Collective Actions and Joinder of Parties in Arbitration: Implications of *DR Horton* and *Concepcion*

Catherine L. Fisk†

INTRODUCTION

Scholars of labor law and scholars of procedure have long emphasized the significance of a right to group action, and access to courts, legislatures, and other public forums, for the airing and resolution of disputes and the assertion of claims.[1] Well over a century ago, legal and policy analysts realized that the days of purely individual action in matters of business and labor were over, and that legal rules must adapt to the social and economic power of large corporations.[2] Among the rules that changed were archaic

† Chancellor's Professor of Law, University of California, Irvine. I am grateful for suggestions from Erwin Chemerinsky, Michael Green, and Michael Rubin.

1. Recent work in this vein includes Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE. L.J. 148 (2013); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78 (2011).

2. *See, e.g.*, Vegelahn v. Guntner, 167 Mass. 92, 108, 44 N.E. 1077 (1896) (Holmes, J., dissenting) ("[I]t is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the

limitations on joinder of claims and parties in litigation and laissez faire "liberty of contract" doctrines invalidating labor legislation. Yet the twentieth century consensus view that labor and procedural law should best protect the wellbeing of labor and capital and industrial and political democracy by facilitating group action and public courts' involvement in the development of rights has come under assault in both legal and political discourse. This Article assesses one facet of that assault at the intersection of labor and procedure: the question whether corporations can privatize and individualize all dispute resolution by requiring every worker to sign an agreement waiving the right to assert any claims in court and waiving the right even to proceed as a group in arbitration.

The individuation and privatization of employment dispute resolution has been aggressively pushed by lawyers representing large corporate employers. But, as this Article will show, it is not at all clear that their clients will benefit from the legal regime the lawyers have created. As long as employers have large workforces working under uniform policies, they will face dozens or hundreds of similar claims challenging pay practices, discrimination, and harassment. Group adjudication arose to address efficiently the many similar claims that arise when large institutions adopt uniform policies.[3] Individual arbitration of such claims may result in fewer claims being filed, especially if confidentiality provisions keep co-workers from learning from each other about how to assert successful claims. But unless or until employers figure out a way to shift all the costs of dispute resolution onto the claimants (and thus far courts have resisted such efforts), and to silence all claimants and their lawyers, employers will face many similar claims, will be paying part or all of the costs of lots of identical arbitrations, and will be paying lawyers to handle them separately rather than on a classwide basis.

This Article addresses a specific facet of that larger phenomenon. The National Labor Relations Act ("NLRA") protects the right of employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[4] The National Labor Relations Board ("the Board") has long held that protected activity includes asserting claims in courts, agencies, and in arbitration. In *D.R. Horton*, the Board found the NLRA to prohibit enforcement of an employer-imposed requirement that employees waive their right to bring a collective action challenging their working conditions.[5] On petition for review, a divided panel of the United

world, now going on so fast, means an ever increasing might and scope of combination. It seems to me futile to set our faces against this tendency.").

3. *See generally* Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866 (1977) (tracing the origins of the class action in seventeenth century English chancery courts).

4. National Labor Relations Act § 7, 29 U.S.C. § 157 (2012).

5. D.R. Horton, Inc., 357 N.L.R.B. No. 184, at *6-8 (2012).

States Court of Appeals for the Fifth Circuit rejected the Board's determination, holding that the Federal Arbitration Act ("FAA") requires enforcement of the mandatory arbitration agreement, including its class action waiver.[6]

The question whether the NLRA prohibits mandatory arbitration agreements containing waivers of the right to proceed as a class or collective or the right to join two or three plaintiffs, has not been definitively resolved. Historically, the Board does not always change its rule simply because one court of appeals denies enforcement; the Board often will wait for a consensus among circuit courts or a Supreme Court decision before abandoning its considered judgment about the proper interpretation of the statute.[7] The Board may be reluctant to regard the Fifth Circuit's ruling as persuasive or definitive, particularly because the Fifth Circuit majority questioned the Board's authority to construe its own statute. NLRB Administrative Law Judges continue to adhere to the *D.R. Horton* rule, and a number of decisions pending before the Board offer the newly reconstituted Board the opportunity to reaffirm its position in *D.R. Horton* with the possibility of review in circuits other than the Fifth.[8] As of this writing, no circuit other than the Fifth has reviewed an NLRB decision on the *D.R. Horton* issue; although two circuits have issued dicta

6. D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 362 (5th Cir. 2013). A number of articles published before the Fifth Circuit's decision in *D.R. Horton* have explained why the right to proceed in arbitration or in litigation as a collective or class is protected concerted activity under the NLRA, why the NLRA prohibits employer policies requiring employees to forego that right, why mandatory arbitration agreements containing class action waivers are also unenforceable under the Norris-LaGuardia Act, and why the FAA does not trump these rights under the NLRA and the Norris-LaGuardia Act. *See, e.g.*, Charles A. Sullivan & Timothy P. Glynn, Horton *Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013 (2013) (concerted dispute resolution remains valid); Michael D. Schwartz, Note, *A Substantive Right to Class Proceedings: the False Conflict Between the FAA and NLRA*, 81 FORDHAM L. REV. 2945 (2013) (NLRA renders class waivers unenforceable); Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled With Section 7 Rights?* 38 WAKE FOREST L. REV. 173 (2003) (section 7 forecloses arbitration that prohibits concerted activity). Professor Katherine Stone recently published a fine article on the same subject as this one making a powerful defense of the right to group litigation and arbitration of employment claims. Katherine V.W. Stone, *Procedure, Substance and Power: Collective Litigation and Arbitration of Employment Rights*, 61 UCLA L. REV. DISC. 164 (2013). Like the other articles on this topic, it was written before the Fifth Circuit decided *D.R. Horton*. *See id.*

7. *See* Iowa Beef Packers, Inc., 144 N.L.R.B. 615, 616 (1963) ("It has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise"); *see also* Int'l Ass'n of Machinists, District No. 9, 171 N.L.R.B. 234 (1968) (noting that Board adhered to its position about illegality of certain conduct even though every court of appeals to consider the matter refused to enforce the Board's order).

8. *See Employers Illegally Required Workers to Sign Arbitration Agreements, NLRB ALJs Find*, 167 DAILY LAB. REP. A-2 (Aug. 28, 2013) (citing J.P. Morgan Chase Co., No. 2-CA-088471 (Aug. 21, 3013); Cellular Sales of Mo., No. 14-CA-094714 (Aug. 19, 2013); Everglades College, Inc., No. 12-CA-096026 (Aug. 14, 2013)).

disagreeing with the Board, the issue remains pending in circuit courts around the country.[9] So the issue is far from dead.

