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## Which Statute Will Trump: The Validity of Class-Action Waivers in Employment Arbitration Agreements

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## NOTE

# WHICH STATUTE WILL TRUMP: THE VALIDITY OF CLASS-ACTION WAIVERS IN EMPLOYMENT ARBITRATION AGREEMENTS

by: Allen S. Al-Haj\*

*A law can often be a double-edged sword—its mandate or protection of one right will sometimes come at the cost of another. Compounding this problem of unintended consequences is that laws do not operate in a vacuum. Instead, laws interact with other laws, and if they conflict, courts must determine which will prevail. Determining the validity of class-action waivers in employment arbitration agreements will require reconciling the Federal Arbitration Act's mandate that arbitration agreements be enforced according to their terms against the National Labor Relations Act's protection of employees' right to engage in concerted activities for the purpose of mutual aid and protection. The dispute over the validity of these agreements requires courts to determine which law and congressional policy should prevail. The National Labor Relations Board and circuit courts throughout the country have been unable to reach a uniform decision, which has prompted the United States Supreme Court to grant certiorari on a triad of cases concerning this issue. With a decision from the nation's highest Court expected during the 2017–18 term, this Comment analyzes the background and legal arguments behind these competing statutes to determine how the Court is likely to rule. This Comment concludes that, given the Court's previous rulings in arbitration and class-action cases and the recent Supreme Court confirmation of Justice Neil Gorsuch, the Court is likely to rule in favor of validating class-action waivers in employment arbitration agreements.*

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## I. INTRODUCTION

Can employee arbitration agreements include within their terms a class-action waiver requiring employees to adjudicate all work-related disputes through individual arbitration? In deciding this question, the Supreme Court is likely to rule in favor of allowing class-action waivers in employment arbitration agreements because of established precedent and the recent confirmation of Justice Neil Gorsuch. This question was originally addressed by the National Labor Relations Board ("NLRB" or "the Board") in 2012 and has since traveled up the federal court system, creating a circuit split that will ultimately be resolved by the Supreme Court. The validity of class-action waivers in employment arbitration agreements involves the interaction of the National Labor Relations Act's ("NLRA") protection of employees' right to engage in concerted activities with the Federal Arbitration Act's ("FAA") requirement to enforce arbitration agreements according to their terms. The issue focuses on whether the rights created by the NLRA are substantive rights that an employee cannot waive and, in turn, how those substantive rights interact with the FAA's requirements.

After years of NLRB decisions invalidating arbitration agreements that contained class-action waivers and a circuit split among several courts affirming or rejecting the NLRB's approach, this issue has finally made its way to the Supreme Court. This Comment will look at the statutory backdrop provided by both the FAA and the NLRA, the

legal arguments for and against validating class-action waivers, and the competing concerns of employers and employees alike, to ultimately predict how the Supreme Court is likely to rule on this issue. This Comment also addresses the competing opinions and commentaries discussing the effect of class-action waivers on employees and employers. Lastly, this Comment analyzes competing legal arguments, judicial precedent, and current political climate to predict the Supreme Court's likely outcome. This Comment concludes that the Court will likely enforce class-action waivers because of the Court's history of disfavoring class-action adjudication and favoring the expansion of the FAA.

Section I of the Article provides background for this question by explaining the history, legislative purpose, and Supreme Court precedent surrounding the FAA and the NLRA. Section II then compares the legal arguments of the NLRB and circuit courts adopting the NLRB's reasoning for invalidating class-action waivers with the legal arguments of circuit courts rejecting the NLRB's approach and enforcing class-action waivers. Section III then looks outside the purely legal arguments and addresses the competing concerns of employers and employees and the effect that class-action waivers have on each constituency. Accordingly, Section IV argues that the Supreme Court is likely to enforce class-action waivers because of its decades of pro-arbitration and anti-class-action precedent in addition to the recent administration change and Supreme Court confirmation of Justice Neil Gorsuch. Finally, Section V briefly discusses what this potential outcome could mean for employers and employees.

## II. LEGAL BACKGROUND

Class-action waivers in employment arbitration agreements involve the unique intersection between two comprehensive federal statutes: the Federal Arbitration Act ("FAA"), which mandates that arbitration agreements be enforced according to their terms; and the National Labor Relations Act ("NLRA"), which protects employees' right to engage in concerted activities. Most cases that deal with the FAA and enforceability of arbitration agreements have involved state law, where courts have comfortably decided the cases under preemption, holding that the FAA preempts state law.<sup>1</sup> However, determining whether FAA-protected arbitration agreements that include class-action waivers are enforceable—in light of the NLRA and its protections—will inevitably require the Court to decide how to interpret two federal statutes when they appear to conflict.

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1. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

### A. *Federal Arbitration Act*

The FAA has a broad remedial purpose designed to counteract judicial hostility towards arbitration and to ensure that arbitration agreements are enforced like any other contract. Its remedial purpose is shown by the Supreme Court's expansion of the Act's applicability and limitation of the Act's exceptions. Further, the Act has had an increasing effect on employment contracts and disputes. This has resulted in an increase in employment arbitration agreements and created conflicts with other employer protection statutes, such as the one addressed in this Comment.

Congress enacted the FAA in 1925 and codified it in 1947<sup>2</sup> "in response to widespread judicial hostility [towards] arbitration agreements."<sup>3</sup> The Supreme Court stated that Congress intended the FAA to embody a "national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts."<sup>4</sup> The significant amount of hostility towards arbitration agreements in the American court system before the passage of the FAA was based on arbitration's treatment in English common law.<sup>5</sup> Before the FAA, courts, following centuries of English courts' precedent, did not enforce arbitration agreements upon the ground that arbitration ousted courts from their own jurisdiction.<sup>6</sup>

Thus, to counteract the hostility, the FAA now requires that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."<sup>7</sup> In relevant parts, the Act provides that: "A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>8</sup> The final phrase of Section 2, referred to as the Act's "savings clause," allows for invalidating arbitration agreements based on "'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."<sup>9</sup> Although the "savings clause" is intended to prevent overreaching and unfair arbitration agreements, the Supreme Court has historically applied the

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2. 9 U.S.C. §§ 1–14 (1947).

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

4. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

5. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

6. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219–20 n.6 (1985).

7. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

8. 9 U.S.C. § 2.

9. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

clause narrowly because of apprehension in placing any obstacles in the way of the FAA's pro-arbitration policy.<sup>10</sup>

Decades of Supreme Court precedent have expanded the scope of the FAA and its application to claims arising under many federal statutes.<sup>11</sup> Additionally, the Supreme Court expanded the scope of the FAA when it interpreted the language of Section 1, which states that "nothing herein contained shall apply to contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce"<sup>12</sup> to exempt only the employment contracts of transportation workers, not interstate employees in general.<sup>13</sup>

Although the Supreme Court has recognized that arbitration agreements are not absolute and cannot infringe on or waive an individual's substantive rights, the Court still acknowledges that the FAA intended to establish strong federal policy favoring arbitration.<sup>14</sup> One case of particular importance on this issue is *Gilmer v. Interstate/Johnson Lane Corp.*, a case in which the Supreme Court held that arbitration in the employment context is permissible and does not violate any substantive rights, even when the statute allows collective suits to be brought.<sup>15</sup> The Supreme Court held that the FAA protects the rights of parties to agree to arbitrate; however, "[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."<sup>16</sup> The Court reasoned that the claim could be subject to mandatory arbitration because "neither the text nor the legislative history of the ADEA explicitly precludes arbitration," and the employee failed to show any "inherent conflict between arbitration and the ADEA's underlying purposes."<sup>17</sup> Thus, arbitration may serve as an adequate substitute for a judicial forum "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum . . . ."<sup>18</sup> The Court noted that although arbitration and judicial action allow employees to resolve a specific dispute and defend their rights in different forums, they are not the only way.<sup>19</sup> For example, in the case of the *Gilmer* employee, he was

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10. See e.g., *id.* at 334.

11. See *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 101 (2012) (summarizing cases the Court has determined are arbitrable).

