

2017

Tragedy of the Commonality: A Substantive Right to Collective Action in Employment Disputes

Spencer Stephens

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/elj>

Recommended Citation

Spencer Stephens, *Tragedy of the Commonality: A Substantive Right to Collective Action in Employment Disputes*, 67 Emory L. J. 157 (2017).

Available at: <https://scholarlycommons.law.emory.edu/elj/vol67/iss1/4>

This Comment is brought to you for free and open access by the Journals at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory Law Journal by an authorized editor of Emory Law Scholarly Commons. For more information, please contact law-scholarly-commons@emory.edu.

TRAGEDY OF THE COMMONALITY: A SUBSTANTIVE RIGHT TO COLLECTIVE ACTION IN EMPLOYMENT DISPUTES[†]

ABSTRACT

A fundamental aspect of many workers' daily lives involves joining coworkers in a common dispute to alter the circumstances of their employment. This ability to collectively overcome repressive employment practices and advocate for workplace improvements is derived from the substantive protections afforded in the National Labor Relations Act (NLRA). In recent years, employees' collective rights have come under attack from employers shielding themselves from liability by prohibiting all forms of collective action in individual arbitration. In addition, the Supreme Court has adopted a hostile position toward invalidating arbitration agreements, irrespective of the substantive rights they restrict. This combination threatens employees' fundamental rights and may radically change the foundation of employment relationships. This threat stems from the perceived tension between employment rights guaranteed by the NLRA and the enforcement of arbitration agreements under the Federal Arbitration Act (FAA). Courts across the nation have been thrust into the unenviable position of resolving this conflict by choosing one over the other.

This Comment argues that the NLRA and FAA do not inherently conflict and can be harmonized through the application of the effective vindication exception. This exception, a Supreme Court doctrine, provides the optimal solution by protecting necessary employment rights while favoring the liberal enforcement of legitimate arbitration agreements. This Comment concludes that the Supreme Court should adopt the effective vindication exception to invalidate individual arbitration agreements that prohibit employees from utilizing any form of collective action in an employment dispute.

[†] This Comment received the 2016 Mary Laura "Chee" Davis Award for Writing Excellence.

INTRODUCTION	159
I. BACKGROUND OF CONGRESSIONAL ACTION	161
A. <i>The National Labor Relations Act</i>	162
B. <i>The Federal Arbitration Act</i>	164
II. THE HISTORY OF COLLECTIVE ACTION WAIVERS	166
A. <i>Supreme Court Authority</i>	167
1. <i>Hostility in the Foundational Era</i>	167
2. <i>The Creation of the Effective Vindication Exception</i>	168
3. <i>Rigorous Enforcement by the Modern Court</i>	169
B. <i>The Position of the National Labor Relations Board</i>	173
C. <i>Rejection by the Circuit Courts</i>	175
III. THE CIRCUIT SPLIT: <i>LEWIS V. EPIC SYSTEMS CORP.</i>	177
A. <i>Collective Action as Concerted Activity</i>	177
B. <i>Reconciling the National Labor Relations Act and Federal Arbitration Act</i>	179
C. <i>The Courts React: Acceptance and Rejection</i>	181
IV. A SUBSTANTIVE RIGHT TO COLLECTIVE ACTION AND THE EFFECTIVE VINDICATION EXCEPTION	184
A. <i>Protection of Collective Action Under the National Labor Relations Act</i>	185
B. <i>Harmonizing the National Labor Relations Act and Federal Arbitration Act Through the Effective Vindication Exception ...</i>	186
1. <i>Application of the Effective Vindication Exception to Employment Contracts</i>	187
2. <i>Distinguishing AT&T Mobility and Italian Colors</i>	189
3. <i>The Affirmative Opt-Out Clause</i>	192
C. <i>Possible Implications for Employers and Employees</i>	194
CONCLUSION	195

INTRODUCTION

Labor law is in the midst of a rapid transformation.¹ Stemming from the rise of right-to-work laws and the decline in representation by formalized unions, employees are increasingly dependent on individual protections afforded by federal law.² During this shift, economic inequality has increased between employers and employees.³ Furthermore, workers continue to lose influence not only in their individual workplaces, but also at the legislative policymaking level.⁴ Employers and businesses have capitalized on this climate by expanding the use of mandatory, individual arbitration agreements to shield themselves from collective liability.⁵ The Supreme Court memorably endorsed the use of this arbitration tactic in the interstate commercial sphere by stating, “States cannot require a procedure that is inconsistent with [arbitration], even if it is desirable for unrelated reasons.”⁶ Modern courts facing arbitration agreements, irrespective of conflicting statutory rights, generally feel compelled to enforce them.⁷

The Seventh Circuit in *Lewis v. Epic Systems Corp.* rebuffed the escalating trend of individual arbitration agreements restricting employment rights.⁸ The Court reasoned that the National Labor Relations Act (NLRA) provides an employee the substantive right to collective action if the employee is “engage[d] in concerted activities . . . intend[ing] to induce group activity” against an employer to equalize the inequality of bargaining power between the parties.⁹ This right invalidates arbitration agreements requiring the waiver of all collective representation as an unfair labor practice.¹⁰ The court, recognizing the threat to employment rights from the Supreme Court’s

¹ See Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 8 (2016).

² See JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 10–30 (2014); Jeanne Mirer, *Right-to-Work Laws: History and Fightback*, 70 NAT’L LAW. GUILD REV. 30, 38 (2013); see also *Union Members Summary*, BUREAU OF LABOR STATISTICS (Jan. 26, 2017, 10:00 AM), <https://www.bls.gov/news.release/union2.nr0.htm> (providing data about union membership in 2016).

³ Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579, 580 (2009).

⁴ Andrias, *supra* note 1, at 5.

⁵ See Andrias, *supra* note 1, at 6; Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 90 (2014); Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 92 (2012).

⁶ AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011).

⁷ See Andrias, *supra* note 1, at 39; Wilson, *supra* note 5.

⁸ *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016).

⁹ *Id.* at 1152; see *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984).

¹⁰ *Lewis*, 823 F.3d at 1154.

expanded scope of the Federal Arbitration Act (FAA), stated the two statutes do not irreconcilably conflict.¹¹ In particular, the FAA's policy of liberally enforcing arbitration agreements could not validate an otherwise illegal arbitration agreement.¹²

The *Lewis* majority further noted that its decision diverted from decisions by various federal circuit courts and the Supreme Court.¹³ In the wake of *Lewis*, both commentators and lower courts have struggled to reconcile existing law without overturning precedent.¹⁴ This has created a vast federal circuit split, pitting the Sixth, Seventh, and Ninth Circuits against the Second, Fifth, and Eighth Circuits.¹⁵ This circuit split has produced uneven results leading to unjust infringements upon the substantive rights of employees.¹⁶ Since the Supreme Court has decided to resolve the conflict, collective action waivers in individual arbitration agreements are primed to occupy the national spotlight during the 2017–2018 term.¹⁷

The impending Supreme Court decision will have far-reaching implications on the future of labor law and may radically transform employment relations. There is an inherent imbalance of bargaining power present in every employment contract, as the employer has the power to dictate the terms and policies of employment, as well as the method to resolve disputes.¹⁸ Individual workers, regardless of their education or skill level, possess meager and insufficient power to challenge an employer and enact changes in the

¹¹ *Id.* at 1158.

¹² *Id.* at 1157–58.

¹³ *Id.* at 1155; see Gordon W. Renneisen, *Lewis v. Epic Systems: An Ongoing Debate Over Class Waivers*, LAW360 (June 13, 2016, 1:54 PM), <https://www.law360.com/articles/805857/lewis-v-epic-systems-an-ongoing-debate-over-class-waivers>.

¹⁴ *Compare* Cellular Sales of Mo., LLC v. NLRB, 824 F.3d 772, 776 (8th Cir. 2016) (holding that an employer does not commit unfair labor practices by prohibiting collective action in an individual arbitration agreement), *with* Morris v. Ernst & Young, LLP, 834 F.3d 975, 979 (9th Cir. 2016) (refusing to enforce an individual arbitration agreement prohibiting collective action).

¹⁵ See Daniel B. Pasternak, *Sixth Circuit Joins Two Sister Circuits in Holding that Class Action Waivers in Employment Arbitration Agreements Violate National Labor Relations Act*, NAT'L L. REV. (May 30, 2017), <https://www.natlawreview.com/article/sixth-circuit-joins-two-sister-circuits-holding-class-action-waivers-employment>; Renneisen, *supra* note 13.

¹⁶ See Renneisen, *supra* note 13.

¹⁷ Richard R. Meneghello, *Good Things Come to Those Who Wait? Supreme Court Delays Class Waiver Decision Until Next Term*, LEXOLOGY (Feb. 8, 2017), <http://www.lexology.com/library/detail.aspx?g=d20f3372-2450-4ddc-b973-889d813fa99c>. In granting certiorari, the Supreme Court consolidated the Seventh Circuit's decision in *Lewis*, the Ninth Circuit's decision in *Morris v. Ernst & Young*, and the Fifth Circuit's decision in *Murphy Oil USA v. NLRB*. *Id.* With the confirmation of Justice Neil Gorsuch, the Supreme Court has decided to postpone deciding these cases until the 2017–2018 term. *Id.*

¹⁸ See D.R. Horton, Inc., 357 N.L.R.B. 2277, 2279 (2012); Bagchi, *supra* note 3.

workplace.¹⁹ Left to their own devices, employees are routinely subjected to adhesion contracts, misclassification of employment duties and obligations, lost wages, and unsafe working conditions.²⁰ These examples demonstrate the importance of an employee's ability to band together with similarly situated coworkers in a collective action against an employer. This represents the only effective method to equalize the parties' bargaining powers and enact changes in the workplace.

This Comment argues that the protections afforded by Congress in Section 7 of the NLRA include the right of employees to join together in collective suits against an employer. An employer cannot force an employee to waive this substantive right by requiring individual arbitration to resolve disputes. This Comment argues that the FAA does not demand enforcement of these arbitration agreements and that the NLRA and FAA can be harmonized to guarantee the protections afforded by both statutes. To accomplish this feat, this Comment further argues that the effective vindication exception, a Supreme Court doctrine used to invalidate contracts acting as a "prospective waiver of a party's right to pursue substantive remedies," should be applied.²¹ The application of this doctrine protects the substantive rights afforded by the NLRA while ensuring valid arbitration agreements are liberally enforced by their terms.

This Comment proceeds in four parts. Part I focuses on the history of the NLRA and FAA. Part II examines class and collective action waivers, including Supreme Court decisions, the position taken by the National Labor Relations Board (NLRB or "Board"), and the deference given to the Board's position by courts. Part III explores the Seventh Circuit's decision in *Lewis* and the circuit split that has emerged in its wake. Part IV argues for the application of the effective vindication exception to harmonize the FAA and NLRA.

I. BACKGROUND OF CONGRESSIONAL ACTION

The current state of collective action waivers in individual arbitration agreements is best understood through the historical development of congressional intervention into private employment contracts. Section A discusses the history of the NLRA, including its enactment, protections, and

¹⁹ See Colvin, *supra* note 5, at 71–72.

²⁰ See Bagchi, *supra* note 3, at 582; Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *FORDHAM L. REV.* 761, 766 (2002).

²¹ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985).

judicial deference. Section B examines the FAA, including its purpose, scope, and subsequent interpretations.

A. *The National Labor Relations Act*

In 1935, Congress enacted the Wagner Act, styled as the National Labor Relations Act, and created a new independent agency, the National Labor Relations Board.²² The Board is comprised of three members appointed by the President and confirmed by the Senate.²³ Its primary function is to “enforce employee rights” and “endorse[] the principles of exclusive representation and majority rule.”²⁴ Congress enacted the NLRA due to the “denial by some employers of the right of employees to organize,” their “refusal to accept the procedure of collective bargaining,” and “[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract.”²⁵ The expansive coverage of “employees” includes nearly all private-sector employees, subject to only a few well-delineated exceptions.²⁶ This section first discusses Section 7 of the NLRA, which provides employees substantive rights in employment.²⁷ Then, this section examines Section 8, which enforces those protections against employers.²⁸

Section 7, the heart of the NLRA, guarantees an employee substantive rights and benefits that are free and independent from employer interference.²⁹ In relevant part, Section 7 states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through

²² *The 1935 Passage of the Wagner Act*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/who-we-are/our-history/1935-passage-wagner-act> (last visited May 14, 2017).