Moreover, regardless of the fate of the Board's *D.R. Horton* rule, the legal limits on arbitration agreements waiving the right to proceed as a collective or class remain unclear. The Fifth Circuit only considered whether an agreement can prohibit collective actions under the Fair Labor Standards Act ("FLSA")[10] (which was at issue in the case) or class actions under Federal Rule of Civil Procedure 23 (which was not an issue in the case).[11] No court, however, has considered whether an agreement can prohibit other forms of joinder of plaintiffs or defendants. The Supreme Court has upheld class action waivers against state law unconscionability challenges (in *AT&T Mobility LLC v. Concepcion*[12]) and against the claim that they prevented effective vindication of substantive antitrust rights (in *American Express Co. v. Italian Colors*[13]). But the Court has yet to address other arguments against the enforcement of class action waivers. Even if the Court were to conclude that class actions are *always* antithetical to arbitration, including in employment cases,[14] it is another matter entirely to find that joinder of two, three, or twenty plaintiffs or two or three defendants is antithetical to arbitration. As scholars have shown, there are many different types of multiparty dispute resolution, of which nationwide class actions like *Concepcion* are only one. Multiparty arbitration is a well-established phenomenon and there is nothing necessarily antithetical between multiparty joinder and arbitration.[15]

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9. As of this writing, Owen v. Bristol Care, Inc., 702 F.3d 1050, 1053-54 (8th Cir. 2013), is the only circuit court of appeals case to purport to decide the issue definitively; the statement, however, was dictum. The court of appeals reversed a district court order denying a motion to compel arbitration in a collective action under the FLSA, reasoning that court owes "no deference" to Board's reasoning in *D.R. Horton* because the Board has "no special competence" in interpreting the FAA. *Id.* at 1054 (quoting Delock v. Securitas Sec. Servs. USA, 883 F. Supp. 2d 784, 787 (E.D.Ark. 2012)). The court was not, however, actually reviewing a Board decision. The only other circuit to address *D.R. Horton* is the Second, which likewise reversed the district court's denial of a motion to compel arbitration in a collective action under the FLSA. Sutherland v. Ernst & Young LLP, 726 F.3d 290, 297 n.8 (2d Cir. 2013). The Second Circuit confined its discussion to footnote, provided no reasoning, acknowledged that the class action waiver it addressed differed than the one at issue in *D.R. Horton* and said simply that it followed the Eighth Circuit. *Id.* The Second Circuit also explained in the same footnote that *D.R. Horton* "may have been decided by the National Labor Relations Board without a proper quorum." *Id.* The issue is, however, pending in a number of circuit courts.

10. 29 U.S.C. § 216 (2012).

11. *D.R. Horton*, 737 F.3d at 357 ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.") (quoting Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 332 (1980)).

12. 131 S.Ct. 1740 (2011).

13. 133 S. Ct. 2304 (2013).

14. *See Concepcion*, 131 S. Ct. at 1750-52.

15. *See* S.I. Strong, *Does Class Arbitration "Change the Nature" of Arbitration?* Stolt-Nielsen, AT&T, *and a Return to First Principles*, 17 HARV. NEGO. L. REV. 201, 268 (2013); Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1139 (2011)

This Article explains why collective action waivers or requirements to arbitrate individually are unenforceable under the National Labor Relations Act and the Norris LaGuardia Act. The Fifth Circuit's decision in *D.R. Horton* is wrong, the Board should adhere to its rule, and other courts of appeals should enforce the Board's orders when the issue reaches them. The Article also explains why arbitration agreements requiring claims to be brought by individuals are not covered by the Court's reasoning in *Concepcion* and *Italian Colors* to the extent they prohibit joinder of fewer parties than would be required to bring a large class action and, therefore, remain protected by labor law. The Article notes the inconsistency in the FAA cases about whether agreements can waive the right to file charges with some agencies and courts rather than others and therefore critiques the Fifth Circuit's ruling that the FAA trumps the employees' rights under section 7 and 8(a)(1) to file group actions in court or arbitration but does not trump section 8(a)(4), which protects the right to file unfair labor practice charges. Finally, the Article raises some questions about the practical wisdom of the courts' willingness to allow employers to require employees to pursue claims only as individuals, although the full treatment of the joinder issues is beyond the scope both of section 7 protections and this Article. State and federal courts universally allow liberal joinder of plaintiffs and defendants because it is more efficient and avoids some truly thorny issues about the preclusive effect of judgments. The Fifth Circuit majority's assumption, like the Supreme Court majority's in *Concepcion*, that individual determination of claims is better suited to arbitration is simply wrong in many cases. Unless employers can opt out of the usual rules for the binding effects of judgments and the usual rules for joinder of claims and parties, the notion that individual arbitration is superior for everyone (including employers) is simply wrong.

I.
D.R. HORTON

In *D.R. Horton*, an employee of the home builder brought a nationwide class action challenging the company's misclassification of its so-called superintendents as exempt from the wage and overtime protections of the FLSA.[16] Horton insisted that the collective action was barred by its "mutual arbitration agreement," which required that "all disputes and claims" be resolved by arbitration and that the arbitrator would not have "authority to consolidate the claims of other employees" or "the authority to fashion a proceeding as a class or collective action or to award relief to a group or

(discussing the decades-long history of class arbitration); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 454 (2003) (holing that nothing in the Federal Arbitration Act precludes class arbitration).

16. 737 F.3d at 349.

class of employees in one arbitration proceeding."[17] The plaintiff then filed unfair labor practice charges asserting that the arbitration agreement's prohibition on class and collective actions violated the NLRA. The Board held that the agreement's prohibition on class or collective actions violated section 8(a)(1).

On Horton's petition for review, a divided panel of the Fifth Circuit rejected the Board's decision in part. In an opinion by Judge Southwick, the majority held that the class and collective action waiver was enforceable, although it upheld the Board's ruling that an agreement may not waive employees' rights to file unfair labor practice charges. Judge Graves dissented, reasoning that the Board had correctly interpreted both the NLRA and the Norris-LaGuardia Act and that the FAA did not override their protections. The majority's reasoning proceeded in several steps, and the discussion that follows explores each.

A. Deference to the Board

The majority's first step was to brush aside the argument for deference to the Board's expertise in construing federal labor law. Reasoning that courts need not grant the usual deference to the Board's authority and expertise to interpret the NLRA when its "preferences potentially trench upon federal statutes and policies unrelated to the NLRA,"[18] the Fifth Circuit held that the Board's usual entitlement to "considerable deference" in matters of labor relations was not implicated. In the court's view, the validity of contractual waivers of section 7 rights is "unrelated to the NLRA."[19]

The Fifth Circuit relied upon *Hoffman Plastic Compounds, Inc. v. NLRB*, and *Southern Steamship Co. v. NLRB*, which rejected the Board's determinations of statutory remedies and the scope of section 7 protections in cases involving undocumented immigrants and sailors mutinying on board a vessel, respectively, on the ground that the Board's determination in each case conflicted with federal immigration law and federal criminal maritime law, respectively. Whatever the merits of the Supreme Court's cases declining to defer to the Board's reconciliation of federal immigration or criminal law with federal labor law, the Board's core responsibility is to decide whether contractual waivers of section 7 rights are enforceable and its decisions are entitled to deference.[20] The Board determined that the

17. *Id.* at 348.

18. *Id.* at 356 (quoting Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 173, 144 (2002)).

19. *See id.* (quoting Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 173, 144 (2002)).

20. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 144 (2002) (rejecting Board's interpretation as being in conflict with federal immigration law); Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942) (rejecting Board's determination that NLRA protects a strike by sailors on a vessel in port because it was a mutiny by sailors prohibited by federal criminal maritime law).

NLRA prohibits contractual waivers of section 7 rights. The Supreme Court has long deferred to the Board's interpretations of the scope of section 7 protections, especially in the context of determining the validity of employment and labor contracts. For example, in *National Licorice Co. v. NLRB*, the Court upheld the Board's finding of unlawful and enforceable an employment contract restricting a discharged employee from presenting a grievance to the employer "through a labor organization or his chosen representatives, or in any way except personally."[21] The Court has also deferred to the Board's interpretations of the scope of section 7 in cases in which it was alleged that other federal laws—such as federal antitrust law, criminal law, highway safety law, or other federal labor laws—were implicated by the Board's ruling.[22] Board decisions from the very early days of the NLRA found that arbitration agreements contained in individual employment agreements and that requires employees to arbitrate disputes on an individual basis were *per se* violations of the NLRA and courts deferred to that Board rule. As the Seventh Circuit explained in 1942 upholding a Board decision invalidating an arbitration agreement: "By the clause in dispute, the employee bound himself to negotiate any differences with the employer and to submit such differences to arbitration. . . . Thus the employee was obligated to bargain individually and, in case of failure, was bound by the result of arbitration. This is the very antithesis of collective bargaining."[23]

For over 70 years, the Board has considered the right to collective action, including collective arbitration and litigation, to be a core section 7 right and has held contractual provisions requiring individual arbitration to violate that right. This longstanding rule is entitled to deference.