12. 9 U.S.C. § 1.

13. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

14. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("[A] party does not forgo the substantive rights afforded by the statute . . . . It trades the procedures . . . for the simplicity, informality, and expedition of arbitration.").

15. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).

16. *Id.* at 24 (quoting *Mitsubishi*, 473 U.S. at 628).

17. *Id.* at 20.

18. *Id.* at 28 (quoting *Mitsubishi*, 473 U.S. at 637).

19. *Id.* at 27–28.

still free to seek redress from the Equal Employment Opportunity Commission (“EEOC”)—the Commission tasked with the enforcement of the ADEA—or the EEOC could have instituted its own cause of action.<sup>20</sup>

It is on this judicial precedent and strong policy favoring arbitration agreements that proponents of class-action waivers in employee arbitration agreements and the courts upholding them, have relied. However, although it is clear that the FAA has established a strong public policy in favor of arbitration agreements, the question still remains whether the NLRA and its purpose and protections require that the FAA not prevail in this scenario.

### B. *National Labor Relations Act*

Competing with the FAA is the NLRA, which has a similarly broad and remedial purpose of protecting employees’ right to bargain collectively. This right is deeply rooted in the NLRA’s birth out of the Great Depression era.<sup>21</sup> However, the NLRA, unlike the FAA, has seen less Supreme Court expansion in recent decades.

Congress enacted the NLRA in 1935 to counteract the industrial strife and unrest occurring in the country due to employers’ failure to allow employees to organize and bargain collectively.<sup>22</sup> The NLRA was the by-product and successor of the Norris LaGuardia Act (“NLA”) of 1932, which made “unenforceable so-called yellow dog contracts, under which employees automatically forfeited their jobs if they joined a union [and] . . . limited the right of judges to enjoin strikes or otherwise interfere in labor disputes . . . .”<sup>23</sup> Before the NLRA and NLA, employees’ primary way to vindicate their rights was through filing lawsuits, voting for pro-employee candidates, and participating in strikes and walkouts—all of which proved to be unsuccessful.<sup>24</sup>

Congress, through the NLA, declared that due to the inequality of bargaining power between employers and employees, it was the public policy of the United States for employees to have the:

full freedom of association, self-organization, and designation of representatives of his [or her] own choosing, to negotiate the terms and conditions of his [or her] employment, and that he [or she] shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or

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20. *Id.* at 28.

21. See James R. Montgomery, “*Horton and the Who*”: *Determining Who Is Affected by the Emerging Statutory Battle Between the FAA and Federal Labor Law*, 2014 J. DISP. RESOL. 363, 366 (2014).

22. 29 U.S.C. § 151 (2012); A.H. Raskin, *Elysium Lost: The Wagner Act at Fifty*, 38 STAN. L. REV. 945, 945 (1986).

23. Raskin, *supra* note 22, at 945.

24. Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013, 1015–16 (2013).

in self-organization or in *other concerted activities* for the purpose of collective bargaining or *other mutual aid or protection*; . . . .<sup>25</sup>

Three years after the passage of the NLA, Congress passed the NLRA in order to add statutory remedies for employees to pursue against their employer and tasked the NLRB with the NLRA's enforcement.<sup>26</sup>

Section 7 of the NLRA mimicked the NLA and guaranteed employees the right to “form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other concerted activities* for the purpose of collective bargaining or *other mutual aid or protection*, . . . .”<sup>27</sup> The Supreme Court held that the rights created by Section 7 are “collective rights,” with the exception of Section 7's right to refrain from concerted activity.<sup>28</sup> Section 8(a)(1) of the NLRA, makes it “an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed” in Section 7 of the Act.<sup>29</sup> And finally, Section 10 authorizes the NLRB “to prevent any person from engaging in any unfair labor practice<sup>30</sup> and gives the Board the authority to “requir[e] such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . [that] will effectuate the policies of this [Act] . . . .”<sup>31</sup> Thus, the NLRA establishes an employee's right to engage in concerted activities; furthermore, it allows the NLRB or an employee a cause of action if an employer infringes that right.

The Supreme Court has expansively interpreted Section 7 of the NLRA to protect more than an employee's right to form unions and engage in collective bargaining. In *Eastex, Inc. v. NLRB*, the Court stated that it is well settled that “mutual aid or protection” includes an employee's attempt “to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.”<sup>32</sup> The Court held that Section 7 “protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums.”<sup>33</sup> Thus, the NLRA protects an employee's right to engage in class-actions through arbitration or the

25. 29 U.S.C. § 102 (emphasis added).

26. *Id.* § 151; Sullivan & Glynn, *supra* note 24, at 1017 (“[A] core protection of the NLRA, like the NLA, is the right of workers to engage in concerted activities for mutual aid and protection, regardless of whether the workplace is unionized.”).

27. 29 U.S.C. § 157 (emphasis added).

28. *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975) (Section 7 rights “are, for the most part, collective rights, rights to act in concert with one's fellow employees.”).

29. 29 U.S.C. § 158.

30. *Id.* § 160(a).

31. *Id.* § 160(c).

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

33. *Id.* at 566.



courts. What is up for debate, and ultimately for the Supreme Court to decide, is whether this right is a substantive right not capable of being waived by employees—or a procedural right, capable of being waived by employees because they are still able to vindicate their rights through individual arbitration.

### III. DEBATE OVER THE VALIDITY OF CLASS-ACTION WAIVERS

It is based on the above-mentioned historical context, different yet similarly broad legislative purposes, and decades of Supreme Court precedent expounding both the FAA and the NLRA that the conflict over the validity of class-action waivers in employment arbitration agreements has transpired. Following a series of pro-arbitration Supreme Court cases applying the FAA in the employment context, companies began drafting arbitration agreements with class-action waivers making individual arbitration the only available adjudicative forum for resolving employment disputes.<sup>34</sup> Instead of allowing similarly situated employees to join and bring a cause of action against their employer as a class, class-action waivers in arbitration agreements require employees to pursue their claims through individual arbitration. As discussed below, the NLRB and employees argue that these class-action waivers in arbitration agreements violate employees' NLRA-protected rights to engage in concerted activities. On the other hand, employers argue that the waivers are valid under the FAA. An analysis of the competing legal arguments will shed greater light onto how the Supreme Court is likely to decide this issue.

#### A. *The NLRB's Approach to Invalidating Class-Action Waivers*

The foundation of the NLRB's approach is that class-action waivers infringe on an employee's substantive right to engage in concerted activities and that the NLRA establishes a process for invalidating these agreements that is not contrary to the FAA's purpose. The NLRB has consistently argued<sup>35</sup> that it is unlawful under Section 8(a)(1) of the NLRA for employers to require their employees to sign an agreement

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34. See Jean R. Sternlight, *Tsunami: AT&T Mobility v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 718 (2012) (discussing how the Court's holding in *Concepcion* will encourage more companies to insert class-action waivers in employment and consumer contracts) [hereinafter Sternlight, *Tsunami*].

35. The NLRB originally presented its approach to invalidating employment arbitration agreements that contain a class-action waiver in *D.R. Horton Inc.*, a case of first impression for the NLRB decided in 2012. *D.R. Horton, Inc.*, 357 N.L.R.B. 184, at 2277–78 (2012) (unless otherwise stated, *D.R. Horton, Inc.* will refer to the NLRB's decision, not the Fifth Circuit's decision on review). Then in 2014, the NLRB reaffirmed its reasoning in deciding *Murphy Oil USA, Inc.*, 361 N.L.R.B. 72, at 2 (2014) (unless otherwise stated, *Murphy Oil USA Inc.* will refer to the NLRB's decision, not the Fifth Circuit's decision on review). The facts surrounding the two cases and the arguments presented in each mimic one another in many respects, but following the Fifth Circuit reversal of *D.R. Horton Inc.* in 2013, the NLRB took the opportunity in deciding *Murphy Oil USA, Inc.* to clarify its previous holding and bolster its position.

precluding them from filing joint, class, or collective claims addressing working conditions against their employer in both judicial and arbitral forums.<sup>36</sup> The NLRB bases its approach on three major reasons:

- (1) Mandatory arbitration agreements that prohibit employees from bringing joint, class, or collective employment claims restrict the exercise of *substantive* rights protected by Section 7 of the NLRA;
- (2) Such a prohibition in an employer-imposed individual agreement that restricts an employee's exercise of Section 7 rights constitutes an unfair labor practice under Section 8(a)(1); and
- (3) Finding a mandatory arbitration agreement unlawful under the NLRA, insofar as it prohibits employees from bringing joint, class, or collective employment claims violates the NLRA and does not conflict with the FAA or undermine its purpose or policy.<sup>37</sup>

Overall, the NLRB argues that the FAA explicitly provides a mechanism in the Act's "saving's clause" to invalidate arbitration agreements and that its reasoning for invalidating class-action waivers does not conflict with the FAA.

