18/business/la-fi-lazarus-20111018>. Arbitration Fairness Act of 2013, S. 878, 113th Cong. (1st Sess. 2013) (referring to the Committee on the Judiciary); H.R. 1844, 113th Cong. (1st Sess. 2013) (referring to the Committee on the Judiciary).

would support making arbitration truly voluntary, either before or after the dispute arises.²⁰⁵ A number of employment law scholars have written extensively on the pro-management incentives offered by predispute arbitration agreements, giving reason to think that employers would resist efforts to make post-dispute arbitration an option for resolving workplace grievances. While this suggested reform will likely face stern opposition from industry groups before and after its passage, it is probable that it will also generate support from pro-labor and consumer advocacy groups that stand to benefit from legislation that ends the practice of including class waivers in predispute binding arbitration clauses.²⁰⁶

Additionally, businesses may decide to abandon arbitration entirely if employees had the opportunity to bring their claims collectively in arbitration. This may well be a realistic possibility, especially for employers that have sought to avoid defending against class claims by attaching class waivers in predispute individual arbitration agreements. The abandonment of arbitration may not be desirable for employees, many of whom would find it more costly and time-consuming to pursue their claims in court.²⁰⁷ But it is doubtful that employers will universally discontinue their practice of requiring employees to agree to arbitration as a condition of employment. Arbitration procedures, moreover, are relatively flexible and can be structured to allow collective adjudication of employment-related claims in a forum that is generally more efficient and informal than litigation.²⁰⁸

205. E.g., Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 IND. L.J. 83, 92 (2001) (arguing that, for employers, “the sensible strategy is to agree to arbitrate only if everything can be included, and that almost necessarily means an agreement before any dispute arises”); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. DISP. RESOL. 559, 567 (2001) (explaining that “postdispute arbitration, in all but the rarest cases, will not be offered by one party or accepted by the other”).

206. A host of advocacy organizations have expressed their support of the AFA, who would likely back the more limited reform I propose. For a letter to Members of the House Committee on the Judiciary signed by these organizations, see *Consumer, Labor, and Civil Rights Groups Support the Arbitration Fairness Act*, NATIONAL CONSUMER LAW CENTER (Jul. 26, 2010), <http://www.nclc.org/images/pdf/arbitration/letter-afa-support-7-26-10.pdf>.

207. John B. O’Keefe, Note, *Preserving Collective Rights in Employment Arbitration*, 91 VA. L. REV. 823, 838–39 (2005).

208. The American Arbitration Association (“AAA”) issued Supplementary Rules for Class Arbitration following the Supreme Court decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). These rules govern proceedings brought as class arbitrations. See *AAA Policy on Class Arbitration*, AMERICAN ARBITRATION ASSOCIATION (Jul. 14, 2005), available at http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003840. See also *Supplementary Rules for Class Arbitrations*, AMERICAN ARBITRATION ASSOCIATION (Oct. 8, 2003), available at https://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004129.pdf.

Critics may also contend that statutory reform is premature and insist on pursuing further judicial review. But while the Fifth Circuit's reversal of *D.R. Horton* has been hailed as a "win for businesses,"²⁰⁹ the Board may choose not to acquiesce and continue to invalidate certain class waivers in mandatory arbitration agreements until the Supreme Court rules on the issue. Likewise, the Fifth Circuit's ruling will probably not affect future decisions of NLRB administrative law judges, who will probably apply the Board's reasoning and reach similar conclusions. Although the Fifth Circuit's decision would perhaps be binding on district courts in that jurisdiction, it is possible that federal courts in other circuits may decline to take the same approach. Even though this particular ruling may not signal the death knell for collective legal action in workplace disputes, it nevertheless undercuts the Board's authority over the interpretation of the NLRA, and it chips away at the capacity of employees to vindicate their statutory rights. Legislative action is therefore necessary not only to reconcile the FAA and the NLRA but also to restore the substantive right to class proceedings.