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21. 309 U.S. 350, 360 (1940).

22. For example, the Court deferred to the Board's interpretation of the NLRA as protecting individual invocation of a collective bargaining agreement provision allegedly entitling an employee to refuse to drive an unsafe truck. *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822 (1984). Since then, lower federal courts have deferred to the Board's rules regarding when individual invocation of federal or state statutory rights is protected. Similarly, the Court deferred to the Board's judgment that union rules restricting resignations during a strike violated the NLRA, notwithstanding the argument that the rule restricted union members' rights under the federal Labor Management Reporting and Disclosure Act, which the Board does not enforce. Pattern Makers' League v. NLRB, 473 U.S. 95 (1985). See also *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), and *United States v. Hutcheson*, 312 U.S. 219 (1941), both construing the relationship between federal labor and antitrust law. *Cf.* Eastern Associated Coal Co. v. United Mine Workers, 531 U.S. 57 (2000) (arbitrator's award enforceable under section 301 of the Labor Management Relations Act notwithstanding alleged conflict between the award and federal Omnibus Transportation Employee Testing Act and federal Department of Transportation regulations implementing it).

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

B. Collective Actions: Substantive or Procedural?

The second step in the *D.R. Horton* majority's analysis was to dismiss the right to seek collective legal redress as a *procedural* right.[24] In contrast to non-waivable substantive rights, employers can demand employees waive their procedural rights as a condition of employment. The court noted NLRB, circuit, and Supreme Court authority holding that section 7 protects the right of employees to join together to file suit,[25] but reasoned that the FAA "has equal importance" to the NLRA and that, under the FAA, neither the right to go to court nor the right to use a class or collective action is a substantive right.[26] Immediately thereafter, the court conceded that "Rule 23 is not the source of the right to the relevant collective actions. The NLRA is." But in the next paragraph, the court asserted that "there is no substantive right to proceed collectively under the FLSA."[27]

Despite having drawn the distinction between procedural and substantive rights, the court never addressed whether the right to engage in collective action, including group litigation or arbitration, is a *substantive* right under the NLRA even if it is a procedural right under Rule 23 (which was not relevant in the case) and the FLSA (which was). Although the Supreme Court has decided that mandatory arbitration agreements may waive statutory and constitutional rights to sue in court and to trial by jury because the Court regarded these as procedural rights under other statutes, it does not follow that the NLRA treats the right to seek improvements in working conditions *as a group* as a waivable procedural right. In fact, the NLRA treats the right to collective action to improve working conditions as a substantive right. Because the Fifth Circuit majority conceded that the NLRA and the Norris-LaGuardia Act protect such a right and prohibit employers from requiring employees to waive it, the majority should have explained why the FAA allows waivers of a right that the NLRA and the Norris-LaGuardia Act treat as non-waivable. The majority never did so.

The Board's decision in *D.R. Horton* went to some lengths to explain why the right to bring group actions before arbitrators, agencies, and courts is a substantive right under section 7's broad protection for "concerted activities for . . . mutual aid and protection."[28] As the Board explained, Congress envisioned and the Supreme Court has long held that seeking legal redress in arbitral, administrative and judicial tribunals is part and

24. *D.R. Horton*, 737 F.3d at 357.

25. *Id.* at 356 (citing 127 Rest. Corp., 331 NLRB 269, 275-76 (2000); Brady v. Nat'l Football League, 644 F.3d 661, 673 (8th Cir. 2011); NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 831-36 (1984)).

26. *D.R. Horton*, 737 F.3d at 357.

27. *Id.*

28. 29 U.S.C. § 157 (2012); *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, at *12 (2012).

parcel of the labor relations regime.[29] This type of redress has long been preferred by the NLRB and the federal courts in lieu of strikes, boycotts, and other forms of labor unrest.[30] Indeed, a major purpose of federal labor law was to minimize the risk of commercial disruption by channeling labor disputes into tribunals rather than into the streets. Had the Fifth Circuit considered this long line of Supreme Court authority, it would have been forced to explain why section 7 protections for strikes, picketing, boycotts, filing unfair labor practice charges, collective bargaining, and a whole host of collective ways of seeking better working conditions are *substantive* (and, therefore, not waivable absent genuine employee consent) but the right to achieve the same ends through collective litigation under the FLSA is merely procedural and waivable as a condition of employment.

As Judge Graves pointed out in his dissent to *D.R. Horton*, collective action is first and foremost what the NLRA protects.[31] As Congress stated in the first sentence of the NLRA section 1, "[t]he denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest . . . ."[32] Congress continued, "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce . . . and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions."[33] The *only* rights the NLRA protects are the rights to act as a collective; the Supreme Court has specifically held

29. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (finding federal labor law to contain a policy of promoting labor peace by encouraging enforcement of collective bargaining agreements, including their arbitration agreements and specifying that a collectively bargained "agreement to arbitrate grievances is the quid pro quo for an agreement not to strike"); United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960) (enforcing executory arbitration agreement because "arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under" a collective bargaining agreement); United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960) ("In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife.").

30. *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, at *4 (citing NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962) (concerted walkout to protest cold working conditions is protected even though employees were not represented by a union and did not attempt to bargain collectively), and Eastex, Inc. v. NLRB, 437 U.S. 556 (1978) (dissemination of newsletter encouraging employees to vote for labor issues in upcoming national election is protected)). Indeed, in finding an exception to the Norris-LaGuardia Act's prohibition on injunctions in labor disputes such that courts may enjoin strikes in violation of a collectively bargained no strike clause, the Court found that "the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures." Boys Markets, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235, 249 (1970).

31. 737 F.3d at 365 (Graves, J., dissenting).

32. 29 U.S.C. § 151 (2012).

33. *Id.*

that individual action aimed at improving only an individual's wages or working conditions is unprotected under the NLRA. In *Emporium Capwell*, for example, the Court held that employees who sought to engage in individual bargaining over claims of race discrimination were unprotected by section 7 because they refused to act as part of the union.[34] Similarly, in *J.I. Case*, the Court held that individual contracting over wages violated the NLRA because the statute authorizes only collective contracting.[35]

As the Board also observed in *D.R. Horton*, the NLRA is not the only federal labor statute that makes unenforceable contractual waivers of the right to engage in group action. The Norris-LaGuardia Act was enacted in 1932 precisely to invalidate contracts by which employers conditioned employment on the employee's waiver of a right to concerted action. The Norris-La Guardia Act declares the public policy of the United States to be that "the individual unorganized worker . . . shall have full freedom . . . to negotiate the terms and conditions of his employment, and that he shall . . . be free from the interference, restraint or coercion of employers of labor . . . in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[36] Moreover, the Norris-LaGuardia Act declares any "undertaking or promise in conflict with" that public policy "shall not be enforceable in any court of the United States."[37]

Histories of the Norris-La Guardia Act emphasize that Congress prohibited contracts that waive the right to engage in collective action because it considered group action to be an essential feature of the modern economy. As Daniel Ernst wrote in his classic intellectual history of the Norris-LaGuardia Act's prohibition on yellow dog contracts, employers who used such contracts "sought to mobilize on their behalf old notions about the moral value of individual decision-making in the marketplace."[38] Then as now, employers used yellow dog contracts as a basis for obtaining injunctive relief against group action that employers considered a threat to their profit. Then, of course, the group action that the yellow-dog contract sought to forestall was unionization and collective bargaining. Now it is class action litigation in courts. But in both cases, employers seek to lower labor costs by forcing employees to resolve all disputes on an individual basis in which the employer enjoys the advantage of superior bargaining power. The proponents of bans on contracts requiring employees to foreswear group action pointed out that such agreements drove down labor costs because, as Ernst quoted, "'the mass of wage earners can no longer be dealt with by capital as so many isolated units' and that the individual

34. Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50 (1975).