### 1. Section 7 Rights are Substantive Rights

Paramount to the NLRB's argument is that it considers an employee's right to proceed as a class in a labor dispute as a substantive right not capable of being waived. As discussed above, the *Eastex* Court held that Section 7's protection of concerted activities includes "protect[ing] employees from retaliation by their employers when they seek to improve [their] working conditions through resort to administrative and judicial forums . . . ."<sup>38</sup> Thus, the NLRB, relying on the Supreme Court's interpretation of Section 7 rights in *Eastex*,<sup>39</sup> held that Section 7 also prohibits arbitration agreements with class-action waivers because the agreements prevent employees from pursuing class-action claims in any forum, even arbitration.<sup>40</sup>

The NLRB based this holding on another Supreme Court decision in *NLRB v. City Disposal Systems, Inc.*, where the Court observed that "[n]o one doubts that the processing of a grievance [under a collectively-bargained grievance-arbitration procedure] . . . is [a] concerted activity within the meaning of [Section] 7."<sup>41</sup> Although the arbitration agreement executed between D.R. Horton and its employees was not collectively-bargained for, the NLRB held that D.R. Hor-

36. *D.R. Horton, Inc.*, 357 N.L.R.B. 184, at 2277–78; *Murphy Oil USA, Inc.* 361 N.L.R.B. 72, at 3.

37. *Murphy Oil USA, Inc.*, 361 N.L.R.B. 72, at 6–7; Sullivan & Glynn, *supra* note 24, at 1024.

38. *Eastex*, 437 U.S. at 565–66.

39. *Id.* at 566.

40. *D.R. Horton, Inc.*, 357 N.L.R.B. 184, at 2278–79; *Murphy Oil USA, Inc.*, 361 N.L.R.B. 72, at 25–26.

41. *D.R. Horton, Inc.*, 357 N.L.R.B. 184, at 2279 (quoting *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 836 (1984)).

ton's agreement violated the NLRA because it prohibited employees from engaging in consolidated class arbitration claims, which was a concerted activity protected by Section 7 of the NLRA.<sup>42</sup> Additionally, the NLRB found no reason why the right to engage in concerted legal activities would not be included among the Section 7 rights.<sup>43</sup> The collective rights protected by Section 7 included picketing, consumer boycotts, employment strikes, and "workers joining together to pursue legal redress . . . ."<sup>44</sup> Congress passed the NLRA to counteract the industrial strife and unrest that was occurring due to unfair treatment of employees; the NLRB argued that, in accomplishing that purpose, "concerted legal activity would seem . . . to be a *favored* form of concerted activity under the Act because it would have the least potential for economic disruption . . . ."<sup>45</sup>

## 2. Class-Action Waivers Violate Section 8 of the NLRA

Even though the NLRB held that Section 7 rights protect class-wide arbitration and lawsuits, the NLRA still requires that an employer "interfere with, restrain, or coerce employees in the exercise of the [Section 7] rights" for a violation to exist.<sup>46</sup> Thus, the NLRB had to find that requiring employees to only engage in individual arbitration by signing a class-action waiver interfered with a Section 7 right, and thereby gave them the authority to invalidate the agreement.<sup>47</sup> The NLRB reached this conclusion by applying the test set forth in *Lutheran Heritage Village-Livonia*.<sup>48</sup> The test requires the rule or policy imposed by the employer explicitly restrict activity protected by Section 7 or a "showing of one of the following: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."<sup>49</sup>

Applying this test, the NLRB in *D.R. Horton, Inc.* found that the arbitration agreement explicitly restricted protected Section 7 activities, even though it was a mutual agreement between the employer and employees.<sup>50</sup> Quoting the Supreme Court, the NLRB held that allowing employees to waive their statutory right to engage in concerted activities through a mutually agreed-upon contract would "reduce[ ] [the Act] to a futility."<sup>51</sup> The NLRB expanded its approach in

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42. *Id.* at 2279.

43. *Murphy Oil USA, Inc.*, 361 N.L.R.B. 72, at 10.

44. *Id.*

45. *Id.*

46. 29 U.S.C. § 158(a)(1).

47. *See D.R. Horton, Inc.*, 357 N.L.R.B. 184, at 2281.

48. *Id.* (test set forth in *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 75 (2004)).

49. *Id.* (citing *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 75, at 647).

50. *Id.*

51. *Id.* at 2281 (quoting *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944)).

*Murphy Oil USA, Inc.* and held that an employer can be in violation of Section 8(a)(1) by maintaining a mandatory arbitration agreement that precludes concerted activities and by taking action to enforce an agreement that unlawfully violates Section 7 rights.<sup>52</sup> Thus, the employers in *D.R. Horton, Inc.* and *Murphy Oil USA, Inc.* violated Section 8(a)(1) of the NLRA through their respective arbitration agreements that limited their employee's ability to engage in concerted arbitration and lawsuits and by their attempts to invoke those agreements in court and compel arbitration.

### 3. No Conflict with the FAA's Purpose, Policies, or Text

Lastly, the NLRB, possibly foreshadowing a head-to-head matchup between the NLRA and the FAA in federal court, gave several reasons why its holding does not create a conflict between the two statutes and why its holding should prevail.<sup>53</sup> The NLRB found no conflict because the class-action waivers infringed upon substantive rights that cannot be waived and the FAA's "savings clause" allowed for the invalidation of these agreements.

The NLRB expressly addressed and rejected the argument by the employer in *D.R. Horton, Inc.* that "finding the restriction on class or collective actions unlawful under the NLRA would conflict with the [FAA]."<sup>54</sup> The NLRB contended that as administrators of the NLRA, "when two federal statutes 'are capable of co-existence,' both should be given effect 'absent a clearly expressed congressional intention to the contrary.'"<sup>55</sup> Specifically, the NLRB argued that invalidating arbitration agreements containing class-action waivers did not conflict with the FAA's purpose, policies, or text because the agreements violated substantive rights protected by the NLRA.<sup>56</sup>

First, the NLRB's conclusion that these class-action waivers violated the NLRA's protection of employees' right to engage in concerted activities was not based on the fact that an arbitration agreement was at issue, but because it "required employees, as a condition of employment, to agree to pursue any claims in court against [their employer] . . . on an individual basis."<sup>57</sup> Thus, because the NLRB invalidated the arbitration agreement on grounds separate from the fact that an arbitration agreement was at issue, it did not conflict with the purpose of the FAA in preventing "courts from treating arbitration agreements less favorably than other private con-

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52. *Murphy Oil USA, Inc.*, 361 N.L.R.B. 72, at 27 (2014).

53. See Sullivan & Glynn, *supra* note 24, at 1026 (The NLRB "acknowledg[ed] its obligation to accommodate policies under potentially conflicting statutes if possible.").

54. *D.R. Horton, Inc.*, 357 N.L.R.B. 184, at 2283.