²³ *Id.*

²⁴ *Id.*; see *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984) (explaining that Congress enacted the NLRA 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”).

²⁵ 29 U.S.C. § 151 (2012).

²⁶ *Are You Covered?*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/rights-we-protect/whats-law/employees/i-am-represented-union/are-you-covered> (last visited May 14, 2017). Employees excluded from coverage under the NLRA include certain “public-sector employees . . . , agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers . . . , and supervisors.” *Id.*

²⁷ See 29 U.S.C. § 157 (2012).

²⁸ See 29 U.S.C. § 158 (2012).

²⁹ *Interfering with Employee Rights (Section 7 & 8(a)(1))*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1> (last visited May 14, 2017).

representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities³⁰

Section 7 is important due to the substance and breadth of the protections it guarantees. “Concerted activities” and “mutual aid or protection” are not defined in the NLRA, which allows Section 7 to provide protections to an employee’s activities in a wide range of situations.³¹ Given the ordinary meanings of “concerted” and “activities,” “concerted activities” should be done in a planned and deliberated way, usually by several or many people for a particular purpose.³² The Supreme Court has interpreted concerted activities to embrace “the activities of employees who have joined together in order to achieve common goals.”³³ This includes a single employee acting alone when the employee “intends to induce group activity” or “acts as a representative of at least one other employee.”³⁴ “Mutual aid or protection” encompasses an employee’s efforts to improve the terms and conditions of employment through channels outside the immediate employee-employer relationship.³⁵

Section 8, the enforcement clause, mandates that an employer cannot “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]” without committing unfair labor practices.³⁶ “The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce.”³⁷

³⁰ 29 U.S.C. § 157.

³¹ See 29 U.S.C. § 152 (2012).

³² See MERRIAM-WEBSTER DICTIONARY, *Activities*, <http://www.merriam-webster.com/dictionary/activities> (last visited May 14, 2017); MERRIAM-WEBSTER DICTIONARY, *Concerted*, <http://www.merriam-webster.com/dictionary/concerted> (last visited May 14, 2017).

³³ NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 830 (1984).

³⁴ *Id.* at 831 (citation omitted); see *Brady v. Nat’l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) (“[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* ‘concerted activity’ under § 7 of the National Labor Relations Act.”) (emphasis in original); *F.W. Woolworth Co. v. NLRB*, 655 F.2d 151, 153 (8th Cir. 1981) (“Activity is concerted . . . even where only one employee is involved if the employee is enlisting the support of fellow employees.”).

³⁵ *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–66 (1978).

³⁶ 29 U.S.C. § 158(a)(1) (2012).

³⁷ 29 U.S.C. § 160(a) (2012).

The Board is afforded significant judicial deference in its application of Section 7 stemming from its expertise in labor law.³⁸ Courts will defer to plausible inferences drawn by the Board, even if the court would otherwise reach a contrary result.³⁹ Furthermore, the Board possesses the power to define the scope of Section 7, giving the Board considerable deference to any reasonable construction.⁴⁰ Therefore, a court interpreting whether employees can engage in joint representation under an employment contract should analyze the substantive protections guaranteed by the NLRA, as well as the Board's interpretations of those protections.

B. The Federal Arbitration Act

In 1925, Congress codified the usage of arbitration as a means of dispute resolution through the FAA.⁴¹ Congress enacted the FAA to combat the severe hostility against arbitration agreements prevalent in both state and federal courts.⁴² This section explores various aspects of the FAA, including interpretations by the Supreme Court, the benefits intended by Congress, and the disadvantages presented by the arbitral forum, particularly in the employment context.

Section 2 is the main thrust of the FAA and specifically mandates the enforcement of arbitration agreements in federal courts, and has been interpreted to apply in state courts as well.⁴³ Section 2 states: "A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."⁴⁴

The Supreme Court has interpreted Section 2 as reflecting a "congressional declaration of a liberal federal policy favoring arbitration" that requires courts

³⁸ See *J. Vallery Elec., Inc. v. NLRB*, 337 F.3d 446, 450 (5th Cir. 2003) ("Our deference extends to our review of both the Board's findings of fact and its application of the law. It does not extend to the Board's legal conclusions, including its interpretation of a collective bargaining agreement . . .").

³⁹ See *id.*

⁴⁰ *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984).

⁴¹ 9 U.S.C. § 2 (2012).

⁴² See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008); David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 *BUS. LAW.* 55, 58 (2007).

⁴³ Claudia Salomon & Samuel de Villiers, *The United States Federal Arbitration Act: A Powerful Tool for Enforcing Arbitration Agreements and Arbitration Awards*, LEXISNEXIS (Apr. 17, 2014), <https://m.lw.com/thoughtLeadership/the-us-fed-arbitration-act>.

⁴⁴ 9 U.S.C. § 2.

to treat arbitration agreements as equally as other private contracts and enforce them according to their terms.⁴⁵ Section 2's savings clause allows the invalidation of arbitration agreements by utilizing "generally applicable contract defenses, such as fraud, duress, or unconscionability" that cannot be derived solely because an arbitration agreement is at issue.⁴⁶ Furthermore, the Court has stated that the FAA preempts all state laws that conflict with its spirit and purpose.⁴⁷

While the Supreme Court has interpreted the FAA to apply broadly in commercial contracts, the Court has not provided guidance concerning the scope of the FAA outside the commercial sphere.⁴⁸ It is clear from the legislative history that Congress intended to limit the scope of the FAA.⁴⁹ Specifically, Congress intended to place commercial (between merchants) and admiralty contracts on equal footing with other contracts to avoid expensive and prolonged litigation.⁵⁰ Professor Van Wezel Stone noted that the "FAA was intended to facilitate self-regulation within commercial communities, not to regulate relationships between consumers and large corporations."⁵¹ Congress did not intend to require binding arbitration if the parties possessed unequal bargaining power, such as in employment contracts.⁵²

By providing arbitration agreements federal protection, Congress intended to promote certain benefits such as prompt resolution to disputes, a less expensive forum, and procedurally streamlined rules to create an informal

⁴⁵ *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); see *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

⁴⁶ *AT&T Mobility LLC*, 563 U.S. at 339; see 9 U.S.C. § 2; see also *AT&T Mobility LLC*, 563 U.S. at 355 (Thomas, J., concurring) ("Contract defenses unrelated to the making of the agreement—such as public policy—[cannot] be the basis for declining to enforce an arbitration clause.").

⁴⁷ See *AT&T Mobility LLC*, 563 U.S. at 352 (majority opinion) ("Because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress,' . . . California's . . . rule is preempted by the FAA." (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941))).

⁴⁸ See 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, 100 (2006) (arguing that the Court has interpreted the FAA "to cover worker agreements, which had been expressly excluded by Congress"); Robert lafolla, *NLRB Asks High Court to Prohibit Class-Action Waivers for Employees*, REUTERS (Sept. 12, 2016, 4:31 PM), <http://www.reuters.com/article/usa-employment-classaction-idUSL1N1BO1O5>.

⁴⁹ H.R. REP. NO. 111-712, at 55 (2011) ("[A]rbitration was initially conceived as a privately-run, voluntary process for resolving disputes, mainly between businesses . . .").

⁵⁰ *Id.*

⁵¹ See Katherine Van Wezel Stone, *RusticJustice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 942 (1999).

⁵² H.R. REP. NO. 111-712, at 55–56.

process.⁵³ The inexpensive but dependable arbitration process is favored over litigation in certain disputes that prove to be costly, time consuming, and troublesome.⁵⁴ This advantage is most applicable in commercial disputes because “arbitration is a very direct and expeditious method [and] courts are so clogged that it is sometimes years before they can reach a settlement.”⁵⁵ Moreover, Congress found the face-to-face and voluntary nature of arbitration to be advantageous.⁵⁶

The arbitral forum also creates significant disadvantages. In employment disputes, arbitration exacerbates the inequality of bargaining power between parties due to its secret nature and the drafter’s ability to dictate the terms.⁵⁷ Since the arbitration process avoids the public court system, parties forfeit various civil protections afforded in litigation.⁵⁸ Furthermore, parties often endure debilitating, and often unanticipated, disadvantages.⁵⁹

II. THE HISTORY OF COLLECTIVE ACTION WAIVERS

As arbitration contracts became more liberally implemented and enforced by courts, their usage spread across several areas of civil disputes.⁶⁰ After the Supreme Court endorsed the use of arbitration to resolve state law claims in *Southland Corp. v. Keating*, businesses and employers began crafting contracts implementing individual arbitration to resolve disputes.⁶¹ This practice

⁵³ See Clancy & Stein, *supra* note 42, at 59.

⁵⁴ *Id.*

⁵⁵ *Id.* (quoting *Hearing on S. 4213 and 4214 Before the Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 2–3 (1923) (statement of Charles L. Bernheimer, Chairman, Arbitration Committee of the New York Chamber of Commerce)).

⁵⁶ *Id.* at 60–61.

⁵⁷ See H.R. REP. NO. 111-712, at 56 (2011).

⁵⁸ *Id.* These include “undermining the role of Article III courts, . . . limiting associational rights, . . . and constricting access to law by enforcing bans on the collective pursuit of claims.” See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2810 (2015) (arguing that recent Supreme Court decisions have created an unconstitutional system that shifts adjudication access away from public courts towards private, arbitral organizations that are insulated from tests of fairness).

⁵⁹ S. REP. NO. 111-176, at 109–10 (2010). The negative factors of mandatory arbitration considered include “high up-front costs[,] limited access to documents and other key information[,] limited knowledge upon which to base the choice of the arbitrator[,] the absence of a requirement that arbitrators follow the law or issue written decisions[,] and extremely limited grounds for appeal.” *Id.* at 110.

⁶⁰ See Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 256–59 (2008) (noting civil disputes in areas such as securities, employment, and consumer transactions).

⁶¹ See *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (rejecting the view that the FAA only applies to cases brought in federal courts under federal law and applying it to state franchising law); Thomas V. Burch,

exploded after the Supreme Court's decision in *AT&T Mobility v. Concepcion*, with more employers requiring individual claims without class representation.⁶² The Board challenged this practice involving employment contracts in *D.R. Horton*, ushering in a new era of activism.⁶³ This decision and the Board's theory—both invalidating agreements containing class action waivers—serve as the baseline for courts to reconsider collective action waivers in employment contracts.⁶⁴ This section reviews important Supreme Court decisions pertaining to individual arbitration and collective action waivers, the Board's theory in protecting employment rights, and other persuasive judicial opinions.

A. Supreme Court Authority

While the Supreme Court has not ruled on the legality of individual arbitration agreements containing collective action waivers in employment contracts, the Court's holdings in other contexts have served as persuasive guidance for lower courts.⁶⁵ This section reviews foundational decisions by the Court in this area; analyzes the rapid acceptance of arbitration agreements as valid in the commercial, business, and employment spheres; and examines the Court's decisions in *AT&T Mobility LLC* and *Italian Colors*.

1. Hostility in the Foundational Era

Historically, the Supreme Court has taken a hostile position toward collective action waivers. In 1940, the Supreme Court in *National Licorice Co. v. NLRB* held that an employment contract is unenforceable if it discourages an employee from pursuing grievances against the employer in any way except

Regulating Mandatory Arbitration, 2011 UTAH L. REV. 1309, 1309 (2011) (noting the addition of "arbitration provisions to . . . consumer, employer, and franchise agreements" after *Southland Corp.*).

⁶² Wilson, *supra* note 5, at 96 n.24.

⁶³ 357 N.L.R.B. 2277 (2012).