35. J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

36. Norris-LaGuardia Act § 2, 29 U.S.C. § 102 (2012).

37. Norris-LaGuradiac Act § 3, 29 U.S.C. § 103 (2012).

38. Daniel Ernst, *The Yellow-Dog Contract and Liberal Reform*, 30 LAB. HIST. 251, 258 (1989).

worker could no longer be expected to pit 'his single, feeble strength against the might of organized capital.'"[39] As Ernst recounts, the primary drafter of the Norris-LaGuardia Act testified before Congress that "[t]hrough their deliberate and widespread policy of destroying the bargaining power of labor," employers who insisted on yellow dog contracts "had forced workers to take whatever wages were offered them and had "beaten down the purchasing power of the people of this country."[40]

Although the precise form of the yellow dog contract that the Norris-LaGuardia Act banned has faded from memory, today's employers still seek to require their employees to waive by contract their rights to engage in group activity that the employer finds obnoxious. The Board recognized that arbitration agreements waiving the right to initiate group actions in courts, agencies, or arbitration are today's yellow dog contract, and the "law has long been clear that all variations of the venerable 'yellow dog contract' are invalid as a matter of law."[41]

The consequence of the Fifth Circuit's position is that employees like D.R. Horton's who are powerless as a practical matter to improve their wages through individual negotiation will be incentivized to strike, picket, or boycott as a group because they cannot use the peaceful and orderly methods of legal redress (such as filing a FLSA claim) that the NLRA specifically encourages and protects as preferred to industrial unrest. A simple example illustrates the problem. Imagine D.R. Horton's employees believed they were entitled to be paid overtime and met to consider options to challenge the company's refusal to pay them. They could have gone on strike to demand overtime. They could have organized a consumer boycott. They could have picketed D.R. Horton projects. They could have formed a union and bargained for overtime pay. All of these would clearly be protected by section 7.[42] If D.R. Horton required them to sign a contract waiving their right to engage in these activities, the contract would have been unenforceable under the Norris-LaGuardia Act, and disciplining

39. *Id.* at 262. Ernst cites this statement as appearing in an amicus brief in Platt v. Philadelphia & Reading R.R., 65 F. 660 (E.D. Pa. 1894). *Id.*; *see also* Hopkins v. Oxley Stave Co., 83 F. 912, 933 (8th Cir. 1897) (Caldwell, J., dissenting) (citing same amicus brief).

40. Ernst, *supra* note 38, *at* 272 (quoting *Defining and Limiting the Jurisdiction of Courts Sitting in Equity: Hearing on H.R. 5315 Before the H. Comm. On the Judiciary*, 72d Cong. 62-63 (1932) (statement of Donald Richberg, Att'y, Ry. Labor Execs. Assoc.).

41. D.R. Horton, Inc., 357 N.L.R.B. No. 184, at *8 (2012) (quoting Barrow Utilities & Elec., 308 N.L.R.B. 4, 11 n.5 (1992)).

42. *See, e.g.*, Edward J. Debartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 581-82 (1988) (handbilling protected); St. Barnabas Hosp., 334 N.L.R.B. 1000, 1000 (2001) (group refusal to perform voluntary on-call work protected); Kaiser Engineers, 213 N.L.R.B. 752, 756 (1974), *enforced*, 538 F.2d 1379 (9th Cir. 1976) (group of engineers writing to legislators to oppose change in immigration laws protected).

employees for refusing to sign would violate the NLRA.[43] Instead, the employees chose to proceed as a group to file a legal action under the FLSA. The law is well settled that the choice to sue or to arbitrate as a group is protected concerted activity just as is the choice to picket, strike, bargain, or boycott as a group.[44] If the purpose of both the NLRA and the FAA is to promote arbitration over alternative forms of dispute resolution, it makes no sense to read them to give employees incentives to strike rather than to use arbitral methods to demand the wages they are owed under the FLSA.[45]

The substantive nature of the right to group legal redress is what distinguishes the NLRA from every other statute the Supreme Court has addressed in its FAA jurisprudence. That the FAA allows arbitration of employment discrimination or other claims could be interpreted as solely procedural because the substantive right protected by these statutes is the right to be free from discrimination, price fixing, or unfair business practices in the pricing of mobile phones. In theory, arbitration of the claim preserves the plaintiffs' statutory claim but simply forces resolution into an arbitral forum.

None of the Court's class-action waiver jurisprudence under the FAA addresses a case in which the fundamental statutory protection is the right of employees to act as a group in improving their working conditions; all of them addressed situations in which the underlying right was an individual right to be free from unfair market behavior. In *Gilmer*, employees alleged age discrimination.[46] In *Concepcion*, consumers alleged fraud and false advertising in the price of mobile phones.[47] In *Italian Colors*, the restaurants alleged price fixing in credit card costs.[48]

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43. *See* 29 U.S.C. § 103 (2012) (contracts in conflict with rights of employees to act concertedly are prohibited); Nat'l Licorice Co. v. NLRB, 309 U.S. 350, 360 (1940) (holding that a contract forbidding employees from presenting grievances to employer in any way except personally was unlawful).

44. Among the many cases the Board cited for this proposition are old cases such as *Spandsco Oil & Royalty Co.*, 42 N.L.R.B. 942, 948-49 (1942), and *Salt River Valley Water Users Association*, 99 N.L.R.B. 849, 853-54 (1952), and recent cases governing class action litigation and lawsuits filed by groups of employees, such as *United Parcel Service*, 252 N.L.R.B. 1015, 1018, 1022 n.26 (1980), *enforced* 677 F.2d 421 (6th Cir. 1982) (section 7 protects filing class action lawsuit alleging employer violated state statute requiring rest breaks), and *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' . . . .").

45. While section 7 does not protect every form of concerted activity that is an alternative to core protected activity, as noted above, the law has been clear for decades that employees have a section 7 right to file and arbitrate grievances, including to assist one another to do so as a group, and to initiate charges under the NLRA and various state and federal employment statutes.

46. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (enforcing arbitration agreement covering an ADEA claim).

47. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011).

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

C. *Reconciling the FAA and the NLRA*

Conceding that the NLRA protects the right to institute group litigation and group arbitration, the Fifth Circuit held that the FAA's policy favoring individual arbitration trumps the NLRA's protections for group action. The FAA makes arbitration agreements "enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*"[49] The purpose of the savings clause, the Supreme Court has explained, is to place arbitration agreements on the same footing as other contracts: they are enforceable but they may still be invalidated if they violate some general principle of contract law, such as fraud, duress, unconscionability, or public policy.[50] The Board reasoned that the NLRA and Norris-LaGuardia Act prohibitions on employer policies or contracts waiving the right to engage in concerted activity were "grounds as exist at law . . . for the revocation of any contract."[51] The Board explained that these labor statutes treat all agreements equally and do not single out arbitration agreements: no contract requiring employees to forego their statutory rights to concerted activities is valid under the NLRA and the Norris-LaGuardia Act.[52]

The Fifth Circuit majority found the FAA to invalidate *any* law, even a law neutral to arbitration, if it "is an actual impediment to arbitration."[53] The majority acknowledged that the prohibition on waiver of rights to engage in collective actions is facially neutral, and applies equally to arbitrations and to adjudications, and would therefore be within the savings clause. But the Fifth Circuit nevertheless found it to violate the FAA because "[r]egardless of whether employees resorted to class procedures in an arbitral or in a judicial forum, employers would be discouraged from using individual arbitration."[54] It thus read the savings clause out of the FAA entirely. Judge Southwick discerned this rule from the reasons given by the Supreme Court in *Concepcion* for finding class actions to be antithetical to arbitration. Class actions are "slower," require greater "procedural formality," are "more likely to generate procedural morass rather than final judgment[,]" and "increase[] risks to defendants" of being held liable or having to settle claims for more money.[55] From that, the Fifth Circuit concluded that a prohibition on class action waivers in arbitration

49. 9 U.S.C. § 2 (2012).