55. *Id.* at 2284 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

56. See *id.* at 2284.

57. *Id.* at 2285.

tracts.”<sup>58</sup> Next, the NLRB stated that “nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable.”<sup>59</sup> In applying the FAA’s “savings clause” found in Section 2 of the Act, the NLRB argued that the arbitration agreement could be invalidated because it went against the federal public policy established by the NLRA, which is a defense to any contract formation.<sup>60</sup>

Also, the NLRB’s holding did not conflict with the FAA because agreements to arbitrate cannot “forgo the substantive rights afforded by the statute,” and NLRB’s major argument in invalidating arbitration agreements with class-action waivers is that they in fact did violate a substantive right protected by Section 7.<sup>61</sup> The NLRB stated that the Section 7 right “to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA” because the rest of the NLRA seeks to protect the rights found in Section 7.<sup>62</sup> Opponents of the NLRB’s view argue that Section 7 did not implicate substantive rights because the section only gave employees a procedural right to pursue class-actions, such as the ones found in the Federal Rules of Civil Procedure, which were “ancillary to the litigation of substantive claims.”<sup>63</sup> In the end, the NLRB rejected this view because the rights afforded by Section 7 of the NLRA to engage in collective activity were not ancillary to other substantive rights afforded by the Act, but the essential right offered by the statute.<sup>64</sup>

### B. Circuit Courts’ Approach to Enforcing Class-Action Waivers

Several circuit courts<sup>65</sup> have not accepted the NLRB’s outcome and reasoning, but have instead refused to give the NLRB’s interpretation

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58. *Id.*

59. *D.R. Horton, Inc.*, 357 N.L.R.B. 184, at 2287 (2012).

60. *Id.*

61. *Id.* at 2285 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

62. *Id.*

63. *Id.* (quoting *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 332 (1980)).

64. *See id.* The arbitration agreement improperly waived a substantive right irrespective of the Supreme Court’s decision in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), where the Court held that a union, through collective bargaining, could agree to waive their employees’ rights to bring employment discrimination claims against their employer in court. *D.R. Horton, Inc.*, 357 N.L.R.B. 184, at 2286. The NLRB made a distinction that, unlike the individual employees acting alone in *D.R. Horton, Inc.*, a “union may waive certain Section 7 rights of the employees it represents . . . in exchange for concessions from the employer” as “an exercise of Section 7 rights: the collective-bargaining process.” *Id.* (emphasis omitted).

65. The Fifth Circuit in *D.R. Horton, Inc. v. NLRB* established the framework for rejecting the NLRB’s approach and held that mandatory arbitration agreements that require individual arbitration do not violate the NLRA. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 348 (5th Cir. 2013). The Fifth Circuit has been at the forefront of arguing against the NLRB’s rationale, and in 2015 again rejected the NLRB’s approach in

deference, holding that no contrary congressional command in the NLRA or the FAA's savings clause prevents these class-action waivers from being valid. In deciding that employment arbitration agreements that require employees to resort to individual arbitration and ban the use of collective claims must be enforced according to its terms, the circuit courts relied on several findings:

- (1) The NLRB does not deserve deference in interpreting the FAA;
- (2) The use of class-action procedures is not a substantive right protected by Section 7 of the NLRA, but a procedural mechanism, ancillary to the litigation of substantive claims;
- (3) No grounds exist to invalidate arbitration agreements under the FAA's savings clause; and
- (4) There is no contrary congressional command found in the NLRA that warrants its applicability over the FAA.<sup>66</sup>

Overall, the circuit courts' reasoning for upholding class-action waivers appears to be more in-line with the Supreme Court's trend of disfavoring class-action lawsuits and favoring the FAA's pro-arbitration policy.

### 1. No Deference to NLRB's Interpretation

A crucial preliminary question before addressing this competing approach is whether as an administrative agency, the NLRB's decision on this issue is worthy of *Chevron* deference by the courts.<sup>67</sup> The courts ultimately found that the NLRB's holdings do not warrant *Chevron* deference because the NLRB's holdings required interpretation of the FAA outside of the NLRB's expertise and the Board had no congressional delegation to interpret other statutes, such as the FAA.<sup>68</sup>

*Chevron* deference applies when a court reviews an agency's construction or interpretation of a statute that it administers.<sup>69</sup> Under the *Chevron* standard for reviewing agency interpretations, a court must first determine whether Congress has unambiguously spoken to the question at issue; if it has, the court and agency must follow Congress's direction.<sup>70</sup> But, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the

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*Murphy Oil USA, Inc. v. NLRB* for the same reasons stated in its 2013 decision. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015). Additionally, the Eighth and Second Circuits have joined the Fifth Circuit in advancing this approach. See generally *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

66. See *id.*

67. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

68. *Cellular Sales of Mo.*, 824 F.3d at 775; *D.R. Horton, Inc.*, 737 F.3d at 356; *Owen*, 702 F.3d at 1054.

69. *Chevron*, 467 U.S. at 842–43.

70. *Id.*

agency's answer is based on a permissible construction of the statute."<sup>71</sup> However, before applying *Chevron* deference, the court must determine whether *Chevron* applies to the interpretation the agency underwent, which is referred to as *Chevron* "Step Zero."<sup>72</sup> An agency is entitled to deference of its interpretation of a statute if Congress has vested the agency with the "general authority to administer [the statute] through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority."<sup>73</sup> Thus, the NLRB is clearly entitled to *Chevron* deference for its interpretations of the NLRA through its decisions adjudicating labor disputes; but, what is less clear is whether that deference extends to other statutes, such as the FAA.<sup>74</sup>

In deciding that the NLRB does not deserve deference in its interpretation of the FAA, the circuit courts cite to several Supreme Court cases where the Court limited the NLRB's agency power.<sup>75</sup> In *Southern S.S. Co.*, the Supreme Court held that the NLRB's determination that steamship employees who were fired for striking did not violate federal mutiny laws was not an agency interpretation worthy of *Chevron* deference.<sup>76</sup> In refusing to defer to the NLRB's decision, the Court stated that "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives."<sup>77</sup> More recently in *Hoffman Plastic Compounds*, the Court again refused to grant the NLRB deference in its decision to grant back-pay to an illegal alien for labor violations because "such relief is foreclosed by federal immigration policy . . . ."<sup>78</sup> The Court stated that it has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA."<sup>79</sup>

Thus, the courts held that because deciding the enforceability of class-action waivers required the NLRB to interpret the interaction between the NLRA and the FAA—a statute that the NLRB is not vested with the authority to enforce or interpret—the circuit courts were not required and, in fact, refused to defer to the NLRB's deci-

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71. *Id.* at 843.

72. See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L. J. 833, 836 (2001).

73. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013).

74. Sullivan & Glynn, *supra* note 24, at 1032–33 n.104 (citing to several Supreme Court decisions that granted the NLRB *Chevron* deference for interpretations of the NLRA).

75. See generally *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002); *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942).

76. *Southern S.S. Co.*, 316 U.S. at 38–47.

77. *Id.* at 47.

78. *Hoffman Plastic Compounds*, 535 U.S. at 140.

79. *Id.* at 144.

sion-making.<sup>80</sup> The Eighth Circuit held that they did not owe the Board's reasoning deference because "the Board has no special competence or experience in interpreting the Federal Arbitration Act."<sup>81</sup> Additionally, the Fifth Circuit refused to grant the Board's decision *Chevron* deference, citing reasoning from *Southern S.S. Co.* and *Hoffman Plastic Compounds* discussed above.<sup>82</sup>

## 2. Procedural Device Not a Substantive Right

Because the courts declined to grant the NLRB's interpretation *Chevron* deference, the courts reviewed the decision *de novo*. The courts first addressed the argument of whether Section 7 rights are procedural or substantive rights and found that a class or collective action is merely a procedural device, capable of being waived in an arbitration agreement. The courts ultimately based their reasoning on Supreme Court precedent holding that there is no substantive right to class procedures, but rather that class-actions are a procedural device to remedy other substantive rights.<sup>83</sup>

Although the Fifth Circuit acknowledged that "cases under the NLRA give some support to the Board's analysis that collective and class claims, whether in lawsuits or in arbitration, are protected by Section 7," they cautioned that "[t]o stop here . . . is to make the NLRA the only relevant authority."<sup>84</sup> The court concluded that "[c]aselaw under the FAA points . . . in a different direction than the course taken by the Board,"<sup>85</sup> yet conceded that "none of those cases considered a Section 7 right to pursue legal claims concertedly . . ."<sup>86</sup> Relying on Fifth Circuit precedent, the court concluded that the ability to bring a class-action or other collective method is a procedural device, and does not rise to the level of a fundamental substantive right.<sup>87</sup> The court also rejected the claim that the NLRA is somehow a unique statute that creates a substantive right to a procedural mechanism.<sup>88</sup> The court cited to the Supreme Court's ruling in *Gilmer* hold-

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80. See *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 775 (8th Cir. 2016); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 356 (5th Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1054 (8th Cir. 2013).