⁶⁴ See Iafolla, *supra* note 48 ("The [Board] has invalidated arbitration agreements with class-action waivers in dozens of cases since its groundbreaking decision in *D.R. Horton* in 2012."). Compare Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016) (adopting the Board's position in *D.R. Horton*), with *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015) (rejecting the Board's position in *D.R. Horton*).

⁶⁵ See, e.g., *Murphy Oil*, 808 F.3d at 1020–21; *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 348, 362 (5th Cir. 2013); Daniel B. Pasternak & Shar Bahmani, *The Seventh Circuit Goes It Alone*, NAT'L L. REV. (May 26, 2016), <http://www.natlawreview.com/article/seventh-circuit-goes-it-alone-upholds-nlr-decision-holding-class-and-collective>.

personally.⁶⁶ The Court held that the contract thwarted the policy of the NLRA, and employers cannot “set at naught the [NLRA] by inducing their workmen to agree not to demand performance of the duties which it imposes.”⁶⁷

Four years later in *J.I. Case Co. v. NLRB*, the Court held that an employment contract cannot limit the scope of the employer’s duty to bargain with a union.⁶⁸ The Supreme Court reasoned that an individual contract may not defeat the procedures proscribed by the NLRA or limit an employee’s right to bargain collectively.⁶⁹ The Court held that whenever private contracts conflict with the Board’s functions of preventing unfair labor practices, the private contracts must yield, or the NLRA would be rendered futile.⁷⁰ An individual contract cannot waive an employee’s collective bargaining benefits because the NLRA protects these rights.⁷¹

2. *The Creation of the Effective Vindication Exception*

After the Court’s foundational rulings regarding collective action waivers, it began looking at these waivers in conjunction with arbitration agreements.⁷² Forty years after its decision in *J.I. Case Co.*, the Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth* fashioned the “effective vindication exception,” which prevents the enforcement of an individual contract that deprives a person of a statutory right.⁷³ The majority declared that the exception invalidates arbitration agreements that “operate[] . . . as a prospective waiver of a party’s right to pursue statutory remedies.”⁷⁴ However, the Court limited the doctrine’s application, stating “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent

⁶⁶ *Nat’l Licorice Co. v. NLRB*, 309 U.S. 350, 360 (1940). The Court’s decision upheld the position previously taken by the Board. See *Nat’l Licorice Co.*, 7 N.L.R.B. 537 (1938).

⁶⁷ *Nat’l Licorice Co.*, 309 U.S. at 361, 364.

⁶⁸ *J.I. Case Co. v. NLRB*, 321 U.S. 332, 339 (1944).

⁶⁹ *Id.* at 338.

⁷⁰ *Id.* at 337.

⁷¹ *Id.* at 338.

⁷² Katherine V.W. Stone, *Will Workers and Consumers Get Their Day in Court?*, PROSPECT.ORG (May 5, 2016), <http://prospect.org/article/will-workers-and-consumers-get-their-day-court-0>.

⁷³ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635–37 (1985).

⁷⁴ *Id.* at 637 n.19.

function.”⁷⁵ The Court subsequently applied the effective vindication exception in analyzing various arbitration agreements.⁷⁶

3. *Rigorous Enforcement by the Modern Court*

As arbitration agreements became more popular in a wide array of contexts, the modern Supreme Court under Chief Justice Roberts has vigorously enforced these agreements. In *AT&T Mobility LLC*, the Court delivered an impactful decision concerning collective action and arbitration.⁷⁷ Justice Scalia, writing for the majority, held that the FAA preempted a state law barring class action waivers in commercial contracts.⁷⁸ This allowed the Court to uphold a corporation’s contract that required customers to bring all claims individually in arbitration.⁷⁹

Justice Scalia stressed that the FAA reflects a “liberal policy favoring arbitration” as a dispute resolution method.⁸⁰ Congress requires courts to “place arbitration agreements on an equal footing with other contracts, . . . and enforce them according to their terms.”⁸¹ Justice Scalia acknowledged that the savings clause renders some arbitration agreements unenforceable, but determined that “nothing in [the savings clause] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”⁸²

⁷⁵ *Id.* at 637.

⁷⁶ *See* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 273-74 (2009) (stating that “a substantive waiver of federally protected civil rights will not be upheld,” but declining to decide the question in this case because it “require[d] resolution of contested factual allegations”); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (holding that certain statutory claims designed to further important social policies may be arbitrated “so long as the prospective litigant effectively may vindicate [the] statutory cause of action in the arbitral forum”).

⁷⁷ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (5-4 decision).

⁷⁸ *Id.* at 352.

⁷⁹ *Id.* at 336.

⁸⁰ *Id.* at 339.

⁸¹ *Id.* (first citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); then citing *Volt Info. Seis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). *But see* *Wilson*, *supra* note 5, at 107 (“The savings clause of section 2 promotes the congressional purpose behind the FAA . . . by placing arbitration agreements on equal footing with other contracts If arbitration agreements are favored to the point that federal law seeks to *promote* arbitration, then generally applicable state laws are bound to conflict with this favoritism policy.”).

⁸² *AT&T Mobility LLC*, 563 U.S. at 343.

Justice Scalia highlighted certain advantages of arbitration and the way in which class-wide arbitration sacrifices those benefits.⁸³ The purpose of arbitration is “to allow for efficient, streamlined procedures tailored to the type of dispute” in a particular field.⁸⁴ Furthermore, the informal nature of arbitration is desirable because it can reduce costs and provide speedy resolution to disputes.⁸⁵ The switch from individual arbitration to class arbitration sacrifices the informality of the process; it involves absent parties, requires burdensome procedures, and raises the stakes for defendants.⁸⁶

Justice Scalia envisioned the largest cost to corporations in class-wide arbitration to be the increased risk of loss.⁸⁷ Without individual arbitration, corporations would be flooded with “tens of thousands of potential claimants . . . aggregated and decided at once” in a process lacking review, “mak[ing] it more likely that errors will go uncorrected.”⁸⁸ Also, defendants might feel compelled to settle questionable or unfounded claims at the possibility of a large loss.⁸⁹ The idea that class proceedings are necessary to adjudicate small claims that would “otherwise slip through the legal system,” Justice Scalia stated that “[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”⁹⁰

In dissent, Justice Breyer rejected the notion that the FAA’s principal goal is the expeditious resolution of claims.⁹¹ Instead, courts are required to “apply the terms of the [FAA] without regard to whether the result would be ‘possibly inefficient.’”⁹² Justice Breyer stressed that Congress intended the FAA to only apply when merchants possessing relatively equal bargaining power “sought to resolve disputes of fact, not law, under the customs of their industries.”⁹³ Furthermore, class actions promote efficiency since a single proceeding is more efficient than various separate proceedings for identical claims.⁹⁴ Finally, Justice Breyer argued that the FAA’s expanded scope would “immunize an

⁸³ *Id.* at 344–45.

⁸⁴ *Id.* at 344. Justice Scalia argued a significant advantage of arbitration lay in its secret nature, which allows for the protection of confidentiality and trade secrets. *Id.* at 344–45.

⁸⁵ *Id.* at 345.

⁸⁶ *Id.* at 348.

⁸⁷ *Id.* at 350.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 351.

⁹¹ *Id.* at 360 (Breyer, J., dissenting).

⁹² *Id.* (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219, 217 (1985)).

⁹³ *Id.* at 362.

⁹⁴ *Id.* at 363.

arbitration agreement from judicial challenge . . . [and] elevate it over other forms of contract.”⁹⁵ This discourages potential plaintiffs from bringing claims, making the “*realistic* alternative to a class action . . . not 17 million suits, but zero individual suits.”⁹⁶

Two years after its decision in *AT&T Mobility*, the Supreme Court revisited individual arbitration and class action waivers in the antitrust sphere. The Court in *American Express Co. v. Italian Colors Restaurant* held that the FAA does not permit courts to invalidate arbitration agreements that prohibit class actions because a plaintiff’s cost of individually arbitrating a statutory claim exceeds the potential recovery.⁹⁷ Justice Scalia, again writing for the majority, argued that excessive cost is not sufficient to override the FAA, even if the individual claims are prohibitively expensive and unlikely to be litigated.⁹⁸ Justice Scalia refused to apply the effective vindication exception, stating that although the claims are too small to be “worth the expense involved in *proving* a statutory remedy, it does not eliminate the *right to pursue* that remedy.”⁹⁹

In dissent, Justice Kagan argued for the application of the effective vindication exception to invalidate arbitration agreements containing class action waivers.¹⁰⁰ According to Justice Kagan, the effective vindication doctrine exists to

[P]revent arbitration clauses from choking off a plaintiff’s ability to enforce congressionally [guaranteed] rights . . . [and] bars applying such a clause when (but only when) it operates to confer immunity from potentially meritorious federal claims . . . by reconcil[ing] the [FAA] with all the rest of federal law.¹⁰¹

The effective vindication doctrine furthers the purpose of the FAA by ensuring arbitration remains a real method of dispute resolution, not merely a foolproof method of allowing defendants to insulate themselves from valid

⁹⁵ *Id.* at 366 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)).

⁹⁶ *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

⁹⁷ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013) (5-3 decision). Justice Sotomayor recused herself from rendering judgment in this case. *See also* Robert Barnes, *Supreme Court Sides with American Express on Arbitration*, WASH. POST (June 20, 2013), https://www.washingtonpost.com/politics/supreme-court-sides-with-american-express-on-arbitration/2013/06/20/dc78c022-d9dc-11e2-a016-92547bf094cc_story.html?utm_term=.d27807d9a0c8.

⁹⁸ *Id.* at 2307.

⁹⁹ *Id.* at 2311.

¹⁰⁰ *Id.* at 2313 (Kagan, J., dissenting).

¹⁰¹ *Id.*

claims.¹⁰² The doctrine only applies when a contract provision completely eliminates a plaintiff's ability to vindicate a statutory violation.¹⁰³ The doctrine ensures that party does not forfeit substantive rights by merely agreeing to arbitrate a claim.¹⁰⁴

Justice Kagan concluded her dissent by urging for the harmonization of the FAA with other competing federal laws.¹⁰⁵ According to Justice Kagan, the majority's under-application of the effective vindication rule is merely an extension of the Court's attitude "bent on diminishing the usefulness of [class and collective actions, making] everything look[] like a class action, ready to be dismantled."¹⁰⁶ Whenever the FAA may conflict with another federal law, "one law does not automatically bow to the other, and the effective-vindication rule serves as a way to reconcile any tension between them."¹⁰⁷ The harmonization of the FAA and other federal statutes is necessary when the arbitration clause "bars not just class actions, but also all mechanisms . . . for joinder or consolidation of claims."¹⁰⁸

In summation, the Supreme Court's recent trend is the strict enforcement of arbitration agreements, irrespective of whether the agreement subverts other statutory rights.¹⁰⁹ Recent opinions indicate the Court's viewpoint has shifted toward hostility in invalidating arbitration agreements on any grounds except traditional contract defenses.¹¹⁰ This attitude threatens employees' rights to engage in concerted activity, such as class and collective actions, when barred by an arbitration clause.¹¹¹ However, other Justices have advocated for a narrower FAA and a greater ability for plaintiffs to exercise statutory rights

¹⁰² *Id.* at 2315.

¹⁰³ *Id.* ("[S]peculative' risks, 'unfounded assumptions,' and 'unsupported statements' will not suffice." (citing *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79, 90–91 & n.6 (2000))).

¹⁰⁴ *Id.* at 2314 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628, 637 (1985)); see *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (instructing courts not to enforce an arbitration agreement that effectively forecloses a plaintiff from remedying the violation of a federal statutory right).

¹⁰⁵ See *id.* at 2320.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* Justice Kagan stressed that the ages of the statutes do not matter because the effective vindication exception asks the same question: "Does the arbitration agreement foreclose a party . . . from effectively vindicating the substantive rights the statute provides?" *Id.* at 2319.

¹⁰⁸ *Id.* at 2318.

¹⁰⁹ See Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 395 n.115 (2005).