50. *See, e.g.*, Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996) ("[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2. [citations omitted.] Courts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions."); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967).

51. D.R. Horton, 357 N.L.R.B. No. 184, at *11 (2012).

52. *See id.*

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

54. *Id.* at 359.

55. *Id.* (quoting AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1751 (2011)).

violates the FAA because "employers would be discouraged from using individual arbitration" and "requiring the availability of class actions interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[56] In other words, employers seek to ban class actions because they believe doing so reduces the amount of money they must pay to resolve claims about illegal labor practices. Having defined the fundamental attribute of arbitration as being a process that reduces labor costs, the Fifth Circuit then found in the FAA a policy to invalidate any labor law that would create an obstacle to the employer preferences. In a word: "Requiring a class mechanism is an actual impediment to arbitration and violates the FAA."[57]

The Fifth Circuit majority fundamentally misunderstood the incentives its rule creates to avoid arbitration. Under its rule, employees have incentives to use economic weapons—strikes, boycotts, picketing—or to invoke the procedures of government agencies, because all of these remain legally protected. But they lose the right to use the very form of peaceful and privatized dispute resolution—group arbitration— that the FAA is supposed to value.

Having decided that the NLRA protection for collective actions is not covered by the savings clause of the FAA, the Fifth Circuit then considered "whether the NLRA contains a congressional command to override the FAA."[58] The court found none in the text of the NLRA, none in its legislative history, and "no inherent conflict" between the two statutes.[59] On the language, the court explained that the "NLRA does not explicitly provide for . . . a collective action" and "[t]hus there is no basis on which to find the text of the NLRA supports a congressional command to override the FAA."[60] On the legislative history, the entirety of the court's analysis referred to the Chamber of Commerce's amicus brief arguing that the NLRA "only supports a congressional intent . . . [to] empower unions to engage in collective bargaining."[61] Because Rule 23 and the collective action provision of the FLSA had not been adopted when the NLRA and the National Industrial Recovery Act of 1933 were enacted, "the legislative history . . . does not provide a basis for a congressional command to override the FAA."[62]

The Fifth Circuit majority also reasoned that the NLRA does not protect a right to engage in group litigation because it was "enacted and

56. *Id.*
57. *Id.* at 360.
58. *Id.*
59. *Id.* at 361.
60. *Id.* at 360.
61. *Id.* at 361.
62. *Id.*

reenacted prior to the advent in 1966 of modern class action procedure."[63] The court got its history wrong, as well as the facts of the *D.R. Horton* case. The right to file a collective action under the FLSA (which is the right at issue in *D.R. Horton*) was in the statute when it was enacted in 1938,[64] and the Board found group filing under the FLSA to be protected concerted activity as early as 1942.[65] The changes to Rule 23 in 1966 are entirely irrelevant to the *D.R. Horton* case.

On the question whether the FAA is an implied repeal of the NLRA right to engage in concerted invocation of statutory rights, the Fifth Circuit also made a rather basic error. In the first place, the FAA as enacted specifically exempted the contracts of employees engaged in commerce, and it was not until *Circuit City Stores, Inc. v. Adams* in 2001 that the Court held that the FAA applied to employment contracts, notwithstanding the provision in section 1 of the FAA which specifically excepts from coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[66] As many scholars have explained, when the FAA was enacted in 1925, this exemption of contracts of employment covered all employment contracts over which Congress had regulatory power, as the Supreme Court had held that the Constitution forbade Congress from regulating the contracts of any other employee because its power under the Commerce Clause was limited to those who actually worked or traveled in interstate commerce.[67] When Congress enacted the NLRA ten years later, it plainly would not have said anything about its effect on the FAA because at the time Congress *only* had the power to regulate employment of those who actually worked on the railroads, in interstate shipping, or in the actual channels of commerce. As Matt Finkin pithily observed, the Court read the FAA "to exclude from coverage those employees for whom Congress could legislate, but to include those employees for whom Congress had had no power to legislate

63. *Id.* at 362.

64. Fair Labor Standards Act, Pub. L. No. 75-718, § 16(b), 52 Stat. 1060, 1069 (1938) (codified as amended at 29 U.S.C. § 216(b) (2012)).

65. Spandsco Oil & Royalty Co., 42 NLRB 942 (1942).

66. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114-19 (2001) (quoting 9 U.S.C. § 1).

67. Carter v. Carter Coal, 298 U.S. 238 (1936) (declaring unconstitutional federal law regulating wages and hours of employees as exceeding scope of Congress' commerce power); R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 368 (1935) (declaring unconstitutional pension system for railroad workers and finding the law was only to help "the social welfare of the worker, and therefore [was] remote from any regulation of commerce"); Hammer v. Dagenhart, 247 U.S. 251 (1918) (declaring unconstitutional under Tenth Amendment a federal law prohibiting shipment in interstate commerce of goods made by child labor because law controlled labor conditions that could be regulated only by states).

at the time, and had been excluded as a matter of practical reach, which, today, amounts to most of the workforce."[68]

But if the principle is that the later enacted statute is an implied repeal of the earlier one, the NLRA is the later one. The Fifth Circuit dithered – there really is no nicer way to put it – on whether the recodification of the FAA in July 1947 made it a later enactment than the recodification of the NLRA in June 1947. The court said that "reenactments were part of a recodification of federal statutes that apparently made no substantive changes" and it is "unclear" whether the recodification without substantive change can be treated as an implied repeal.[69] The Fifth Circuit entirely overlooked that the NLRA was not merely recodified in 1947, but was substantively amended, and amended again in 1959, while the FAA was not.

Moreover, if, as the Fifth Circuit seemed to think, the question whether the FAA impliedly repealed the collective action protections of the NLRA (or vice versa) turns on the dates when the statutes were first enacted or recodified, the recodification (without substantive change) of the FAA occurred *after* the Board held that group filing of an FLSA claim was protected by the NLRA (1942), but *before* the NLRA was twice substantively amended (1947 and 1959) without Congress attempting to change the Board's rule that the NLRA protects a right to file collective litigation under the FLSA. Moreover, when Congress amended the FLSA in the 1947 Portal-to-Portal Act, it specifically left untouched the right of employees to file actions on behalf of other similarly situated employees; it simply eliminated the right of employees to designate an uninterested third party (such as a labor union) to bring suit on the employees' behalf.[70] Given that representative actions, including those filed by unions, were commonplace between the enactment of the FLSA and the labor law amendments in 1947, and that the right of employees to institute such actions was well known to be concerted activity protected by the NLRA, the Fifth Circuit was simply wrong to suggest that Congress may have intended the FAA to repeal the NLRA protections for FLSA collective actions.

D. The Right to File Charges and the Right to Group Arbitration

One final anomaly in the Fifth Circuit's reasoning deserves mention. The court held that the arbitration agreement could not waive the NLRA section 8(a)(4) right to file charges with the National Labor Relations

68. Matthew W. Finkin, *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act*, 93 NEB. L. REV. __ (forthcoming 2014).