81. *Owen*, 702 F.3d at 1054 (quoting *St. John's Mercy Health Sys. v. NLRB*, 436 F.3d 843, 846 (8th Cir. 2006)).

82. *D.R. Horton, Inc.*, 737 F.3d at 356.

83. *Id.* at 357 (citing *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980)) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

84. *Id.*

85. *Id.*

86. *Id.* at 357 n.8.

87. *Id.* at 357 (citing *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630, 643 (5th Cir. 2012)) ("Thus, while a class-action may lead to certain types of remedies or relief, a class-action is not *itself* a remedy.").

88. *Id.* (NLRB argued that the NLRA is unique because the Act's fundamental function is to protect the right of employees to act collectively).



ing that because “there is no right to use class procedures under various employment-related statutory frameworks”, it found no reason to make an exception for the NLRA.<sup>89</sup>

### 3. FAA’s Savings Clause Not Applicable

The courts also rejected the NLRB’s reasoning because, although the reasoning appears neutral and not to be in conflict with the FAA, the ultimate outcome ran counter to the strong public policy favoring arbitration.<sup>90</sup> The courts recognized that the FAA requires an arbitration agreement to be enforced according to its terms, subject to two exceptions. One exception is that “an arbitration agreement may be invalidated on any ground that would invalidate a contract under the FAA’s ‘savings clause.’”<sup>91</sup> Because the NLRB’s approach “clearly relied on the FAA’s savings clause,” the court analyzed this exception to see if it warranted application of the NLRA over the FAA.<sup>92</sup>

The Fifth Circuit argued that the NLRB’s finding that mandatory arbitration agreements violate the NLRA and, thus, make the savings clause applicable was inconsistent with the Supreme Court’s holding in *Concepcion*.<sup>93</sup> In *Concepcion*, the Court held that a state statute invalidating a contract or limiting certain provisions of a contract for being unconscionable did not warrant the application of the FAA’s savings clause because “nothing in [the clause] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”<sup>94</sup> Both the state statute in *Concepcion* and Section 7 of the NLRA run counter to the purposes of the FAA in ensuring the enforcement of arbitration proceedings and streamlining dispute proceedings because both statutes’ effect serve as “an actual impediment to arbitration and violates the FAA.”<sup>95</sup>

Similarly, the Court argued that the NLRB’s decision required employees be allowed to pursue class-action lawsuits or arbitration, which would take away the informality, speed, and cost-savings provided by arbitration and run counter to the FAA’s purpose.<sup>96</sup> The Fifth Circuit stated that “[w]hile the Board’s interpretation [of the FAA’s savings clause] is facially neutral—requiring only that employ-

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89. *Id.* at 357, 361 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991)) (no substantive right to class procedures under the Age Discrimination in Employment Act); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (no substantive right to class procedures under the Fair Labor Standards Act).

90. *D.R. Horton, Inc.*, 737 F.3d at 359.

91. *Id.* at 358 (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011)).

92. *Id.*

93. *Id.* at 359.

94. *Concepcion*, 563 U.S. at 340, 343.

95. *D.R. Horton, Inc.*, 737 F.3d at 360 (citing *Concepcion*, 563 U.S. at 344).

96. *Id.* at 359.

ees have access to collective procedures in an arbitral or judicial forum—the effect of this interpretation is to disfavor arbitration.”<sup>97</sup> As was the case in *Concepcion*, the Fifth Circuit refused to allow the FAA’s “savings clause” be used as a “basis for invalidating the waiver of class procedures in the arbitration agreement.”<sup>98</sup>

#### 4. No Contrary Congressional Command

Next, the courts analyzed, but failed to find a contrary congressional command present in the NLRA that could warrant an FAA override. This exception to the FAA’s requirement that arbitration agreements be enforced according to their terms only exists if the FAA’s mandate has been clearly overridden by another statute’s contrary congressional command.<sup>99</sup> To find a contrary congressional command in another statute, courts look generally at the statute’s text, the legislative history surrounding its passage, or for an “inherent conflict” between arbitration and the purpose of the statute.<sup>100</sup> The burden of establishing that the NLRA contains a contrary congressional command is on the party alleging the command’s existence.<sup>101</sup> Accordingly, the NLRB and employees fashioned several arguments, which the courts ultimately rejected.

The NLRB first argued that the NLRA’s text and legislative history surrounding its passage present a contrary congressional command. The NLRB pointed to the “general thrust of the NLRA—how it operates[ ] [and] its goal of equalizing bargaining power” as a contrary congressional command.<sup>102</sup> The Fifth Circuit rejected this argument because the language the NLRB cited as evidencing a contrary congressional command was vague and did not explicitly mention arbitration or provide for class-action lawsuits.<sup>103</sup> Also, the court looked at other cases where much more explicit language contrary to the FAA was not sufficient to constitute a contrary congressional command.<sup>104</sup>

To show an “inherent conflict” between the FAA and the NLRA, the employee in the Eighth Circuit case of *Owen v. Bristol Care, Inc.*, argued that the date of enactment of the NLRA was indicative of a congressional command to override the FAA.<sup>105</sup> The court analyzed the enactment dates of the NLRA and FAA because statutory interpretation suggests that when statutes conflict with one another, the

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97. *Id.*

98. *Id.* at 360.

99. *Id.*

100. *Id.* (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

101. *Gilmer*, 500 U.S. at 26.

102. *D.R. Horton, Inc.*, 737 F.3d at 360.

103. *Id.*

104. *Id.* (“By comparison, statutory references to causes of action, filings in court, or allowing suits all have been found insufficient to infer a congressional command against application of the FAA.”)

105. *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053 (8th Cir. 2013).

statute passed later in time may be interpreted as limiting and modifying the earlier statute.<sup>106</sup>

The employee in *Owen* argued that Congress passed the NLRA to build upon the Norris-LaGuardia Act of 1933, an Act that was intended to “prevent employers from imposing contracts on employees that would require employees to forgo engaging in collective actions.”<sup>107</sup> Thus, the employee argued that the legislative history of the Norris-LaGuardia Act and the NLRA both show that Congress passed the Acts to protect employees’ concerted activity rights, and the Acts were passed several years after the FAA; therefore, the Acts were intended to limit the FAA’s ability to enforce employment arbitration agreements. The Eighth Circuit rejected this argument because even though Congress originally enacted the FAA in 1925, Congress re-enacted it in 1947, after the passage of both Acts.<sup>108</sup> The Eighth Circuit reasoned that the later re-enactment suggests Congress’ intent to maintain the same arbitration protections despite the major employment protection statutes of that era.<sup>109</sup>

In *D.R. Horton, Inc.*, the Fifth Circuit reached the same conclusion as the Eighth Circuit on whether the FAA and NLRA were inherently conflicted, but for slightly different reasons. The Fifth Circuit noted that Congress enacted the NLRA before the creation of the modern class-action practice in 1966.<sup>110</sup> Thus, the court held that there could not be an inherent conflict between the FAA and NLRA when, at the time of the enactment of the NLRA, there was no class-action procedure right to protect.<sup>111</sup>

### C. Circuit Courts Embracing the NLRB’s Approach

Recent decisions out of the Seventh and Ninth Circuits have adopted the NLRB’s approach and created a circuit split, which has prompted the Supreme Court to review this issue. The Seventh Circuit in *Lewis v. Epic Sys. Corp.* held that a mandatory arbitration agreement that prevented employees from engaging in concerted activities was unenforceable because it violated the NLRA.<sup>112</sup> Then, the Ninth Circuit in *Morris v. Ernst & Young, LLP*, joined the Seventh Circuit’s holding, further deepening the divide among circuit courts.<sup>113</sup> The Seventh and Ninth Circuits stated that their holdings did not create a conflict between the FAA and the NLRA because class-action waivers

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106. *See* Chi. & N.W. Ry. Co. v. United Transp. Union, 402 U.S. 570, 582 & n.18 (1971).