¹¹⁰ See *Italian Colors*, 133 S. Ct. at 2312–13 (Thomas, J., concurring).

¹¹¹ See Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 884 (2016).

that are foreclosed in arbitration agreements.¹¹² This is indicated by Justice Kagan’s revitalization of the effective vindication exception and its potential application to employment contracts. This Supreme Court divide, without a clear answer on the discrete question, has led the Board and lower courts to rule inconsistently.

B. The Position of the National Labor Relations Board

The Board’s position concerning collective action plays a significant role in the tension between the NLRA and FAA. The Board made an early and foundational decision concerning collective action waivers in *J.H. Stone & Sons*.¹¹³ In *J.H. Stone*, the Board invalidated an employment contract that required employees to resolve disputes individually with the employer through arbitration.¹¹⁴ The Board stated that the restriction allowed the employer, at the “earliest and most crucial stage” of the dispute, to restrict a worker’s right to joint representation, thereby pitting the worker’s “individual bargaining strength against the superior bargaining power of the employer.”¹¹⁵ The Seventh Circuit affirmed the Board’s holding, declaring the contract restriction a per se violation of the NLRA because “the employee was obligated to bargain individually and . . . [constituted] a restraint upon collective action.”¹¹⁶

In furtherance of *J.H. Stone*, and in tension with *AT&T Mobility*, the Board in *D.R. Horton* held that an employer engages in unfair labor practices by requiring employees to waive all collective action rights and resolve disputes in individual arbitration.¹¹⁷ The main thrust of the Board’s opinion argued that Section 7 protects employees who pursue collective action against an employer.¹¹⁸ This rendered the contract unenforceable as an unfair labor practice under Section 8.¹¹⁹ The Board stated that Congress, “[i]n enacting the NLRA, expressly recognized and sought to redress ‘[t]he inequality of bargaining power between employees who do not possess full freedom of association . . . and employers.’”¹²⁰ Efforts to collectively address harms or

¹¹² *Italian Colors*, 133 S. Ct. at 2320 (Kagan, J., dissenting).

¹¹³ 33 N.L.R.B. 1014 (1941).

¹¹⁴ *Id.* at 1023.

¹¹⁵ *Id.*

¹¹⁶ *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942).

¹¹⁷ *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2292 (2012).

¹¹⁸ *Id.* at 2278–88.

¹¹⁹ *Id.* at 2292.

¹²⁰ *Id.* at 2279 (alteration in original) (quoting 29 U.S.C. § 151 (2012)).

improve conditions in the workplace are the core protections afforded by Section 7.¹²¹

Furthermore, the Board determined that an employee's Section 7 right to engage in collective action does not conflict with the FAA.¹²² Echoing Justice Kagan, the Board reasoned that when a presumable conflict arises between the protections afforded in the NLRA and those of another statute, "the issues must be resolved in a way that accommodates the policies underlying both statutes to the greatest extent possible."¹²³ The Board formulated three reasons that the NLRA and FAA could be reconciled without violating the FAA's liberal, pro-arbitration policy.¹²⁴

First, the Board argued that while Congress intended that the FAA "prevent courts from treating arbitration agreements less favorably than other private contracts," if those arbitration agreements conflict with the functions of the NLRA, "they must yield or the [NLRA] would be reduced to a futility."¹²⁵ The FAA cannot place arbitration contracts on a superior level above other private contracts.¹²⁶ For example, if a court upheld an arbitration agreement that violated the NLRA solely because it implicated arbitration, then that agreement would be imbued with superior protection in relation to ordinary private contracts.

Second, the Board held that the Supreme Court has routinely invalidated arbitration agreements that require a party to forgo the substantive rights afforded by federal statutes.¹²⁷ The right to engage in collective action is a core tenet of labor law, not merely a procedural right.¹²⁸ The Board explained that while the process of class action certification for plaintiffs is procedural, employees engaging in joint representation against an employer is substantive, regardless of whether the employees are ultimately successful.¹²⁹

¹²¹ *Id.*

¹²² *Id.* at 2284.

¹²³ *Id.*; see *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2314 (2013) (Kagan, J., dissenting). *But see* *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 359–60 (5th Cir. 2013). Neither the Board nor the Fifth Circuit on appeal formulated a test, baseline, or factors to guide courts in determining how to accommodate and reconcile possibly competing federal statutes, thus, creating an ambiguity.

¹²⁴ *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2284–88 (2012).

¹²⁵ *Id.* at 2285 (quoting *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944)).

¹²⁶ *See id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 2286.

¹²⁹ *Id.*

Third, the Board held that the FAA has never been interpreted to have the power to enforce an arbitration agreement that is wholly inconsistent with the NLRA.¹³⁰ In particular, the Board challenged the tension created by the Supreme Court in *AT&T Mobility* regarding the enforcement of arbitration agreements by their terms to facilitate informal and streamlined proceedings.¹³¹ Employment disputes are substantially different from consumer disputes in which the enormous commercial defendant faces thousands of simultaneous contracts and potential claimants in *AT&T Mobility*.¹³² By contrast, one employer employs twenty employees on average; therefore, “most class-wide employment litigation involves only a specific subset of employees.”¹³³ Class-wide disputes in the employment context are more similar to individual arbitration than the nationwide commercial disputes in *AT&T Mobility*, and do not sacrifice the main benefits of arbitration—speed, cost, informality, and low risk—that Congress intended to preserve in the FAA.¹³⁴ The Board concluded that “an employer violates the NLRA by requiring employees, as a condition of their employment, to waive their right to pursue” joint representation in any judicial forum.¹³⁵ Despite the Board’s criticism of *AT&T Mobility*, the Board emphasized that its holding did not “rest on any form of hostility or suspicion of arbitration” as a dispute resolution process.¹³⁶

C. Rejection by the Circuit Courts

Although the Board has adopted the position that individual arbitration clauses waiving an employee’s right to collective action are unenforceable, federal courts did not initially agree with this viewpoint. In fact, the Second, Fifth, Eighth, and Ninth Circuits specifically rejected the Board’s position.¹³⁷

The Fifth Circuit in *D.R. Horton, Inc. v. NLRB* rejected the Board’s position and initiated the tension between the Board and federal circuit

¹³⁰ *Id.* at 2287.

¹³¹ *Id.*; see *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

¹³² *D.R. Horton*, 357 N.L.R.B. at 2287.

¹³³ *Id.* The Board used data from the U.S. Census Bureau from 2008 to determine this number, which included 5,930,132 employers that employed 120,903,551 employees. See *id.* at 2287 n.25.

¹³⁴ *Id.* at 2287.

¹³⁵ *Id.* at 2287–88.

¹³⁶ *Id.* at 2289.

¹³⁷ See *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072 (9th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

courts.¹³⁸ The court held that the NLRA does not contain a congressional command overriding the FAA and that collective action procedures are a procedural rule, not a substantive right under Section 7.¹³⁹ The court determined that an employer does not engage in unfair labor practices by enforcing an arbitration agreement that prohibits collective action and requires employment claims be resolved through individual arbitration.¹⁴⁰ In 2015, the Fifth Circuit affirmed this holding in *Murphy Oil USA, Inc. v. NLRB* and refused to classify collective action as a substantive right.¹⁴¹

The Eighth Circuit in *Owen v. Bristol Care, Inc.* rejected *Horton* because the Fair Labor Standards Act (FLSA) does not contain a contrary congressional command dictating that the right to engage in class actions overrides the FAA.¹⁴² The court stated that it is “not obligated to defer to [the Board’s] interpretation,” and found persuasive authority in that “nearly all the district courts to consider *D.R. Horton* have declined to follow it.”¹⁴³

In discussing the effective vindication exception, the Second Circuit in *Sutherland v. Ernst & Young, LLP* stated that the doctrine could “invalidate ‘a provision in an arbitration agreement forbidding the assertion of certain statutory rights.’”¹⁴⁴ However, the Second Circuit deferred to the Supreme Court’s holding that the effective vindication exception could not invalidate an individual arbitration agreement by showing that the plaintiffs possessed “no economic incentive to pursue [the] claims individually.”¹⁴⁵ “[T]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.”¹⁴⁶

¹³⁸ 737 F.3d at 357.

¹³⁹ *Id.* at 357–62.

¹⁴⁰ *Id.* at 362.

¹⁴¹ *Murphy Oil*, 808 F.3d at 1020. The Supreme Court chose to consolidate the Fifth Circuit’s decision in *Murphy* and the Ninth Circuit’s decision in *Morris* with the Seventh Circuit’s decision in *Lewis* to decide them all at once. See Steven Wildberger, *Supreme Court Adds Sixteen Cases to its Docket*, JURIST.ORG (Jan. 14, 2017, 9:14 AM), <http://www.jurist.org/paperchase/2017/01/supreme-court-adds-16-cases-to-docket.php>.

¹⁴² *Owen*, 702 F.3d at 1055; see *Sutherland*, 726 F.3d at 297.

¹⁴³ *Owen*, 702 F.3d at 1054 (alteration in original); see *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013) (declining to adopt the Board’s position in *D.R. Horton* because a number of other courts have not deferred to the Board’s interpretation). In 2016, the Ninth Circuit overturned *Richards* and held that an individual arbitration contract that prohibits collective action is unenforceable under the NLRA. See *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 989–90 (9th Cir. 2016).

¹⁴⁴ 726 F.3d at 298 (quoting *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310–11 (2013)).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (emphasis omitted).

III. THE CIRCUIT SPLIT: *LEWIS V. EPIC SYSTEMS CORP.*

Recently, the Seventh Circuit in *Lewis v. Epic Systems Corp.* eschewed the consensus among federal courts and capitalized on the absence of binding authority to adopt the Board's position on class action waivers in individual arbitration agreements.¹⁴⁷ Section A details the facts in *Lewis* and the court's interpretation of "concerted activities." Section B discusses the harmonization of the FAA and NLRA and the ensuing circuit split. Section C analyzes important reactions to the decision in *Lewis*.

A. *Collective Action as Concerted Activity*

Plaintiff-appellee Jacob Lewis worked as a technical writer for defendant-appellant Epic Systems, a healthcare software company.¹⁴⁸ On April 2, 2014, Epic sent an e-mail to its employees containing "an arbitration agreement mandating that wage-and-hour claims could be brought only through individual arbitration and that the employees waived the right to participate in . . . any class, collective, or representative proceeding."¹⁴⁹ The agreement included a clause stating that employees were "'deemed to have accepted this agreement' if they 'continued to work at Epic,'" thus giving employees no option to refuse and retain their jobs.¹⁵⁰

Lewis continued his employment at Epic; however, when he later engaged in an employment dispute against Epic, he did not pursue his claims through arbitration, but filed suit in federal court.¹⁵¹ Epic filed a motion to dismiss the suit and compel resolution of the claim through individual arbitration.¹⁵² Lewis's response deemed the arbitration agreement invalid and unenforceable as a violation of the NLRA because it foreclosed his right to engage in concerted activities with other employees for mutual aid and protection.¹⁵³ The District Court for the Western District of Wisconsin agreed with Lewis, and denied Epic's motion to compel arbitration.¹⁵⁴ Epic appealed this decision to

¹⁴⁷ *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (2016); see Pasternak & Bahmani, *supra* note 65.

¹⁴⁸ *Lewis*, 823 F.3d at 1151.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* Lewis asserted violations of the FLSA against Epic for employment misclassification and deprivation of overtime pay. *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*; see 29 U.S.C. § 157 (2012).