69. D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 362 (5th Cir. 2013).

70. *See* Hoffman-LaRoche, Inc. v. Sperling, 493 U.S. 165, 173 (1989) (discussing the repeal of the uninterested representative action by the Portal-to-Portal Act).

Board.[71] The court determined that D.R. Horton's arbitration agreement could be read to prohibit filing unfair labor practice charges, discussed two prior Board decisions finding similar agreements to violate the NLRA, and then simply stated that the Board validly ordered D.R. Horton to rewrite its agreement to make clear that employees retained the right to file NLRB charges.[72]

The court did not explain why employers can require employees to waive the right to sue in any court and the right to institute group arbitration, but not the right to file charges with an administrative agency. The Supreme Court has held that mandatory employment claim arbitration agreements may waive the right to litigate before other agencies, including the EEOC, although they do not waive the agency's independent right to sue.[73] Michael Green's article in this Symposium explains the basis for the Board's rule prohibiting waiver of the right to file charges with agencies.[74]

The Fifth Circuit's approval of the contract prohibiting collective actions contradicts its holding that the FAA does not allow employers to impose arbitration agreements that prohibit filing unfair labor practice charges.[75] The court explained that "the NLRA does not contain a congressional command exempting the statute from application of the FAA," and therefore, the arbitration agreement "must be enforced according to its terms."[76] Its terms, as the court found, prohibited filing charges anywhere except as an individual in arbitration. On what basis does the statutory right to file charges with the Board survive the FAA while the statutory rights to file litigation or group arbitration do not? The difference between the NLRA and other labor and employment statutes, of course, is that only the NLRB has jurisdiction to adjudicate unfair labor practice charges whereas courts can adjudicate other federal and state statutory claims, subject to administrative exhaustion requirements.[77] But why does that difference dictate a different result under the FAA?

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71. *D.R. Horton*, 737 F.3d at 363 (quoting Cintas Corp. v. NLRB, 482 F.3d 463, 467 (D.C. Cir. 2007)).

72. *Id.* at 364.

73. EEOC v. Waffle House, Inc., 534 U.S. 279 (2002).

74. Michael Z. Green, *Retaliatory Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 201 (2014).

75. *See D.R. Horton*, 737 F.3d at 363 (citing Cintas Corp. v. NLRB, 482 F.3d 463, 467 (D.C. Cir. 2007)).

76. *Id.* at 362.

77. 29 U.S.C. § 160(a) (2012) ("The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.").

II.
WHEN IS JOINDER OF PARTIES ANTITHETICAL TO ARBITRATION?

The primary purpose of section 7 of the NLRA is to protect the right of employees to improve their working conditions through collective action. According to the Fifth Circuit in *D.R. Horton*, employers can demand as a condition of employment that employees waive this right of collective action because the FAA's policy favoring individual arbitration supersedes the NLRA's protections. The basis of the argument that the FAA supersedes the NLRA is the Supreme Court's determination in *Concepcion* that class actions are antithetical to arbitration.[78] For the reasons explained below, nothing in the FAA allows employers to require employees to abandon their NLRA rights to seek legal redress in smaller groups, such as a collective action under the FLSA or through ordinary rules for joining multiple plaintiffs or multiple defendants in a single action. Moreover, the notion that joint or group legal actions are inconsistent with the FAA policy of efficient dispute resolution makes absolutely no sense. Liberal joinder of claims and parties has been favored by state and federal courts for decades precisely *because* multiparty joinder is efficient.

As a threshold matter, it might be argued that *Concepcion* is irrelevant to *D.R. Horton* because it addressed the scope of FAA preemption of state laws limiting enforcement of arbitration agreements, not the validity under the FAA of federal laws limiting arbitration agreements. The Fifth Circuit did not read *Concepcion* simply as a preemption decision, and for good reason. The Court has applied its policy favoring arbitration and its reading of the FAA to allow waivers of statutory rights to sue equally in cases alleging preemption of state law restrictions on arbitration (as in *Concepcion*) and cases alleging violation of federal substantive rights, including antitrust, securities, age and race discrimination, fair credit laws, the federal Automobile Dealers Day in Court Act, and a host of other federal laws.[79] The Court in *Concepcion* and *Italian Colors* made clear that it thinks that at least some forms of class action to be antithetical to some arbitration systems, and when contracting parties have agreed to an arbitration system that cannot accommodate class actions, the FAA trumps the federal law providing a right to a class action.

Going forward, therefore, it is important for courts to decide whether statutory rights to all forms of collective action can be waived by any

78. *D.R. Horton*, 737 F.3d at 359-60 (discussing *Concepcion*, 131 S. Ct. at 1748).

79. *See, e.g.*, CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2012) (Credit Repair Organizations Act); EEOC v. Waffle House, Inc., 534 U.S. 279 (2002) (Title VII of the Civil Rights Act of 1964); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (Age Discrimination in Employment Act); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (Securities Act of 1933); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (Sherman and Clayton Acts and Automobile Dealers Day in Court Act).

arbitration agreement. Whatever the merits of the Court's judgment about nationwide class actions and the highly informal dispute resolution process used by AT&T, nothing in *Concepcion* or in the FAA addresses the much different question whether all rules for joinder of parties are anathema to all forms of the arbitral process.

Consider two typical employment matters. Matter A involves two female coworkers who were sexually harassed and physically assaulted by a coworker and a supervisor while employed at Corporation A while the four were working alone in Corporation A's warehouse late at night. The women reported the incidents pursuant to their employer's workplace harassment policy; the person responsible for handling complaints did nothing, the harassment continued for two weeks, and the harassers threatened to severely injure the victims in retaliation for reporting. The victims wish to file a lawsuit under Title VII (which allows claims only against the employer, in this case a corporation), the state fair employment law (which allows claims against the employer as well as supervisory employees), and to assert tort claims for battery and intentional infliction of emotional distress against the individual harassers.

A second matter, Matter B, involves six administrative assistants and twelve nurses working in identical jobs under identical schedules and pay for a corporate medical practice (Corporation B) owned by two doctors. The six administrative assistants and twelve nurses believe the employer misclassified them as exempt administrators and professionals and seek unpaid overtime under the FLSA and a state wage/hour law. When the doctors learn that their employees are demanding unpaid overtime, they fire all eighteen employees, dissolve the corporation, and transfer all its assets to a new corporation engaged in the same business in the same city under a different name (Corporation C).

Corporations A, B and C require employees to sign identical arbitration agreements providing, as D.R. Horton's and AT&T's did, that "all disputes and claims relating to the employee's employment" will be determined by arbitration and the arbitrator "may hear only Employee's individual claims" and "will not have the authority to consolidate the claims of other employees" or authority "to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding."[80] It then says, "YOU AND CORPORATON A [or B or C] MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY." Imagine, further, that instead of saying, as D.R. Horton's did, that the employee waived the "right to file a lawsuit or other civil proceeding relating to Employee's employment with the company" and the right to resolve employment-related disputes before a

80. D.R. Horton, 357 NLRB No. 184, at *1 (2012).

judge or jury, the employee waived the right to file "*any and all* claims before a court or agency."

Imagine, finally, that after filing charges with the state fair employment agency and receiving a right to sue letter, the two employees in Matter A join as plaintiffs to file a single suit and name as defendants Corporation A, the harassing supervisor, and the harassing coworker. In addition, they file criminal charges against the individual harassers. The eighteen employees in Matter B join as plaintiffs to file a single suit against Corporation B, the two doctors, and Corporation C. They also file charges with the state labor commissioner. What is the effect of the arbitration agreement and its prohibitions on joinder?