107. *Owen*, 702 F.3d at 1053 (citing 29 U.S.C. § 102).

108. *Id.* (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)).

109. *Id.*

110. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 823–33 (1999)).

111. *Id.*

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

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

in arbitration agreements infringed on an employee's substantive rights, in violation of the NLRA. Like the disputes addressed by the NLRB, the Seventh and Ninth Circuit cases deal with employers trying to enforce their mandatory arbitration agreements that precluded employees from engaging in any collective action procedure.<sup>114</sup>

In both cases, the courts mimicked the NLRB's reasoning in ruling that the employer's arbitration agreement were unenforceable and in violation of the NLRA.<sup>115</sup> The courts held in this manner because: (1) the employers' arbitration agreements interfered with employees' Section 7 substantive rights to engage in concerted activities, (2) interfering with Section 7 rights is an unfair labor practice under Section 8, and (3) the FAA and the NLRA did not conflict with one another.<sup>116</sup> However, slightly different then the NLRB's application in *D.R. Horton Inc.*, the circuit courts reasoned that the FAA's "savings clause" allowed the courts to consider the arbitration agreements unenforceable on the grounds of illegality, not public policy.<sup>117</sup> Thus, the courts reasoned that because illegality is a contract defense,<sup>118</sup> and the NLRA makes arbitration agreements such as the one the employers used illegal, the arbitration agreements "meet[ ] the criteria of the FAA's saving clause for nonenforcement."<sup>119</sup>

#### IV. COMPETING CONCERNS OF EMPLOYERS AND EMPLOYEES

The debate over whether to allow class-action waivers in employee arbitration agreements cannot simply be analyzed by looking at the competing legal arguments supporting each side. Underlying this issue is a fierce divide among pro-employer and pro-employee advocates, each with their own legitimate concerns. Pro-employer advocates argue that class-action waivers are good for business because of their cost-effectiveness, timesaving, and risk reduction. On the other hand, pro-employee advocates argue that prohibiting class-action waivers gives employees greater bargaining power and access to justice that would not exist without the ability to pursue collective suits.

A foundational concern for pro-employee advocates is that employees lack the bargaining power in employee contracts that consumers have in consumer contracts, and, thus, courts should afford employees more protection.<sup>120</sup> For example, consumers have many options to

114. *Id.* at 979; *Lewis*, 823 F.3d at 1155.

115. *Morris*, 834 F.3d at 983–84; *Lewis*, 823 F.3d at 1155–57.

116. *Morris*, 834 F.3d at 983–84; *Lewis*, 823 F.3d at 1155–57.

117. *Morris*, 834 F.3d at 985; *Lewis*, 823 F.3d at 1157.

118. *Lewis*, 823 F.3d at 1157 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006)).

119. *Morris*, 834 F.3d at 985; *Lewis*, 823 F.3d at 1157.

120. Eric Reed, *Here's What the Supreme Court Will Focus on Next in Labor Law: Arbitration*, THE STREET (Feb. 10, 2017, 10:32 AM), <https://www.thestreet.com/story/13995781/5/here-s-what-the-supreme-court-will-focus-on-next-in-labor-law-arbitration.html> [https://perma.cc/B5E2-6H22].

choose from in purchasing goods and services and can easily switch to another brand if they disagree with a company's arbitration requirement.<sup>121</sup> Employees on the other hand have fewer options; an employer could choose to reject an employment contract including a class-action waiver, but employees are typically in need of income and employment, so they may agree to terms they do not agree with or understand.<sup>122</sup> Justice Stevens, in his dissenting opinion in *Gilmer*, addressed this concern and argued that employment contracts should be excluded from the FAA because of the excessive inequality of bargaining power.<sup>123</sup> Although it would be unlikely for the Supreme Court to hold that the FAA does not cover employment agreements because of post-*Gilmer* holdings by the Supreme Court,<sup>124</sup> pro-employee advocates still argue that the unequal bargaining power between employees and employers forces employees to waive their statutory rights in order to obtain employment and, thus, warrants more protection.<sup>125</sup>

The most contested issue is whether class-action waivers requiring individual arbitration still allow employees to defend their statutory rights. As stated in *Gilmer*, arbitration may serve as an adequate substitute for a judicial forum "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum . . . ."<sup>126</sup> In *Lewis v. Epic Sys. Corp.*, the Seventh Circuit invalidated class-action waivers and upheld employers' right to collective action, partially because "[c]ollective, representative, and class legal remedies allow employees to band together and thereby equalize bargaining power."<sup>127</sup> The concern with pro-employee advocates is that allowing class-action waivers prevents similarly situated employees with relatively low dollar amount claims from having their day in court if they each have to pursue their claims separately.<sup>128</sup> This concern is exacerbated by the reality of the legal profession: lawyers typi-

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121. *Id.*

122. Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U.L. REV. 1017, 1036–37 (1996).

123. *Id.* at 1032 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 39 (1991) (Stevens, J., dissenting)).

124. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2011) (The Court has interpreted the FAA to apply to virtually all employment contracts except those of transportation workers).

125. Stone, *supra* note 122, at 1037–38; *see also* Jean R. Sternlight, *Disarming Employees*, 80 BROOK. L. REV. 1309, 1319 (2015) (acknowledging that a distinction between employer and consumer arbitration agreements can be made, but noting a lack of optimism that this "argument would carry the day with today's Supreme Court") [hereinafter Sternlight, *Disarming Employees*].

126. *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

127. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1153 (7th Cir. 2016).

128. *See id.* (citing Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941)); *see also* Sternlight,

cally reject a case worth less than \$100,000.<sup>129</sup> Thus, pro-employee advocates argue that many employees will not be able to defend their claims against unpaid minimum wages, overtime disputes, or discrimination claims without having the class-action mechanism in place because of the high cost of litigation and low dollar amount of the individual claim.<sup>130</sup>

Pro-employer advocates and the Fifth Circuit in *D.R. Horton, Inc.* counter that the “[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”<sup>131</sup> Pro-employer advocates further argue that class-action waivers are “a good way to restrain out of control class[-]action costs.”<sup>132</sup> An attorney who represented the employer in the Fifth Circuit *D.R. Horton, Inc.* case said that class-action waivers are “important because the business community has faced an avalanche of class[-]action lawsuits in the employment context, and frequently companies are forced to settle those cases irrespective of the merits of the allegations merely because of the enormous potential exposure . . . .”<sup>133</sup> The attorney says that class-actions “have become not just a means of seeking justice, but also a means of economic warfare.”<sup>134</sup> In the end, employers argue that class-action waivers take away a procedural tool, but still allow employees to protect their rights just as effectively through individual arbitration.

## V. SUPREME COURT LIKELY TO REJECT NLRB’S APPROACH

Having considered the statutory backdrop provided by the FAA and the NLRA, the legal arguments for and against validating class-action waivers, and the competing concerns of employers and employees, this Section predicts that the Supreme Court is likely to rule in favor of validating class-action waivers in light of its relevant precedent and a new justice on the Court. In early 2017, the Supreme Court

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*Tsunami*, *supra* note 34, at 704 (addressing concern for plaintiffs generally not being able to bring claims without the availability of class-actions).

129. Brittany Kauffman, *Study on Estimating the Cost of Civil Litigation Provides Insight into Court Access*, INST. FOR ADVANCEMENT AM. LEGAL SYS. (Feb. 26, 2013), <http://iaals.du.edu/blog/study-estimating-cost-civil-litigation-provides-insight-court-access> [<https://perma.cc/UQS7-GGBK>].