¹⁵⁴ See *Lewis v. Epic Sys. Corp.*, No. 15-CV-82-BBC, 2015 WL 5330300 (W.D. Wis. Sept. 11, 2015).

the Seventh Circuit Court of Appeals, arguing the district court erred by not enforcing the agreement under the FAA.¹⁵⁵

The Seventh Circuit first engaged with the question of whether Epic's arbitration provision impinged upon Lewis's rights under Section 7 of the NLRA.¹⁵⁶ For Lewis to be protected and for Epic's arbitration clause to be unenforceable, the court determined that Lewis's actions qualified as "other concerted activity" under Section 7.¹⁵⁷ The court reasoned that an employee, even acting alone, "may engage in concerted activities when he 'intends to induce group activity' or 'act as a representative of at least one other employee.'"¹⁵⁸ The court rejected a narrow interpretation of "concerted activities" that would cover only union activity and recognized that Congress intended the NLRA to provide collective action remedies that allow employees to band together and equalize the bargaining power of the employer.¹⁵⁹ These protections are the strongest when a private contract forecloses all representative opportunities, not just formal class actions.¹⁶⁰ The court stated that contracts requiring the "'renunciation by the employees of rights guaranteed by the [NLRA]' are unlawful and may be declared unenforceable."¹⁶¹ Epic's individual arbitration clause constituted an illegal labor practice because it required employees to waive all rights to pursue collective action in any forum.¹⁶²

The court recognized that its holding conflicted with the Ninth Circuit's decision in *Johnmohammadi v. Bloomington's, Inc.*, which held that an individual arbitration agreement may be enforceable where the employee could

¹⁵⁵ *Lewis*, 823 F.3d at 1151.

¹⁵⁶ *Id.* at 1154.

¹⁵⁷ *Id.* at 1154–55.

¹⁵⁸ *Id.* at 1152 (quoting *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 831 (1984)); *see also* D.R. Horton, Inc., 357 N.L.R.B. 2277, 2279 (2012).

¹⁵⁹ *Lewis*, 823 F.3d at 1153; *see* *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (noting that class actions allow plaintiffs to vindicate their rights when they otherwise would have no realistic day in court); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (recognizing that a "single employee [is generally] helpless in dealing with an employer"); Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686, 688 (1941) (arguing that collective suits provide an effective way for workers to ensure the proper enforcement of their rights when they are in a poor position to seek legal redress alone).

¹⁶⁰ *See Lewis*, 823 F.3d at 1154. The court noted collective actions, albeit not codified in Rule 23, greatly predate passage of the NLRA. *Id.*; *see* FED. R. CIV. P. 23.

¹⁶¹ *Lewis*, 823 F.3d at 1152 (quoting *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 365 (1940)); *see* *Brady v. Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011).

¹⁶² *Lewis*, 823 F.3d at 1154.

opt out of the agreement without penalty.¹⁶³ The Seventh Circuit responded that an arbitration agreement prohibiting all collective bargaining is a “per se violation of the NLRA and [cannot] ‘be legalized by showing the contract was entered into without coercion.’”¹⁶⁴ However, the Seventh Circuit did not resolve the affirmative opt-out issue because Epic Systems conditioned future employment upon signing the arbitration agreement, thereby falling squarely within Section 8.¹⁶⁵

B. Reconciling the National Labor Relations Act and Federal Arbitration Act

After holding that an individual arbitration agreement that waives an employee’s right to engage in collective action is unenforceable under the NLRA, the Seventh Circuit discussed the potential conflict between the NLRA and FAA.¹⁶⁶ Epic argued that even if the NLRA invalidates the individual arbitration agreement, the FAA precludes the NLRA and resuscitates the class action waiver in full.¹⁶⁷

The court first stated that Congress enacted the FAA to make arbitration agreements as “enforceable as other contracts, but not more so.”¹⁶⁸ Arbitration agreements may be invalidated by a contrary congressional command or “generally applicable contract defenses,” but may not be overridden by “defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”¹⁶⁹ However, the court refused to hold that the perceived conflict between the NLRA and FAA could not be reconciled, which would be required to enforce Epic’s arbitration agreement.¹⁷⁰ A heavy presumption of coexistence exists in federal statutes, and without “a clearly expressed congressional intention to the contrary,” courts must regard each statute as effective.¹⁷¹ A court must harmonize two complementary

¹⁶³ *Id.* at 1155; *see Johnmohammadi v. Bloomingdale’s, Inc.*, 755 F.3d 1072, 1077 (9th Cir. 2014) (holding that an arbitration agreement with an opt-out clause does not act as a prospective waiver of substantive rights or violate the NLRA).

¹⁶⁴ *Lewis*, 823 F.3d at 1155 (emphasis omitted) (quoting *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942) (“This [prohibition of all joint representation] is the very antithesis of collective bargaining.” (citing *NLRB v. Superior Tanning Co.*, 117 F.2d 881, 890 (7th Cir. 1940))).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1156.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)); *see CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 97 (2012).

¹⁶⁹ *Lewis*, 823 F.3d at 1156 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)).

¹⁷⁰ *Id.* at 1156–57.

¹⁷¹ *Id.* at 1157 (citing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995)).

statutes that embrace distinct scopes, purposes, requirements, and protections.¹⁷² This presumption can be rebutted, leading to implied repeal, “only when there is an irreconcilable conflict between the two federal statutes at issue.”¹⁷³

According to the court, Epic did not overcome this burden because there is no irreconcilable conflict between the NLRA and FAA that requires implicit repeal.¹⁷⁴ Federal law provides that illegal contracts must not be enforceable, and the FAA incorporates this basic principle through its savings clause.¹⁷⁵ Epic’s mandatory individual arbitration agreement is illegal because it “strip[s] away employees’ rights to engage in ‘concerted activities,’” thereby violating Section 7 and constituting illegal labor practices.¹⁷⁶ Thus, because the contract is illegal under Section 7, it falls within the FAA’s savings clause, allowing the NLRA and FAA to work in tandem.¹⁷⁷

The court’s holding that the FAA does not mandate the enforcement of an individual arbitration clause prohibiting collective activity conflicted with other federal circuit courts.¹⁷⁸ In particular, the court reasoned that the Fifth Circuit’s decision in *Horton* should not control because it relied on inapplicable dicta from Supreme Court decisions, made no attempt to harmonize the FAA with the NLRA, and vastly overemphasized the pro-

¹⁷² *Id.*

¹⁷³ *Id.* (quoting *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996)).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*; see *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006) (arguing that illegality is a sufficient defense to the formation of a contract under the FAA’s saving clause).

¹⁷⁶ *Lewis*, 823 F.3d at 1157.

¹⁷⁷ *Id.*

¹⁷⁸ See *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013) (noting, “[w]ithout deciding the issue,” that a number of courts have “determined that they should not defer to the NLRB’s decision in *D.R. Horton*”); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) (holding that an arbitration clause must be enforced because there is no “congressional command exempting the [NLRA] from application of the FAA”); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 298–99 (2d Cir. 2013) (rejecting NLRA-based argument without analysis); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013) (rejecting argument that there is inherent conflict between NLRA/Norris LaGuardia Act and FAA); *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1213 (11th Cir. 2011) (“It would be anomalous indeed if the FAA—which promotes arbitration . . . —were offended by imposing upon arbitration nonconsensual procedures that interfere with arbitration’s fundamental attributes, but not offended by the nonconsensual elimination of arbitration altogether.”). *But see NLRB v. Alt. Entm’t, Inc.*, 858 F.3d 393, 403 (6th Cir. 2017) (“The NLRA prohibits mandatory arbitration provisions barring collective or class actions because they interfere with employees’ right to engage in concerted activity, not because they mandate arbitration.”); *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 987 (9th Cir. 2016) (holding the FAA and NLRA do not conflict).

arbitration policy behind the FAA to the detriment of the NLRA.¹⁷⁹ In actuality, the NLRA is pro-arbitration and does not disfavor or mistreat arbitration as a dispute resolution method.¹⁸⁰ The Supreme Court has never held that “*anything* that conceivably makes arbitration less attractive automatically conflicts with the FAA” or placed arbitration agreements on a more favorable standing than regular contracts.¹⁸¹ Instead, the Court has held that the NLRA “extends far beyond [class actions] or arbitration; it is a general principle that affects countless aspects of the [employment] relationship.”¹⁸² Epic unlawfully required Lewis to waive his Section 7 rights, making the formation of the contract illegal and unenforceable under both the NLRA and FAA.¹⁸³

Finally, the court argued that collective action is a substantive right, and not merely a procedural rule, because it “lies at the heart of the [employment] relationships Congress meant to achieve in the [NLRA].”¹⁸⁴ Section 7’s protections are plainly substantive from the structure of the NLRA and form the foundation on which labor policy rests.¹⁸⁵ Since a party does not forfeit substantive rights by agreeing to arbitrate a claim, the contract is invalid and cannot be enforced.¹⁸⁶

C. *The Courts React: Acceptance and Rejection*

After the Seventh Circuit’s ruling in *Lewis*, other courts have ruled inconsistently when faced with individual arbitration agreements prohibiting collective action. Several courts have viewed *Lewis* as a persuasive reason to adopt the Board’s position in *Horton*. Other courts have rejected *Lewis* and

¹⁷⁹ *Lewis*, 823 F.3d at 1157–58.

¹⁸⁰ *Id.* at 1158.

¹⁸¹ *Id.* “The FAA does not ‘pursue its purposes at all costs’ . . . [and i]f these statutes are to be harmonized . . . it is through the FAA’s savings clause, which provides for the very situation at hand.” *Id.* at 1159; *see also* *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (“[N]o legislation pursues its purposes at all costs.”).

¹⁸² *Lewis*, 823 F.3d at 1158; *see* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (“To immunize an arbitration agreement from judicial challenge on [a traditional ground such as illegality] would be to elevate it over other forms of contract—a situation inconsistent with the ‘saving clause.’”).

¹⁸³ *Lewis*, 823 F.3d at 1159; *see* *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006) (holding that illegality “renders the whole contract invalid”).

¹⁸⁴ *Lewis*, 823 F.3d at 1160; *see* *Allen-Bradley Local No. 1111 v. Wis. Emp’t Relations Bd.*, 315 U.S. 740, 750 (1942) (arguing that Section 7 guarantees fundamental labor rights to self-organization and collective bargaining).

¹⁸⁵ *Lewis*, 823 F.3d at 1160 (citing *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2286).

¹⁸⁶ *Id.*

relied on the Supreme Court's holdings in *AT&T Mobility* and *Italian Colors*. This has created a large circuit split. This section first examines decisions by federal circuit courts, and then reviews important district court opinions that have confronted the issue.

Shortly after *Lewis*, the Ninth Circuit in *Morris v. Ernst & Young, LLP* adopted the Seventh Circuit's reasoning and refused to enforce an individual arbitration agreement that prevented all collective action by employees.¹⁸⁷ The court overturned its holding in *Richards*, stating that there is no irreconcilable conflict between the FAA and NLRA since the FAA's saving clause prevents the enforcement of an illegal arbitration contract that waives an employee's substantive right.¹⁸⁸

The court stressed that its holding did not pertain to disfavoring arbitration as a means of dispute resolution, rather "which substantive rights must be available within the chosen forum."¹⁸⁹ "The Supreme Court has repeatedly held that the core, substantive 'rights' created by federal law survive contract terms that purport their waiver."¹⁹⁰ Without regard to the forum used to resolve disputes, "[t]he NLRA establishes a core right to concerted activity," meaning employees must be able to act collectively in the chosen forum.¹⁹¹ The NLRA encourages arbitration as a means of dispute resolution; however, an employer may not condition employment upon the waiver of a substantive right.¹⁹² If an arbitration agreement were permitted to terminate an employee's ability to pursue collective claims, the NLRA would be rendered futile.¹⁹³

While the Ninth and Sixth Circuits have adopted *Lewis*, district courts have also followed its lead. An exemplary case is *Tigges v. AM Pizza, Inc.*, where

¹⁸⁷ 834 F.3d 975, 987 (9th Cir. 2016).

¹⁸⁸ *Id.* at 987. The court argued that when substantive rights are at issue, the FAA's savings clause works in conjunction with the NLRA to prevent conflict. *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 989.

¹⁹² *Id.* at 989–90.