Following *Concepcion*, the law governing class actions and class arbitration has been steadily shaped according to the interests of corporate defendants who benefit from strong judicial enforcement of individual arbitration. The Supreme Court has in recent years been reluctant to acknowledge the tension between federal statutory rights (e.g., to concerted activity) and the FAA's mandate to arbitrate claims.²¹⁰ Congressional action must therefore be deliberate and explicit in order to permit plaintiffs to effectively vindicate their statutory rights. Such action must also be appropriately tailored to the goal of providing employees with the opportunity to aggregate their claims (in court or in arbitration) while not unduly restricting the ability of employers to draft predispute arbitration agreements.

Overall, however, the benefits of the reform outweigh any potential concerns. This suggested reform would preserve employee protections under the NLRA and strengthen the legitimacy of the NLRB in resolving labor disputes. It would restore the recognition that "collective *legal action*" is the "core substantive right" protected by national labor law.²¹¹ Preserving this right is especially important

209. The Associated Press, *Court Blocks Labor Board on Lawsuits*, N.Y. TIMES (Dec. 3, 2013), http://www.nytimes.com/2013/12/04/business/court-blocks-labor-board-on-lawsuits.html?_r=0.

210. See Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 781-91 (2012)

211. *D.R. Horton*, *supra* note 2, at *12.

to nonunion employees, who make up the vast majority of the private-sector workforce. Unlike unionized employees who can avail themselves of the procedures governing labor arbitration, these individual employees do not enjoy the protections afforded by collective bargaining agreements, yet they are still pressured by their employers to relinquish their right to collective action.²¹² Given the Supreme Court's liberal enforcement of the FAA, this amendment would ensure that national labor policy is not displaced by the Court's recent arbitration jurisprudence.

CONCLUSION

The Supreme Court's liberal enforcement of predispute arbitration agreements, coupled with the Fifth Circuit's reversal of *D.R. Horton*, highlights the pressing need for congressional action aimed at safeguarding the substantive rights of private sector employees under Section 7 of the NLRA. An amendment to the FAA prohibiting class waivers in employment disputes will lead future courts to bar the enforcement of mandatory arbitration agreements that unduly constrain the ability of employees to aggregate their claims. It will, in turn, discourage employers from drafting contracts that compel employees to resolve future claims in individual arbitration. Finally, this amendment will strengthen the authority of the NLRB, permitting it to carry out its statutory duty to protect employees' right to concerted activity. By enabling employees to vindicate their substantive rights, this proposed amendment will help restore one of the chief purposes of the NLRA: to promote equal bargaining power in the workplace.

What is urgently needed is congressional action to preserve the right to collective action in employment disputes. Legislators would do well to heed the words of the trade unionist, Samuel Gompers: "Do I believe in arbitration? I do. But not in arbitration between the lion and the lamb, in which the lamb is in the morning found inside the lion."²¹³ Congress should reform the FAA to ensure that

212. Patricia Lynch, Barbara Crutchfield George & Mary Jane Dundas, *Employment Arbitration Agreements in the Non-Union Workplace: Failure to Meet Minimal Standards of Fairness?*, CAL. STATE UNIV., NORTHRIDGE, available at <http://www.csun.edu/~bz51361/elq/elq1.pdf>.

213. The Samuel Gompers Papers, SG Quotations, UNIV. OF MD., available at <http://www.gompers.umd.edu/quotes.htm> (collection of quotations by Samuel Gompers). The Samuel Gompers Papers, a project at the University of Maryland, "collects, annotates, and makes available primary sources of American labor history." The Samuel Gompers Papers, UNIV. OF MD., available at <http://www.gompers.umd.edu/project.htm>). Quote originally appeared in the ROCKY MOUNTAIN NEWS on Feb. 10, 1888.

the arbitration of workplace grievances be carried out between equals and to protect the substantive rights of employees from being swallowed up by the strategic interests of their employers.