130. Nicole Wredberg, Note, *Subverting Workers’ Rights: Class Action Waivers and the Arbitral Threat to the NLRA*, 67 HASTINGS L.J. 881, 887–88 (2016).

131. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 361 (5th Cir. 2013) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991)).

132. Reed, *supra* note 120.

133. *Id.* According to the Fulbright & Jaworski Litigation Trends Report, the number of class actions per year is indeed rising, and the most cited concern for the companies the firm sampled was the liability of class-action suits. Norton Rose Fulbright, *2015 Litigation Trends Annual Survey* 1, 61 (May 2015), [http://www.nortonrosefulbright.com/files/20150514-2015-litigation-trends-survey\\_v24-128746.pdf](http://www.nortonrosefulbright.com/files/20150514-2015-litigation-trends-survey_v24-128746.pdf) [<https://perma.cc/98PY-KL6U>].

134. Reed, *supra* note 120.

granted certiorari in three of the cases<sup>135</sup> discussed in this Article. Shortly after this announcement, the Court postponed oral argument until October of 2017, so that the case could be heard in front of a full panel of justices.<sup>136</sup> Based on the Supreme Court's precedent favoring the freedom to contract, its pro-arbitration line of cases, and the composition of justices on the Court, the Supreme Court will likely uphold class-action waivers in arbitration agreements, and thus, reject the NLRB's approach.

#### A. *The Court Favors Arbitration & the Freedom to Contract*

Following the enactment of the FAA in 1925, the Supreme Court has interpreted and expounded the FAA into an expansive body of law that favors the enforcement of arbitration agreements according to their terms, with only rare exceptions. With such a comprehensive body of law that has overcome many challenges to its applicability, the Supreme Court is unlikely to hold that allowing the NLRA to prevail will not interfere with the strong public policy favoring arbitration established by the FAA.

Professors William N. Eskridge, Jr. and John Ferejohn have argued that very few statutes “successfully penetrate public normative and institutional culture in a deep way” as to be considered a “*super-statute*[ ]”.<sup>137</sup> The scholars define super-statutes as “a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does ‘stick’ in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute.”<sup>138</sup> In their article, they go on to identify both the FAA and the NLRA as super-statutes and observe, that when “super-statutes” conflict, the Court “will trim back the super-statute whose policy and principle would be relatively less impaired by non-application.”<sup>139</sup> Eskridge and Ferejohn argued that “before 1985, the Supreme Court declined to apply the FAA to cases where colorable rights were pressed pursuant to federal super-statutes.”<sup>140</sup> More re-

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135. NLRB v. Murphy Oil USA, Inc., No. 16-307; Epic Sys. Corp. v. Lewis, No. 16-285; Ernst & Young LLP v. Morris, No. 16-300.

136. Samia M. Kirmani et al., *United States Supreme Court Delays Oral Argument in Class Action Waiver Cases*, NAT'L L. REV. (Feb. 10, 2017), <http://www.natlawreview.com/article/united-states-supreme-court-delays-oral-argument-class-action-waiver-cases> [https://perma.cc/2GNE-ZWS3].

137. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215 (2001).

138. *Id.* at 1216.

139. *Id.* at 1227, 1260.

140. *Id.* at 1261–62 (citing McDonald v. City of W. Branch, 466 U.S. 284, 290 (1984) (“[A]lthough arbitration is well suited to resolving contractual disputes . . . it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard.”); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 745 (1981) (“[T]he FLSA rights peti-

cently, the Court has expanded the FAA and, in turn, revealed a judicial tilt in the FAA cases that is different from the tilt before 1985: the current Court is more insistent that the FAA reflects a critically important national policy and less likely to find inconsistency between arbitration and federal statutory schemes.”<sup>141</sup>

Although the “super-statute” analysis does not lead to a pre-determined conclusion for all challenges to the FAA, it does show the significant hurdles the NLRB and anti-class-action waiver advocates must go through to overcome the FAA’s strong public policy favoring arbitration. Also significant to the Court’s favoritism towards arbitration and FAA expansion is Congress’ lack of response to the Court’s decades of pro-arbitration cases. For example, the Court in *Southland v. Keating* held that the FAA required arbitration in federal courts and preempted state anti-arbitration statutes, thus requiring enforcement in state courts as well.<sup>142</sup> Then in *Circuit City Stores, Inc. v. Adams*, the Court refused to overturn the *Southland* holding, in part because Congress had not enacted legislation contrary to the Court’s interpretations.<sup>143</sup> Thus, without action either by Congress to amend the FAA and its applicability or the Supreme Court to depart from their history of favoring arbitration agreements, the Court is unlikely to rule in the NLRB’s favor.

### B. *The Court Disfavors Class-Actions*

Additionally, the Supreme Court has shown distaste for class-actions both by holding that class-actions are not an appropriate substitute for arbitration proceedings and by failing to find a substantive right to proceed as a class.<sup>144</sup> Some argue that the questions posed by class-action waivers in employment arbitration agreements are similar to the issues addressed in *AT&T Mobility, LLC v. Concepcion*.<sup>145</sup>

Although *Concepcion* dealt with arbitration agreements in the consumer context and whether the FAA preempted state law, the Court’s reasoning in *Concepcion* illustrates how it may address class-action

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tioners seek to assert in this action are independent of the collective-bargaining process.”)).

141. *Id.* at 1263 (citing *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (“[T]he right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act that § 14 [of the Act] is properly construed to bar any waiver of these provisions.”); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 242 (1987) (concluding that there is “no basis for concluding that Congress intended to prevent enforcement of agreements to arbitrate RICO claims”)).

142. *Southland Corp. v. Keating*, 465 U.S. 1, 21 (1984).

143. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2011).

144. See Sternlight, *Disarming Employees*, *supra* note 125, at 1320 (“[T]he Supreme Court’s current arbitration jurisprudence not only allows employers to require employees to resolve disputes in arbitration rather than in litigation, but also has been interpreted to permit employers to use arbitration to elude class[-]actions.”).

145. Reed, *supra* note 120.



waivers in employment arbitration agreements.<sup>146</sup> In *Concepcion*, the Supreme Court held that a company's terms-of-service agreements may include clauses that bar consumers from bringing class-action lawsuits even though state law considers those contracts unconscionable.<sup>147</sup> In its decision, the Court stated that requiring the availability of class-wide arbitration, and arguably any form of class-actions, interferes with and frustrates the FAA's purpose of ensuring "the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."<sup>148</sup> The Court reasoned that class-actions conflict with the FAA's purpose because it takes the informal and efficient arbitration method and "makes the process slower, more costly, and more likely to generate procedural morass than final judgment."<sup>149</sup>

Also, as discussed above, the Supreme Court has refused to hold that the right to proceed as a class is a substantive right that cannot be waived through an employment arbitration agreement. In *Gilmer*, the Court held that although the ADEA provided employees with the ability to proceed as a class, it "does not mean that individual attempts at conciliation were intended to be barred."<sup>150</sup> Thus, the Court ultimately found that arbitration was an adequate way to vindicate an employer's ADEA rights.<sup>151</sup> These two cases show both the Supreme Court's disfavor for class-actions and its failure to find class-actions necessary to vindicating an employee's rights, both of which will prove to be significant hurdles for anti-class-action waiver advocates.<sup>152</sup>

### C. Supreme Court's Composition & New Administration's Pro-Employer Policies

Lastly, because the Court has deferred this case to late 2017, when the Court will have a full panel of nine Justices, President Trump's appointment of Justice Neil Gorsuch to replace the late Justice

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146. See Sternlight, *Tsunami*, *supra* note 34, at 708–09 (disagreeing with the outcome in *Concepcion*, but arguing that "[m]ost courts are rejecting all potential distinctions and are instead applying *Concepcion* broadly as a 'get out of class[-]actions free' card"); see also Sternlight, *Disarming Employees*, *supra* note 125, at 1318–19 (Addressing the effect of *Concepcion*, Sternlight argues that "it seems quite likely that companies will increasingly use arbitration to block employees from bringing collective or class claims, and that this Supreme Court will uphold such efforts by employers.").

147. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341–43 (2011) ("Although [Section] 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives.").

148. *Id.* at 344.

149. *Id.* at 348.

150. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991).

151. *Id.*

152. See Sternlight, *Tsunami*, *supra* note 34, at 709 ("As interpreted by most courts, *Concepcion* is destroying virtually all possible attacks on arbitral class[-]action waivers.").

Antonin Scalia will inevitably affect this case's outcome.<sup>153</sup> Also, some argue that the Trump Administration's pro-employer outlook will affect how the NLRB handles this issue on appeal to the Supreme Court once all of Trump's new NLRB Commissioners are appointed.<sup>154</sup> Shortly after his inauguration, President Trump appointed the sole Republican member of the NLRB to serve as chairman, and has since nominated two additional Republican Commissioners, one of whom has already been confirmed by the Senate and the other awaiting confirmation, which will inevitably give the five-member board a Republican majority.<sup>155</sup> The NLRB has already placed a partial stay on invalidating similar arbitration agreements until the Supreme Court reaches its decision.<sup>156</sup> And more recently, the Department of Justice filed an *amicus curiae* brief where it changed the position it took while under the Obama administration and now argues that class-action waivers do not violate the NLRA.<sup>157</sup>

More indicative of the likely outcome of this issue before the Supreme Court is the fact that the Court was ideologically split four-to-four prior to Gorsuch's appointment based on the nominating President's political affiliation of each Justice prior; therefore, some have argued Justice Gorsuch could have the deciding vote on the case.<sup>158</sup> Although Justice Gorsuch has not ruled on a similar case involving class-action waivers in arbitration agreements, his decisions regarding the FAA and class-actions during his time on the Tenth Circuit show a preference for enforcing arbitration.<sup>159</sup> Justice Gorsuch has shown his commitment to upholding pro-arbitration policy established by the

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153. Aaron Wegrzyn, *Waiting for Gorsuch: SCOTUS Kicks Important Class-Action Waiver Case to Next Term*, JD SUPRA (Feb. 17, 2017), <http://www.jdsupra.com/legalnews/waiting-for-gorsuch-scotus-kicks-37101/> [<https://perma.cc/74FQ-WLTV>].

154. See Howard M. Bloom & Philip B. Rosen, *Short List of Possible Trump NLRB Candidates Reported*, NAT'L L. REV. (Feb. 24, 2017), <http://www.natlawreview.com/article/short-list-possible-trump-nlr-b-candidates-reported> [<https://perma.cc/K7GC-LA93>].

155. *Id.*; Risa Salins, *Trump Expected to Alter Labor Laws, Policies*, JD SUPRA (Feb. 6, 2017), <http://www.jdsupra.com/legalnews/trump-expected-to-alter-labor-laws-56829/> [<https://perma.cc/C5EK-M4VF>]; Adam C. Abrahms et al., *Senate Confirms Trump NLRB Nominee Marvin Kaplan; Delays Nomination of William Emanuel*, NAT'L L. REV. (Aug. 3, 2017), <https://www.natlawreview.com/article/senate-confirms-trump-nlr-b-nominee-marvin-kaplan-delays-nomination-william-emanuel> [<https://perma.cc/AK6Y-LLXP>].

156. See Beth Tursell, *Impact on Pending Cases Due to Supreme Court's Grant of Certiorari in NLRB v. Murphy Oil USA*, NLRB (Jan. 26, 2017), <https://apps.nlr-b.gov/link/document.aspx/09031d458234476d> [<https://perma.cc/DJJ4-UX6K>].

157. Christopher J. Stevens, *Department of Justice Changes Stance on Class Action Waivers in Favor of Employers*, NAT'L L. REV. (June 19, 2017), <https://www.natlawreview.com/article/depart-ment-justice-changes-stance-class-action-waivers-favor-em-pliers> [<https://perma.cc/9RGA-ZLLA>].

158. Wegrzyn, *supra* note 153; Lindsay DiSalvo, *Trump's Supreme Court Nominee Neil Gorsuch Sides with Businesses on Labor and OSHA Issues*, JD SUPRA (Feb. 16, 2017), <http://www.jdsupra.com/legalnews/trump-s-supreme-court-nominee-neil-37130/> [<https://perma.cc/4G5F-RQ9B>].

159. DiSalvo, *supra* note 158.

FAA in his authored opinions, both for the majority and the dissent.<sup>160</sup> Also important is Justice Gorsuch's recent concurring opinion addressing the "elephant in the room" arguing that "*Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power . . . that seems more than a little difficult to square with the Constitution" and that "[m]aybe the time has come to face the behemoth."<sup>161</sup>

Finally, some of Justice Gorsuch's opinions disfavoring the use of class-actions, along with his work as a commercial litigation partner prior to serving on the Tenth Circuit, are relevant to how he may vote on the validity of class-action waivers.<sup>162</sup> For example, in a 2005 working paper for the Washington Legal Foundation, Justice Gorsuch showed his disfavor for class-action suits observing that "economic incentives unique to securities litigation encourage class[-]action lawyers to bring meritless claims and prompt corporate defendants to pay dearly to settle such claims. These same incentives operate to encourage significant attorneys' fee awards even in cases where class members receive little meaningful compensation."<sup>163</sup> Thus, Justice Gorsuch's private practice and judicial history arguably suggest that he will be skeptical of giving the NLRB deference and will instead favor promoting the federal pro-arbitration policy and allowing class-action waivers in employment arbitration agreements.

## VI. CONCLUSION

It appears that despite continuous efforts by the NLRB and pro-employee advocates to invalidate class-action waivers from employment arbitration agreements, these efforts will ultimately not be enough to overcome the FAA's pre-emptive force and strong public policy favoring arbitration. If the Supreme Court rules, as this Comment suggests it will, in favor of enforcing class-action waivers, then many low-dollar employment dispute claims will likely go unrepre-

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160. *Ragab v. Howard*, 841 F.3d 1134, 1140 (10th Cir. 2016) (Gorsuch, J., dissenting) (favoring two different ways to uphold the parties' arbitration agreement and arguing that the FAA "requires us to treat arbitration clauses with no less solicitude than we afford to other contractual provisions"); *Sanchez v. Nitro-Lift Techs., L.L.C.*, 762 F.3d 1139, 1148 (10th Cir. 2014) (Gorsuch, J., joining majority) (requiring employees to arbitrate their claims against employer, despite ambiguity in the parties' arbitration agreement, partially based on the federal policy favoring arbitration).

161. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

162. DiSalvo, *supra* note 158; Rachel Apter et al., *The Gorsuch Nomination: The Return of the Business Friendly Court?*, JD SUPRA (Feb. 6, 2017), <http://www.jdsupra.com/legalnews/the-gorsuch-nomination-the-return-of-25081/> [<https://perma.cc/QTC7-48AE>].

163. Neil M. Gorsuch & Paul B. Matey, *Settlements in Securities Fraud Class Actions: Improving Investor Protection*, WASH. LEGAL FOUND., Critical Legal Issues: Working Paper Series No. 128, at 2 (Apr. 2005), <http://www.wlf.org/upload/0405WPGorsuch.pdf> [<https://perma.cc/RED4-LAH7>].

sented. On the other hand, more and more employers are likely to include these waivers in their employment agreements to avoid the possibility of having a frivolous class-action lawsuit brought against them. Supreme Court cases such as *Gilmer*, *Concepcion*, and *Circuit City* show how powerful of a statute the FAA is and how broadly the Court is willing to apply the FAA's mandate of enforcing arbitration agreements according to their terms. Thus, the Court is likely to hold that federal arbitration policy under the FAA dictates that employment arbitration agreements with class-action waivers must be enforced according to their terms, and that the NLRA's right to engage in concerted activities does not amount to a substantive right.