¹⁹³ *Id.* (quoting *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944)). In May 2017, the Sixth Circuit became the second circuit court to adopt the holding of *Lewis* by refusing to enforce an individual arbitration clause that prohibited concerted activity, thereby deepening the circuit split. *See NLRB v. Alt. Entm't, Inc.*, 858 F.3d 393, 407 (6th Cir. 2017) ("Thus, [Section] 8 makes it illegal to force workers, as a condition of employment, to give up the right to concerted legal action, whether that right is substantive or procedural."); *see also* Christopher C. Murray, *Sixth Circuit Adopts NLRB's D.R. Horton Rule and Deepens Circuit Split on Class Action Waivers*, NAT'L L. REV. (June 6, 2017), <http://www.natlawreview.com/article/sixth-circuit-adopts-nlrbs-dr-horton-rule-and-deepens-circuit-split-class-action> (arguing that the NLRB did not prove that individual arbitration agreements prohibit employees from jointly representing their legal actions against an employer).

the District of Massachusetts held that employees have a substantive right to collective action since “the very essence of labor right[s] under the [NLRA]” is joint representation.¹⁹⁴ An arbitration contract prohibiting all collective representation infringes on an employee’s substantive right, and is not enforceable by the FAA merely because it involves arbitration.¹⁹⁵ An agreement containing a clause allowing employees to affirmatively opt out of its terms still violates the NLRA by creating a “second mandatory condition of employment, which requires employees to affirmatively act . . . to retain their Section 7 right[s].”¹⁹⁶ Furthermore, an affirmative opt-out clause requires employees to prospectively waive their Section 7 rights in derogation of the congressional command.¹⁹⁷ Therefore, the court refused to enforce the individual arbitration agreement, irrespective of an affirmative opt-out clause, because it prevented employees’ from exercising their statutory rights.¹⁹⁸

While some courts have adopted *Lewis*, others have rejected its holding. The Eighth Circuit in *Cellular Sales of Missouri, LLC v. NLRB* relied heavily

¹⁹⁴ Nos. 16-10136-WGY, 16-10474-WGY, 2016 WL 4076829, at *13 (D. Mass. July 29, 2016) (first alteration in original). The First Circuit has yet to rule on this issue, allowing the district court to adopt *Lewis*. *Id.* at *18. Notably, the court stated that the United States is distinct in “empower[ing] businesses to employ arbitration agreement[s] to bar their customers from access to court.” *Id.* at *12 n.20.

¹⁹⁵ *Id.* at *15 (quoting *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1157 (2016)); see also *Curtis v. Contract Mgmt. Servs.*, No. 1:15-CV-487-NT, 2016 WL 5477568, at *4 (D. Me. Sept. 29, 2016) (holding that the filing of a labor related civil action by a group of employees is a substantive right and cannot be waived by an arbitration contract); *Totten v. Kellogg Brown & Root, LLC*, 152 F. Supp. 3d 1243, 1256–58 (C.D. Cal. 2016) (holding that the right to act collectively is a substantive right and cannot be waived).

¹⁹⁶ *Tigges*, 2016 WL 4076829, at *16 n.26. This case differs from *Lewis* because the employer did not condition further employment upon agreement to the terms of the arbitration agreement. *Id.* at *15. Opt-out provisions are increasingly popular in employment contracts containing class action waivers. See *Johnmohammadi v. Bloomingdale’s, Inc.*, 755 F.3d 1072, 1077 (9th Cir. 2014) (holding that an arbitration agreement containing an opt-out clause does not violate the NLRA); *Shepardson v. Adecco USA, Inc.*, No. 15-CV-05102-EMC, 2016 WL 1322994, at *3 (N.D. Cal. Apr. 5, 2016) (“[T]he NLRA does not apply here because Plaintiff signed a voluntary arbitration agreement with the opportunity to opt out, and thus elected to arbitrate her employment-related disputes on an individual basis.”).

¹⁹⁷ *Tigges*, 2016 WL 4076829, at *16 n.26; see *On Assignment Staffing Servs., Inc.*, 362 N.L.R.B. No. 189, at *1 (2015), *rev’d on other grounds*, *On Assignment Staffing Servs., Inc. v. NLRB*, No. 15-60642, 2016 WL 3685206 (5th Cir. June 6, 2016). *But see* *Bruster v. Uber Techs. Inc.*, No. 15-CV-2653, 2016 WL 4086786, at *3 (N.D. Ohio Aug. 2, 2016) (holding that an arbitration agreement does not impinge on the plaintiff’s rights under the NLRA because the plaintiff could have opted out).

¹⁹⁸ *Tigges*, 2016 WL 4076829, at *16 n.26; see *Gaffers v. Kelly Servs., Inc.*, 203 F. Supp. 3d 829, 842 (E.D. Mich. 2016) (holding that a contract provision requiring employees to arbitrate FLSA claims “in an arbitral forum on an individual basis is illegal and cannot be enforced”). *But see* *Bekele v. Lyft, Inc.*, 199 F. Supp. 3d 284, 313 (D. Mass. 2016) (concluding that an employer’s “arbitration provision is enforceable under the FAA because its class-action waiver is not illegal under the NLRA”).

on earlier decisions to enforce a mandatory individual arbitration agreement.¹⁹⁹ Specifically, the court determined that Cellular Sales did not violate the NLRA by forcing its employees to resolve disputes in individual arbitration and waive all forms of collective action in all forums.²⁰⁰ Furthermore, courts have distinguished *Lewis* on the basis of an affirmative opt-out clause. In a representative case, the district court in *Zawada v. Uber Techs., Inc.* held that an individual arbitration agreement prohibiting collective action is not illegal when it contains an opt-out provision.²⁰¹ These distinct lines of cases demonstrate the significant circuit split created after *Lewis* that the Supreme Court is tasked with resolving.²⁰²

IV. A SUBSTANTIVE RIGHT TO COLLECTIVE ACTION AND THE EFFECTIVE VINDICATION EXCEPTION

In the wake of the Seventh Circuit's holding in *Lewis*, courts have ruled inconsistently on collective action waivers in arbitration agreements, creating confusion and unpredictable results for both employers and employees. Recognizing the far-reaching impacts of this issue that may redefine employment relationships, the Supreme Court has agreed to resolve the circuit split.²⁰³ However, the Court postponed deciding this issue until the 2017–2018 term, presumably because it now has a ninth justice.²⁰⁴ While the postponement allows the dysfunction and inconsistency in courts to continue, it

¹⁹⁹ *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 776 (8th Cir. 2016) (citing *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013)). *But see* *Patterson v. Raymours Furniture Co.*, 659 F. App'x 40, 43 (2d Cir. 2016) (concluding that Second Circuit precedent requires enforcement, but if the panel could “writ[e] on a clean slate, [it] might well be persuaded . . . to join the Seventh and Ninth Circuits”).

²⁰⁰ *Cellular Sales*, 824 F.3d at 776.

²⁰¹ *Zawada v. Uber Techs., Inc.*, No. 16-CV-11334, 2016 WL 7439198, at *10 (E.D. Mich. Dec. 27, 2016); *see Johnmohammadi*, 755 F.3d at 1077; *Rimel v. Uber Techs., Inc.*, No. 6:15-CV-2191-ORL-41KRS, 2016 WL 6246812, at *6 (M.D. Fla. Aug. 4, 2016) (holding that *Lewis* does not bind the court and the opt-out clause saved the arbitration agreement from unconscionability).

²⁰² *See Riederer v. United Healthcare Servs.*, No. 16-3041, 2016 WL 6682104, at *1 (7th Cir. Nov. 14, 2016) (“There is an entrenched conflict among the circuits on the question in *Lewis*, and this court’s reconsideration could not spare the Supreme Court the need to resolve the conflict. Multiple petitions for certiorari in cases presenting this question are pending before the Supreme Court. That is the right forum for [defendant’s] arguments.”).

²⁰³ *See Wildberger*, *supra* note 141.

²⁰⁴ *Lawrence Hurley & Robert Iafolla, U.S. Supreme Court Puts Off Action on Major Class Action Dispute*, REUTERS (Feb. 8, 2017, 3:22 PM), <http://www.reuters.com/article/us-usa-court-classaction-idUSKBN15N2K0>.

presents the possibility of adding validity and finality to the Court's decision.²⁰⁵

This Comment contends that the NLRA protects an employee's substantive right to utilize collective action that cannot be waived by an individual arbitration agreement. Furthermore, this substantive right is not inconsistent with the FAA, and the two statutes can be harmonized using the effective vindication exception. Section A demonstrates that employees possess the right to proceed collectively against an employer under the NLRA. Section B assesses the application of the effective vindication exception to individual arbitration agreements in the employment context, distinguishes Supreme Court holdings, and discusses affirmative opt-out provisions to urge for a bright line rule. Section C considers possible implications for employers and employees.

A. *Protection of Collective Action Under the National Labor Relations Act*

The text of Section 7 provides employees with substantive protections to engage in concerted activities and bargain collectively with an employer.²⁰⁶ While the NLRA does not define the scope of "concerted activities," the ordinary meaning of the term protects individual employees pursuing any joint representation, not just formal union activity.²⁰⁷ Even the narrowest interpretation of the phrase protects employees acting together in similar issues against a common employer.²⁰⁸

²⁰⁵ Menghello, *supra* note 17. On April 5, 2017, the Senate confirmed Justice Neil Gorsuch's nomination to the Supreme Court to replace Justice Scalia. Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, NY TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html>. While Justice Scalia penned the most important Court decisions concerning arbitration and class action waivers, Justice Gorsuch has not ruled on this issue. See Edith Roberts, *Judge Gorsuch's Arbitration Jurisprudence*, SCOTUSBLOG (Mar. 6, 2017, 10:33 AM), <http://www.scotusblog.com/2017/03/judge-gorsuchs-arbitration-jurisprudence/>. However, Justice Gorsuch has ruled against employers in employment dispute cases, has written strongly in favor of enforcing arbitration agreements, has been skeptical of administrative deference, and has disfavored interpreting statutes to have broad meaning beyond their text. See Ron Chapman, Jr. & Christopher Murray, *Judge Gorsuch's Arbitration Decisions and the Future of Class Action Waivers in the Supreme Court*, LAW360 (Feb. 1, 2017, 1:28 PM), <https://www.law360.com/articles/887293/gorsuch-and-the-future-of-class-action-waivers>; see also Jay-Anne Casuga, *Gorsuch Would Bring Conservative Bona Fides to Labor Cases*, BNA (Feb. 2, 2017), <https://www.bna.com/gorsuch-bring-conservative-n57982083197/>. These views may lead Justice Gorsuch to view both the FAA and NLRA with skepticism.

²⁰⁶ 29 U.S.C. § 157 (2012).

²⁰⁷ *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1153 (7th Cir. 2016); see *supra* note 32.

²⁰⁸ *Lewis*, 823 F.3d at 1153.

In addition to the text of Section 7, the congressional purposes underlying the provision as well as Supreme Court interpretations affirm this substantive right.²⁰⁹ Congress enacted the NLRA to protect employees who are combining their representative power to equalize the bargaining power against the employer.²¹⁰ Collective action is broader than a mere procedural rule²¹¹ because it has historically acted as an effective mechanism to protect employees at the most critical stage of a dispute.²¹² To interpret Section 7 to exclude joint representation outside of formalized unions is to erode the foundation of labor relations: the guarantee that powerless employees may band together to enact changes in the workplace.²¹³ Since the power and influence of unions have significantly diminished in modern workplaces, employees must rely on individual protections found in statutory law.²¹⁴ Therefore, the protection of collective activity under the NLRA must be read broadly to facilitate the shift in protection from unions to individual employees.

B. Harmonizing the National Labor Relations Act and Federal Arbitration Act Through the Effective Vindication Exception

Protecting employees' rights to collective action is not the end of the dispute, as the Supreme Court's decisions in *AT&T Mobility* and *Italian Colors*

²⁰⁹ See, e.g., *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–67 (1978); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944); *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 360 (1940).

²¹⁰ See *City Disposal Sys.*, 465 U.S. at 832; Kalven & Rosenfield, *supra* note 159, at 686.