If Matter A were filed in state or federal court, it would be a simple suit: two plaintiffs, three defendants, and perhaps half a dozen claims. Because both plaintiffs allege they suffered the same conduct committed by both individual defendants, basic principles of civil procedure would suggest the appropriateness of joining both plaintiffs and all three defendants.[81] Matter B would be slightly more complicated, but it is still quite feasible to join either the six assistants or the six assistants and twelve nurses in the same action. Even if the issue of whether the nurses are exempt professionals differs from the issue of whether the assistants are exempt administrators, if the major issue will be corporate veil piercing–an issue that likely would be the same across all eighteen plaintiffs–it would make sense to join all eighteen, especially if they all worked the same hours each week.

If the corporate defendants moved to compel arbitration, could they also compel the individual plaintiffs to proceed separately? The arbitration agreement would appear to prohibit joinder of plaintiffs. And if the agreement were the one at issue in *Concepcion*, it could even be read to prohibit joinder of defendants. Whether the individual defendants could be compelled to arbitrate the claims against them as individuals might depend on whether they had signed arbitration agreements like those signed by the plaintiffs. In Matter A, the individual harassers may indeed have signed such agreements, although they appear to contemplate arbitration only of claims by the employees against the company (or vice versa), not claims against employees by coworkers. In Matter B, if the doctors who own the corporations did not sign the arbitration agreement, it is unclear whether the principles of corporate veil piercing (which may be the major issue in the action, given that Corporation B is now judgment proof) would allow arbitration against them over their objection, and it is even more of a stretch

81. Fed. R. Civ. P. 20 ("All persons may join in one action as plaintiffs" or as defendants if the plaintiffs assert, or the defendants have asserted against them, "any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.").

to find that Corporation C is a party to any agreement with the eighteen former employees of Corporation B.

The FAA, even as interpreted by the Supreme Court, does not compel the conclusion that arbitration agreements may prohibit joinder of plaintiffs and that a plaintiff must arbitrate claims even if joinder of all claims against all defendants is not possible. In the first place, *Concepcion* involved two plaintiffs, Vincent and Liza Concepcion, who apparently purchased phones and sought to arbitrate together.[82] At all levels of the litigation, the courts discussed only the validity of a class action waiver, not any other waiver of joinder rules, yet that agreement provided that the consumer and the company "may bring claims against the other only in you or its individual capacity."[83] That agreement could be read to prohibit only class actions, representative actions, and consolidation ordered by the arbitrator, not joinder of multiple individuals asserting similar claims.

More importantly, nothing in the Court's reasoning in *Concepcion* suggests that multi-party joinder is inconsistent with the policy of the FAA. The Court said "[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute."[84] The Court contrasted "bilateral" with "class" arbitration, and found that the latter "sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly and more likely to generate procedural morass than final judgment."[85] The Court lamented that "class arbitration *requires* procedural formality," and then noted that although "the parties can alter [the procedures of Rule 23] by contract, an alternative is not obvious. If procedures are too informal, absent class members would not be bound by the arbitration," because absent adequate representation, notice, and an opportunity to opt out, absent parties could not be "bound by the results of the arbitration."[86] Finally, the Court condemned a state law rule that allowed class arbitration because it "greatly increases risks to defendants"

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82. Laster v. T-Mobile, Inc., No. 05CV1167 DMS, 2008 WL 5216255, at *1 (S.D. Cal. 2008) ("Plaintiffs Vincent and Liza Concepcion . . . entered into *an* agreement for cellular phone service and the purchase of cellular *phones* . . . .") (emphasis added).

83. The language of the class action waiver is not reported in the *Concepcion* cases, although another case involving a version of the AT&T agreement reported that the agreement provided:

> You and Cingular agree that YOU AND CINGULAR MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, and not as a plaintiff or class member in any purported class or representative proceeding. Further, you agree that the arbitrator may not consolidate proceedings of more than one person's claims, and may not otherwise preside over any form of representative or class proceeding, and that if this specific proviso is found to be unenforceable, then the entirety of this arbitration clause shall be null and void.

Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 980 (9th Cir. 2007).

84. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1749 (2011).

85. *Id.* at 1751.

86. *Id.*

because "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."[87]

None of the Court's concerns about class arbitrations apply to joinder of parties other than through a Rule 23 class action. First, the Court's concern about procedural formality–notice and the right to opt out–does not apply to actions brought by multiple plaintiffs under the usual joinder rules. *Concepcion* involved a large class action involving millions of consumers and an arbitration procedure that was extremely informal because it was designed to deal with claims whose dollar amount was very small. Employment arbitration of statutory claims is nowhere near as informal as the system in *Concepcion*, nor could it be. Grave statutory and constitutional claims would be raised if an employer forced employees to adjudicate statutory and tort claims potentially worth tens or hundreds of thousands of dollars per plaintiff in a telephonic arbitration system like the one AT&T designed for customer complaints.[88] The Supreme Court emphasized in *Gilmer v. Interstate/Johnson Lane*, that enforcement of agreements to arbitrate statutory claims may be conditioned on the arbitral procedures being adequate to enable plaintiffs to protect their statutory rights.[89] It particularly emphasized the arbitral rules at issue in that case provided for neutral arbitrators, discovery that was not dramatically less than available in court, written awards, and no limits on relief arbitrators can provide.[90]

Second, there is no basis for the notion that arbitration is ill-suited to resolve moderately-sized FLSA collective actions. Under the FLSA, unlike under the class action procedure used in *Concepcion*, the collective action procedure can be implemented only if plaintiffs first opt in.[91] Thus, the Court's concern that absent plaintiffs cannot be bound by an arbitral judgment because the processes will be too informal to allow notice is unfounded. Under the FLSA, the only plaintiffs who will be bound are those who receive notice of the action and choose to join it.

Third, the Court's concern about the benefits of a final judgment rather than "procedural morass[,]" and its concern that arbitration decisions must be binding on the parties, suggest that plaintiffs should be allowed to join

87. *Id.* at 1752.

88. *Accord*, Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 940 (4th Cir. 1999) (granting plaintiffs rescission of an arbitration contract where the employer created "a sham system").

89. *See* 500 U.S. 20, 26 (1991) ("[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985))).

90. *See id.* 30-32.

91. 29 U.S.C. § 216 (2012).

claims and parties as necessary to resolve the dispute without duplicative proceedings. In Matter A, efficiency would be served rather than thwarted by allowing both harassment victims to litigate their statutory and tort claims together–so that they only need to call the witnesses and assemble the documentary evidence once–and also that they be allowed to assert their claims against all three defendants. Similarly, in Matter B, why would an employer wish to litigate six identical claims with each assistant, twelve with each nurse, and to litigate whether the doctors are liable for the unpaid wages if the corporation is judgment-proof eighteen separate times? The procedural morass would be especially tricky if arbitrators ruled for one plaintiff and against another on the same issue.

Finally, the Court's concerns about obtaining final and binding arbitration decisions and avoiding "procedural morass" also raise interesting issue preclusion concerns. Imagine one of the employees in Matter B arbitrates individually (as required by the agreement) and obtains an arbitral award against the Corporation and, for the sake of simplicity, the two doctors who own it. The arbitrator determines, after a full and fair opportunity to litigate, that the administrative assistant was not salaried exempt under the FLSA, that she worked fifteen hours of unpaid overtime each week, fifty weeks per year for three years, that the doctors were personally liable for the unpaid wages, and that the violation was willful. Therefore the assistant is entitled to collect three years of backpay rather than just two. The remaining five administrative assistants institute arbitration proceedings asserting that the doctors be prohibited from re-litigating the issues that had already been litigated and decided against them. While of course they would have to prove the hours they worked and that the job category they held was identical to the administrative assistant in the first arbitration, because those issues were not litigated or decided in the first suit, they would not have to litigate whether the job of administrative assistant was exempt, whether the misclassification was willful, and whether the doctors could be held liable for the wages, as those issues were litigated and decided. They might point to standard language in employer-mandated arbitration agreements that the arbitration award is "final and binding" on the parties. They would argue that final and binding means exactly what it says: the arbitrator's determination of the issues is binding on the employer as well as the employee and, therefore, that the employer cannot relitigate before another arbitrator the issues determined. So long as the issues involving the other administrative assistants or nurses are the same – and with uniform personnel practices they presumably would be – the language of the arbitration agreement would appear to prohibit relitigation.