²¹¹ See FED. R. CIV. P. 23. A Rule 23 class action is a procedural rule because it establishes the necessary steps for plaintiffs seeking class certification. The prerequisite elements of a Rule 23 class action include “numerosity, commonality, typicality, and adequate representation.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011). “Unlike class actions, collective actions are ‘opt-in,’ meaning ‘members must actively opt into the lawsuit, by filing an individual consent to join.’” Recent Case, *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), 130 HARV. L. REV. 1032, 1039 (2017). Therefore, collective actions do not involve absentee parties, enjoy historical protections, and serve the necessary public policy of equalizing the collective bargaining power between employees and employers. *See id.*

²¹² See CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, 7 FEDERAL PRACTICE AND PROCEDURE § 1651 (3d ed. 2001) (observing that federal equity courts encouraged permissive joinder of parties as early as 1872). However, the Court has held that other federal statutes that provide for class actions, such as the Age Discrimination in Employment Act, do not provide a substantive right. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991).

²¹³ See *Eastex*, 437 U.S. at 565–66 (arguing that “concerted activities” protects employees engaged in activities in support of other similar employees to “improve working conditions through resort to administrative and judicial forums”); *Allen-Bradley Local No. 1111 v. Wis. Emp’t Relations Bd.*, 315 U.S. 740, 750 (1942) (holding that Section 7 guarantees a “‘fundamental right’ . . . to self-organization and collective bargaining” (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937))).

²¹⁴ See Rosenfeld, *supra* note 2, at 10–30.

further complicate the issue. This Comment agrees with the Seventh Circuit that the NLRA and FAA must be harmonized to give both their full meaning.²¹⁵ However, this Comment contends that the best method to reconcile the two statutes is the application of the effective vindication exception.

1. Application of the Effective Vindication Exception to Employment Contracts

As previously argued, Section 7 provides employees the substantive right to band together and engage in collective action against an employer.²¹⁶ Taken in a vacuum, this substantive right would systematically invalidate any private employment contract, through arbitration or otherwise, that purported to restrict, eliminate, or waive those collective rights.²¹⁷ However, employers have relied upon the Supreme Court's liberal expansion of the FAA to enforce individual arbitration agreements in derogation of statutory rights. As courts have noted, this appears to create tension between the two federal statutes, leading to undue restrictions on employment rights.²¹⁸ This section argues that the effective vindication exception, a Supreme Court doctrine rarely invoked by the Roberts Court, provides the most logical vehicle to harmonize the policies and protections of the FAA and NLRA.²¹⁹

The purpose of the FAA is to make arbitration agreements as enforceable as all other private contracts without imbuing them with superior protections.²²⁰ While the Supreme Court has authorized the use of mandatory arbitration to resolve federal statutory rights, it has refrained from broadly eliminating safeguards to those rights.²²¹ Specifically, the Court has argued that Congress enacted the FAA solely to provide parties an "alternative forum

²¹⁵ See *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1157 (7th Cir. 2016).

²¹⁶ See, e.g., *id.* at 1153; *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 988 (9th Cir. 2016); *Tigges v. AM Pizza, Inc.*, Nos. 16-10136-WGY, 16-10474-WGY, 2016 WL 4076829, at *14–15 (D. Mass. July 29, 2016).

²¹⁷ See *Lewis*, 823 F.3d at 1156 (noting that the mandatory individual arbitration agreement would clearly be unenforceable if not for the FAA).

²¹⁸ See *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 360 (5th Cir. 2013).

²¹⁹ Cf. Okezie Chukwumerije, *The Evolution and Decline of the Effective-Vindication Doctrine in U.S. Arbitration Law*, 14 PEPP. DISP. RESOL. L.J. 375, 377–78, 464 (2014) (arguing that Justice Scalia's narrow conception of the effective vindication doctrine improperly limits its helpfulness in ensuring the prosecution of claims); Stone, *supra* note 72 (noting that the restoration of a robust effective vindication doctrine already commands the support of four Supreme Court justices).

²²⁰ *Tigges*, 2016 WL 4076829, at *14 (citing *Lewis*, 823 F.3d at 1156).

²²¹ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (arguing that the arbitration of a statutory rights does not represent an alteration of the substantive rights protecting employees).

for the resolution of claims”²²² by “trad[ing] [courtroom] procedures . . . for the simplicity, expedition, and informality of arbitration.”²²³ Congress would not expect an employee to forfeit fundamental rights merely because the employer decided to resolve the claim outside the judicial forum.²²⁴

The effective vindication exception is the optimal doctrine to reconcile the perceived tension between the FAA and NLRA. Application of the doctrine encourages the liberal enforcement of valid arbitration agreements, and renders agreements that choke off substantive employment rights invalid under the FAA’s savings clause.²²⁵ Allowing the FAA to enforce an arbitration agreement, notwithstanding its foreclosure of an employee’s ability to pursue collective relief, operates as a prospective waiver of a fundamental right in a sphere Congress did not intend the FAA to cover.²²⁶ This creates a real, not speculative, risk of an employer barring all methods to consolidate claims and grant itself immunity from meritorious claims.²²⁷ Application of the doctrine encourages, not dissuades, arbitration as a dispute resolution method by

²²² Colvin, *supra* note 5, at 74.

²²³ *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

²²⁴ *See Mitsubishi Motors Corp.*, 473 U.S. at 637 n.19 (stating that if a contract term in an arbitration agreement “operate[s] . . . as a prospective waiver of a party’s right to pursue statutory remedies . . . we would have little hesitation in condemning the agreement”); *see also* *Kristian v. Comcast Corp.*, 446 F.3d 25, 48 (1st Cir. 2006) (holding an arbitration provision unenforceable that precluded treble damages available under federal antitrust law); *Booker v. Robert Half Int’l, Inc.*, 413 F.3d 77, 83 (D.C. Cir. 2005) (holding a severing clause unenforceable in an arbitration agreement proscribing exemplary and punitive damages available under Title VII); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 670 (6th Cir. 2003) (holding an arbitration agreement unenforceable that limited remedies under Title VII); *McCaskill v. SCI Mgmt. Corp.*, 285 F.3d 623, 626–27 (7th Cir. 2002) (holding an arbitration agreement unenforceable that did not provide for an award of attorney’s fees in accordance with a right guaranteed by Title VII).

²²⁵ *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2313 (Kagan, J., dissenting) (arguing that the effective vindication doctrine exists to prevent arbitration clauses from foreclosing a plaintiff’s ability to enforce statutory rights and from conferring immunity to employers from potentially meritorious claims by harmonizing the FAA with other federal laws). It is important to note that the application of the exception to employment disputes does not concern the excessive cost of vindicating a statutory right, an argument the Supreme Court has rejected. *See, e.g., Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (noting that high arbitration costs could preclude a plaintiff from effectively vindicating her statutory rights).

²²⁶ *See Gilles, supra* note 109, at 430. In regard to the Court’s expansive application of the FAA, Justice Stevens has observed, “There is little doubt that the Court’s interpretation of the [FAA] has given it a scope far beyond the expectations of the Congress that enacted it.” *Id.* at 395 n.115 (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 132 (2001) (Stevens, J., dissenting)). Further, Justice O’Connor has noted, “The Court has abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation.” *Id.* (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O’Connor, J., concurring)).

²²⁷ *See Italian Colors*, 133 S. Ct. at 2313 (Kagan, J., dissenting); *see Green Tree*, 531 U.S. at 90–91, 91 n.6 (noting that “speculative” risks, “unfounded assumptions,” and “unsupported statements” will not suffice).

ensuring that arbitration “remains a real, not faux, method of dispute resolution.”²²⁸ Thus, the effective vindication exception must be applied to individual arbitration agreements that waive all methods of collective action to ensure that the FAA and NLRA are reconciled to further the protections afforded by both statutes to the greatest extent possible.²²⁹

2. *Distinguishing AT&T Mobility and Italian Colors*

The application of the effective vindication exception to an employer’s individual arbitration agreement distinguishes *Lewis* from the Supreme Court’s holdings in *AT&T Mobility* and *Italian Colors*. First, the doctrine removes illegal arbitration agreements from the Court’s expanded scope of the FAA and places them within its savings clause. Second, the doctrine strictly applies to resolve potential conflicts between federal statutes, not the preemption of state commercial law or small antitrust claims. Third, the doctrine protects employment rights while promoting the advantages and minimizing the disadvantages of arbitration.

First, the effective vindication exception places an employer’s illegal arbitration agreement within the FAA’s saving clause and, therefore, halts modern expansion of the FAA into areas for which Congress did not intend. In the wake of *AT&T Mobility* and *Italian Colors*, the Court’s endorsement of individual arbitration at all costs, irrespective of the substantive rights violated, fails to provide an adequate forum for employees to bargain collectively.²³⁰ Congress did not design the FAA to apply in employment disputes or to supersede all other federal statutes.²³¹ Employment contracts involve historical, fundamental, and statutory rights wholly separate from the concerns in other private agreements.²³² These disputes are completely foreign to the types of

²²⁸ *Italian Colors*, 133 S. Ct. at 2315 (Kagan, J., dissenting); see *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942) (holding that a contract foreclosing all methods of collective bargaining constitutes a per se violation of the NLRA).

²²⁹ *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2283–85 (2012).

²³⁰ See Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 278–79 (2015) (arguing that lower courts often feel compelled to enforce illegal arbitration agreements due to the Supreme Court’s rigorous endorsement of the practice); Stone, *supra* note 72 (“The pervasive use of mandatory arbitration by employers and retailers in their dealings with their workers and consumers is rapidly destroying innumerable rights that were legislated by Congress over more than a century.”).

²³¹ See *Italian Colors*, 133 S. Ct. at 2308–09. The Court has endorsed a broad interpretation of the FAA without taking into account the substantive considerations of the contract or other relevant statutes. See *Moses*, *supra* note 48, at 100.

²³² Cf. Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U. L. REV. 293, 296 (1999).

multinational, class-wide litigations intended to fall under the FAA. There is no overwhelming need for streamlined resolution of claims or significant risks of prolonged judicial deliberation.²³³ Furthermore, there is no risk of erroneous claims involving thousands of fraudulent or absentee plaintiffs because the disputes are remarkably smaller in number, concern identical employment issues, and are brought against the same employer who once employed the workers.²³⁴ Expanding the scope of the FAA to enforce illegal employment contracts and supersede the NLRA would immunize arbitration agreements from judicial challenge in a sphere Congress did not intend the FAA to apply.²³⁵ This would elevate arbitration agreements over all other private contracts, a situation inconsistent with the FAA's savings clause.²³⁶

Second, the factual and legal issues at stake in *AT&T Mobility* and *Italian Colors* are vastly different than the concerns in collective employment cases. In *AT&T Mobility*, the Court dealt with the federal preemption of a conflicting state law, not the type of substantive rights afforded by the NLRA.²³⁷ Collective employment actions are protected by a federal, not state, law that focuses on the inequality between parties.²³⁸ Furthermore, the protections are broader than a procedural rule, such as a Rule 23 class action.²³⁹ In *Italian Colors*, the Court held the prohibitively high cost of individually litigating small antitrust claims is insufficient to supersede the FAA.²⁴⁰ Unlike miniscule antitrust claims that must be aggregated just to incentivize a plaintiff to bring a potentially meritorious claim, Section 7 is the foundation on which all employment relations rest.²⁴¹ The right to collectively bargain in employment disputes represents the only effective method to protect workers from employers who possess the vastly superior power to dictate the terms and methods of the employment relationship.²⁴² The Court cannot rely upon inapplicable precedent without analyzing the distinct issues at stake in *Lewis*

²³³ See *id.* at 299 (arguing that the Supreme Court has often overestimated the virtues of arbitration in its decisions).

²³⁴ See *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2287 (2012).

²³⁵ See *Moses*, *supra* note 48, at 100.

²³⁶ See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (“To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract—a situation inconsistent with the [FAA’s] ‘saving clause.’”).

²³⁷ See *NLRB v. Alt. Entm’t, Inc.*, 858 F.3d 393, 406 (6th Cir. 2017).