This is the basic rule of offensive non-mutual collateral estoppel as articulated by the Supreme Court in *Parklane Hosiery Co. v. Shore*.[92] If the first assistant to reach a final arbitration decision lost, however, each subsequent assistant would *not* be bound by the adverse ruling because the Court does not allow the use of issue preclusion against a person who was not a party to the prior litigation.[93] The scope of issue preclusion in arbitration is a large topic well beyond the scope of this Article.[94] The point is simply that requiring bilateral arbitration as a matter of contract is not necessarily a good idea for employers and will not simplify the resolution of disputes as the Court in *Concepcion* seemed to think.

If employees can be compelled to waive their right to seek collective legal redress, why can they not be required to waive their right to institute proceedings before the NLRB? And which other types of administrative claims can employees be required to forego? Although the Fifth Circuit did not explain its reasons for upholding the Board's judgment that the FAA does not supersede the right to file ULP charges, presumably the rationale is the public interest in allowing the government agency to investigate, prosecute, and remedy unfair labor practices. Does a state labor agency with the authority to litigate claims have an independent right to proceed such that a waiver of the right to file the charge that would trigger that agency's processes cannot be waived?[95] If the employees in Matter A cannot waive their right to file criminal charges arising out of the battery and attempted rape, why can they waive their right to file tort claims seeking judicial determination of compensation for the exact same harms? Why is the right of the NLRB or a state prosecutor to litigate such charges, and the public interest in having courts adjudicate them, different from the public interest in having courts or agencies adjudicate tort claims or statutory claims for unpaid wages?

One major practical obstacle to plaintiffs asserting preclusion in employment arbitration is that many arbitration agreements prohibit parties

92. 439 U.S. 322 (1979).

93. *See* Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 322-27 (1971) (holding it is a due process violation for a judgment to be binding on a litigant who was not a party or a privy to a party to prior litigation and therefore never had an opportunity to be heard); Hansberry v. Lee, 311 U.S. 32, 40 (1940).

94. *See* Timothy J. Heinsz, *Grieve It Again: Of Stare Decisis, Res Judicata and Collateral Estoppel in Labor Arbitration*, 38 B.C. L. REV. 275 (1997); G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623 (1988); Mark Lightner, Comment, *Pre-Hearing Discovery in Arbitration and Its Impact on the Application of Nonmutual Offensive Collateral Estoppel*, 38 ARIZ. ST. L.J. 1111 (2006); *but see* Neal Troum, *The Problem with Class Arbitration*, 38 VT. L. REV. 419 (2013) (arguing that class arbitration should be prohibited by the FAA because it binds parties who are not parties to the arbitration agreement).

95. *See* EEOC v. Waffle House, Inc., 534 U.S. 279 (2002) (arbitration agreement did not waive EEOC's right to seek victim-specific relief); Jason A. McNeil, Note, *The Implications of* EEOC v. Waffle House*: Do Settlement and Waiver Agreements Affect the EEOC's Right to Seek and Obtain Victim-Specific Relief?*, 38 IND. L. REV. 761 (2005).

to the agreement to disclose the award or other facts about the arbitration. These confidentiality provisions make it difficult or perhaps a breach of contract for a plaintiff who prevails in arbitration to inform her similarly situated co-workers that the employer's personnel practices were found by the arbitrator to be unlawful, and even to share evidence obtained during pre-hearing discovery or during the arbitration hearing. While the scope and legality of such confidentiality agreements is beyond the scope of this Article, in the context of this Article's focus on section 7 rights, it is worth noting that employer-mandated confidentiality rules in employment agreements often violate section 7. Employees have a section 7 right to discuss their wages and working conditions, and employer confidentiality policies that prohibit disclosure of such information to co-workers are unlawful.[96] Moreover, employees have a section 7 right to encourage co-workers to challenge objectionable employment conditions, including through protesting to management, filing grievances under a contract, or initiating state or federal agency or court action.[97] Because the law is settled that employees have a section 7 right to engage in group arbitration and litigation for mutual aid and protection, and a section 7 right to confer with one another about their working conditions and their efforts to improve them, it follows that a confidentiality provision in an arbitration agreement violates section 7 to the extent that it prohibits employees from discussing their arbitrations with one another.[98]

CONCLUSION

In *D.R. Horton* a divided Fifth Circuit extended the Supreme Court's FAA jurisprudence beyond its current boundaries, which holds that arbitration agreements are enforceable, notwithstanding contrary state or federal law, when they reflect only a change in forum rather than a waiver of substantive rights. *D.R. Horton* held that the section 7 right of

96. *See* Taylor Made Transp. Servs., Inc., 358 N.L.R.B. No. 53, at *1-2 (2012) (holding an employee's right to discuss wages is a section 7 right).

97. *See* Ellingson Media Co., 344 N.L.R.B. 1113, 1113 (2005) (holding that employee who had experienced sexual harassment has section 7 right to encourage co-worker who experienced similar harassment to complain to management); *Dearborn Big Bow No. 3, Inc.*, 328 N.L.R.B. 705, 710 (1999) (holding that employee has a right to speak with other employees about racially discriminatory practices); Gatliff Coal Co. v. NLRB, 953 F.2d 247, 251 (6th Cir. 1992) (holding that employees have a right to discuss alleged sexual harassment); Vought Corp.- (MLRS Sys. Div.), 273 N.L.R.B. 1290, 1294 (1984), *enforced*, 788 F.2d 1378 (8th Cir. 1986) (holding that employee who informed co-workers of possible race discrimination in promotion engaged in protected concerted activity).

98. Employers lawfully may prohibit discussing wages and working conditions within the earshot of non-employees, at least in a hospital or health care setting in which gripes about working conditions might upset patients or their families. *See* Aroostook Cnty. Reg. Ophthalmology Ctr. v. NLRB, 81 F.3d 209, 214 (D.C. Cir. 1996). But employers have no legitimate interest in preventing employees from discussing their arbitration cases with other similarly-situated employees for the purpose of enabling their co-workers to make similar challenges to the employer's allegedly unlawful practices.

employees to engage in concerted legal action to improve working conditions is not a substantive right but rather a mere procedural right and, therefore, that the FAA invalidates an NLRB rule prohibiting waivers of the right to institute group actions.

D.R. Horton was wrong as a matter of labor law. The right to engage in group actions, including invoking arbitration, administrative, and judicial proceedings, is the core substantive right protected by federal labor law, and the FAA should not be read to trump or impliedly repeal this core right.

But in rejecting the Board's protection in favor of a vision of the FAA allowing employers to contract around all the usual rules for joinder of claims and parties in litigation, the Fifth Circuit (and the Supreme Court cases which it extends) have opened up the very sort of procedural morass that the Court in *Concepcion* thought class action waivers were designed to avoid. If employers can require employees to sue only as an individual and only as individual defendants, they invite employees to file duplicative arbitration, agency, or criminal charges. Of course, duplication can be avoided and the goals of efficiency can be obtained if the employees who are forced to sue individually can assert offensive non-mutual collateral estoppel. That will certainly be faster and cheaper for lawyers representing groups of employees (or consumers) than would be a class action.