²³⁸ See *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1158 (2016).

²³⁹ See *supra* note 211.

²⁴⁰ See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013).

²⁴¹ See *Allen-Bradley Local No. 1111 v. Wis. Emp’t Relations Bd.*, 315 U.S. 740, 750 (1942).

²⁴² See *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942); Bagchi, *supra* note 3, at 580.

and the debilitating effects of individual arbitration on employees. As Justice Kagan noted, “To a hammer, everything looks like a nail.”²⁴³ While the Court may see the FAA as a mechanism to automatically validate every arbitration agreement, class action waivers in employment contracts have wholly distinct characteristics and issues than those found in the narrow holdings of *AT&T Mobility* and *Italian Colors*.²⁴⁴

Third, factual circumstances present in collective employment disputes tend to promote, not discourage, the principle advantages of arbitration while minimalizing potential adverse effects. The Court’s desired benefits of arbitration include informality, streamlined procedures tailored to a type of dispute, reduced costs, and “increase[ed] speed of resolution.”²⁴⁵ Unlike the commercial context, class-wide employment disputes promote these benefits. Collective employment disputes promote informality because the employer once employed the plaintiffs, meaning the dispute involves familiar, not absentee, plaintiffs.²⁴⁶ Furthermore, the employees are bringing identical claims regarding a specific employment issue. This uniformity allows for streamlined rules, crafted equally between the parties, to govern since the parties are generally identical in their makeup and claims. In the employment context, Justice Breyer’s words are persuasive because “a single class [action] proceeding is surely more efficient than thousands of separate proceedings for identical claims.”²⁴⁷ Since employment disputes promote the benefits of arbitration, the Court cannot “immunize an arbitration agreement from judicial challenge” and shield employers from potential losses resulting from their conduct.²⁴⁸

Collective employment disputes also avoid the negative aspects of class-wide arbitration. Courts have noted that class-wide arbitration increases the risk to defendants, sacrifices informality, makes the process slower and costlier, promotes procedural morass due to a high number of absentee parties, lacks multilayered review, and provides poor protections of confidentiality and

²⁴³ *Italian Colors*, 133 S. Ct. at 2320 n.5 (Kagan, J., dissenting) (arguing that “to a Court bent on diminishing the usefulness of [class actions], everything looks like a class action, ready to be dismantled”); Chukwumerije, *supra* note 219, at 464.

²⁴⁴ See Edwards, *supra* note 232.

²⁴⁵ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011); see *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2287 (2012).

²⁴⁶ See *D.R. Horton*, 357 N.L.R.B. at 2287; Edwards, *supra* note 232, at 297–98.

²⁴⁷ *AT&T Mobility*, 563 U.S. at 363 (Breyer, J., dissenting).

²⁴⁸ *Id.* at 366 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)).

trade secrets.²⁴⁹ While these concerns may be applicable to a commercial business, they are largely inapplicable in the employment context. An average collective employment dispute involves only a specific subset of employees, and is more akin to individual arbitration than the tens of thousands of potential claimants envisioned by the Court in *AT&T Mobility*.²⁵⁰ Generally, disputes concern identical factual and legal issues of present employees, such as employment classification, thereby making joinder more efficient and expeditious than arbitrating cases on an individual basis.²⁵¹ With a small, substantially identical class of plaintiffs, there is no risk of procedural chaos from absentee parties, and employers will not be pressured into settling claims unless they are truly liable.²⁵² Furthermore, access to the judicial system ensures multilayered review, and disputes concerning trade secrets or confidential information that require private arbitration are less common. Enforcing collective action waivers would only discourage and dissuade employees from bringing grievances against the employer.²⁵³ Employers and employees are free to engage in arbitration if they choose; however, employers cannot terminate an employee's right to joint representation in the chosen forum. Thus, since the policies in collective employment disputes are vastly different than the commercial context, the effective vindication exception must apply to invalidate individual arbitration agreements that prohibit collective action.

3. *The Affirmative Opt-Out Clause*

While the factual situation in *Lewis* clearly violates Section 7 by conditioning continued employment on the waiver of a substantive right, the issue is complicated by the presence of an affirmative opt-out clause.²⁵⁴ This Comment suggests that an affirmative opt-out clause does not save an illegal arbitration agreement prohibiting collective action from invalidation because an employee cannot be forced to preemptively waive a substantive right in order to validate a claim. Furthermore, this Comment rejects the Ninth

²⁴⁹ See *AT&T Mobility LLC*, 563 U.S. at 344–46; *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 359 (5th Cir. 2013).

²⁵⁰ See *D.R. Horton*, 357 N.L.R.B. at 2287.

²⁵¹ See IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION – NATIONALIZATION – INTERNATIONALIZATION* 172 (1st ed. 1992) (“One cannot immerse oneself in the arbitration cases without coming to the conclusion that a major force driving the court is docket-clearing pure and simple.”).

²⁵² See *D.R. Horton*, 357 N.L.R.B. at 2287.

²⁵³ See *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 360 (1940).

²⁵⁴ *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016).

Circuit's reasoning in *Johnmohammadi* and advocates for a bright-line rule to minimize the risk of employers manipulating Section 7 rights.

First, the Ninth Circuit's holding in *Johnmohammadi* should not be adopted because affirmative opt-out clauses allow employers to coerce employees into forfeiting their Section 7 rights.²⁵⁵ The Court should not focus on whether substantive rights are actually waived if an employee can affirmatively opt-out of the terms of the agreement.²⁵⁶ Rather, the Court should ask whether an "employer's conduct reasonably tends to interfere with the free exercise of employee rights."²⁵⁷ An employer requiring employees to take a second mandatory step of employment to preserve their substantive rights, or else permanently forfeit them, is a clear impediment to the operation of those rights.²⁵⁸ This renders all agreements requiring the waiver of substantive employment rights invalid, regardless of whether they contain an affirmative opt-out clause.

Second, a bright-line rule of invalidation, irrespective of an affirmative opt-out clause, should be adopted to improve judicial consistency and promote fundamental employment policies. A clear rule recognizes the inherent inequality in bargaining power between employers and employees.²⁵⁹ This promotes consistency in lower courts by affording all employees across the nation identical substantive protections from employers who may attempt to immunize themselves from potentially meritorious claims.²⁶⁰ A clear rule resolves ambiguity and establishes a baseline for both parties, a feat the Supreme Court and lower courts have failed to accomplish in previous decisions.²⁶¹ Employers cannot require a prospective waiver of an employee's fundamental right at the most critical part of a dispute.

²⁵⁵ See *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1077 (9th Cir. 2014); *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942).

²⁵⁶ See *Curtis v. Contract Mgmt. Servs.*, No. 1:15-CV-487-NT, 2016 WL 5477568, at *5 (D. Me. Sept. 29, 2016).

²⁵⁷ See *id.* at *6 (emphasis omitted) (quoting *On Assignment Staffing Servs., Inc.*, 362 N.L.R.B. No. 189, at *5 (2015)).

²⁵⁸ See *id.*

²⁵⁹ See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–66 (1978); *Stone*, 125 F.2d at 756 (holding that a per se violation of the NLRA is not legalized by showing the employer did not coerce the employee into signing the agreement).

²⁶⁰ See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2314 (2013) (Kagan, J., dissenting).

²⁶¹ See, e.g., *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 360 (5th Cir. 2013).

C. Possible Implications for Employers and Employees

Applying the effective vindication exception to invalidate all individual arbitration agreements that prohibit collective action will have serious implications on employers and employees. In so holding, the Supreme Court would bolster the rights of employees in disputes and begin to cut back on an overbroad application of the FAA.²⁶² Furthermore, the Court would be adopting a long-held, and often unpopular, position by the Board.²⁶³ One implication is that both large and small employers must immediately change their employment practices. Thousands of employers across the nation have relied upon individual arbitration and collective action waivers to resolve disputes with employees. Many employers would be required to immediately revise their dispute resolution process.²⁶⁴ Another implication is that since collective action is a substantive right, all employees would gain a significantly increased ability to jointly represent their interests in disputes against their employer, whether through arbitration or traditional litigation.²⁶⁵ This would not disfavor arbitration as a process; rather, it would provide employers and employees with options to fashion a dispute resolution method that best fits both of their needs and objectives.²⁶⁶ A final implication is that large employers may be more inclined to settle claims rather than expose themselves to a collective penalty.²⁶⁷ Individual settlements may increase because employers may no longer shield themselves from liability by implementing contracts mandating the waiver of collective action, not because a large number of claims are unfounded.

²⁶² See Wilson, *supra* note 5.

²⁶³ See D.R. Horton, Inc., 357 N.L.R.B. 2277, 2283 (2012).

²⁶⁴ See Allyson Ho & Scott Schutte, *The Court After Scalia: Uncertain First Principles for Class Actions*, SCOTUSBLOG (Sept. 7, 2016, 2:06 PM), <http://www.scotusblog.com/2016/09/the-court-after-scalia-uncertain-first-principles-for-class-actions/> (“The Court’s moderate-conservative consensus on class actions has proven unwilling to reshape arbitration doctrines that would come at the steep cost of fundamentally transforming arbitration.”).

²⁶⁵ Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, ECON. POL’Y INST. (Dec. 7, 2015), <http://www.epi.org/publication/the-arbitration-epidemic/#epi-toc-8>.

²⁶⁶ See *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1158 (2016).

²⁶⁷ See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (arguing that employers faced with thousands of simultaneous lawsuits would avoid the risk of a huge loss in class-wide arbitration by settling claims).

CONCLUSION

An employee's substantive right to engage in collective action against an employer is the foundation of employment law. This right equalizes the bargaining power of the parties and prevents an employer from immunizing itself from liability for meritorious claims. In passing the NLRA, Congress recognized these dangers and ensured that employees could not be coerced into waiving this substantive right. Subsequent Supreme Court decisions demonstrate that the meaning of "concerted activities" has been broadly construed to encompass employees acting in a joint capacity, regardless if on their own or through a formal union. However, the Supreme Court's expanded scope of the FAA and liberal enforcement of arbitration agreements irrespective of the rights they supersede threatens employees. The foremost concern is that employers will gain more authority to completely foreclose an employee's right to act collectively and require all employment claims be resolved individually in arbitration.

This Comment concludes that the Seventh Circuit's holding in *Lewis* is correct because Section 7 provides substantive rights that an employer cannot restrict in individual arbitration. This Comment argues that the Supreme Court should resolve the perceived conflict between the FAA and NLRA by applying the effective vindication exception. The tension between the FAA and NLRA must be resolved to promote the distinct policies and protections afforded by both statutes.²⁶⁸ The adoption of the doctrine creates a bright-line rule invalidating individual arbitration agreements that foreclose an employee's right to collective action while still liberally enforcing legitimate arbitration agreements. This rule, regardless of the inclusion of an affirmative opt-out clause, creates consistency and stability in employment relationships. While the FAA mandates the liberal enforcement of arbitration, no legislation pursues its purposes at all costs, particularly when fundamental employment rights are at stake.²⁶⁹ The effective vindication exception ensures arbitration remains a real method of dispute resolution and prevents employers from immunizing

²⁶⁸ See *D.R. Horton*, 357 N.L.R.B. at 2283.

²⁶⁹ See *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987).

themselves from potentially meritorious claims.²⁷⁰ Therefore, the effective vindication exception should be adopted to invalidate individual arbitration agreements prohibiting an employee from pursuing collective action.

SPENCER STEPHENS*

²⁷⁰ See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2314 (Kagan, J., dissenting).

* Notes and Comments Editor, *Emory Law Journal*, Volume 67; Emory University School of Law, J.D., 2018; Marshall University, B.A., 2015. I would like to thank my parents, Matthew and Woneeka Stephens, for their endless sacrifices and unwavering support for me to pursue my dreams. I am truly grateful for my comment advisor Charles Shanor for his guidance during the writing process. I am also thankful for *Emory Law Journal* members Alexandra Gioseffi and Caryn Wang for their invaluable advice, feedback, and edits.