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THE CURRENT STATUS OF *D.R. HORTON*, PENDING APPELLATE LITIGATION, AND PREDICTIONS OF SUPREME COURT REVIEW

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I. INTRODUCTION

Enforcement of arbitration agreements and class-action waivers has been consistently upheld by the Supreme Court's construction and interpretation of the Federal Arbitration Act ("FAA"). Indeed, the Court has generally found that resolution of claims as a class is a procedural, not substantive, right and that as such, class action waivers are enforceable under the FAA. Unlike the cases that have been decided by the Supreme Court to date, the National Labor Relations Act ("NLRA") protects employees' right to act in concert for the protection of their interests. As such, the NLRA is unique in that collective action is a substantive right within the statutory scheme.

Part II of this paper discusses the tension between the FAA and the NLRA by outlining the Supreme Court's FAA jurisprudence and the rights provided and protected by the NLRA.[1] Part III discusses the National Labor Relations Board ("Board") decision and subsequent Fifth Circuit reversal in *D.R. Horton* and *Murphy Oil USA, Inc.*[2] Part IV examines the Board's strategy advocating its own construction of the NLRA and FAA when analyzing class arbitration waivers, and includes a discussion of recent Circuit Court decisions in the Seventh and Ninth Circuits.[3] Lastly, Part V contemplates potential Supreme Court treatment of *D.R. Horton* in light of the recent death of Justice Antonin Scalia, as well as the three petitions for writ of certiorari pending before the Supreme Court.[4]

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1. *See infra* Part II.
2. *See infra* Part III.
3. *See infra* Part IV.
4. In light of the results of the most recent election, and in the likely event that Circuit Judge

II. THE FAA AND THE NLRA

A. The FAA

The FAA was originally enacted in 1925 and provides for the enforcement of arbitration agreements by courts.[5] The broad pronouncement of the enforceability of arbitration agreements is limited by the statute's "savings clause," which provides that arbitration agreements are enforceable to "save upon such grounds as exist at law or in equity for the revocation of any contract."[6]

Modern Supreme Court jurisprudence has broadly interpreted the scope and power of the FAA. One of the first Supreme Court cases addressing the application of the FAA when it potentially conflicts with another federal statutory regime was *Gilmer v. Interstate/Johnson Lane Corporation*.[7] In *Gilmer*, the Court was asked to address whether collective action claims under the Age Discrimination in Employment Act ("ADEA") may be arbitrated.[8] The Court, in reading the FAA as broadly permitting the resolution of statutory claims by arbitration if the parties agree to the same, found nothing in the text or purpose of the ADEA as explicitly precluding arbitration.[9] Moreover, the Court rejected the argument that the provision in the ADEA allowing collective suits did not create a substantive right to proceed collectively.[10]

In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[11] the Supreme Court held that an arbitration agreement that is silent on the availability of class or collective action procedures will not have such procedures inferred into it.[12] In reaching its holding, the Court reasoned that there must be a contractual basis to find that the parties agreed to class arbitration before the parties will be compelled to collectively arbitrate their claims.[13] The following year, the Supreme Court

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Merrick Garland is not appointed to the Supreme Court, this section will serve as an academic analysis of what would have occurred under a full bench that included Circuit Judge Garland. *See infra* Part V.

5. 9 U.S.C. § 2 (2012).
6. *Id.*
7. 500 U.S. 20 (1991).
8. *Id.* at 23.
9. *Id.* at 26-27.
10. *See id.* at 32 (quoting Nicholson v. CPC Int'l Inc., 877 F.2d 221, 241 (3d Cir. 1989)).
11. 559 U.S. 662 (2010).
12. *Id.* at 687.
13. *See id.* at 682.

addressed class arbitration waivers in *AT&T Mobility LLC v. Concepcion*.[14] There, the Court considered whether a consumer contract of adhesion that is found to be unconscionable under state contract law is unenforceable under the FAA's "savings clause."[15] In a five-to-four decision authored by the late Justice Scalia, the Court held that the state contract law finding class arbitration waivers unenforceable was preempted by the FAA because it undercuts and hinders the purpose and objectives of the Act, which is the efficient and expeditious resolution of disputes by arbitration.[16]

In 2013, Justice Scalia, again writing for the majority, addressed class action waivers in *American Express Co. v. Italian Colors Restaurant*.[17] In *Italian Colors*, the Court addressed whether class arbitration waivers are enforceable under the FAA "when the [] cost of individually arbitrating a federal statutory claim exceeds [the] potential recovery."[18] The Court answered in the affirmative, explaining that prior to the adoption of class action procedures, individual suits adequately protected the federal right.[19] The Court further found that the federal antitrust statute, the statute at issue in *Italian Colors*, has no contrary congressional command requiring claims to be collectively adjudicated.[20]

B. Section 7 "Substantive Right"

Section 7 of the NLRA confers the right of association to employees.[21] Specifically, section 7 protects the employees' right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[22] To protect the rights granted by section 7, section 8 provides that it is an unfair labor practice if an employer "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section [7]."[23] Indeed, any individual contract that interferes with an employee's section 7 right to

14. 563 U.S. 333 (2011).
15. *See id.* at 339-40.
16. *See id.* at 352.
17. 570 U.S. _, 133 S. Ct. 2304, 2307 (2013).
18. *Id.* at 2307.
19. *Id.* at 2311.
20. *Id.* at 2309.
21. 29 U.S.C. § 157 (2012).
22. *Id.*
23. *Id.* § 158(a)(1).

engage in concerted activity is unlawful.[24]

Unlike Rule 23 of the Federal Rules of Civil Procedure ("FRCP")—the statutory scheme for class actions, which has been held to be a procedural rather than substantive right[25]—pursuing labor claims as a class is protected under section 7 and 8, core provisions of the NLRA.[26] For example, in *In re 127 Restaurant Corp.*, the Board found the formation of a class is protected concerted activity under section 7.[27] Additionally, in *Brady v. National Football League*, relying on the intent and purpose of the Act, the Eighth Circuit permitted class action to adjudicate federal labor claims.[28] Accordingly, unlike FRCP 23 and other statutory regimes with collective action provisions, the NLRA uniquely grants a substantive right to employees to concertedly protect their employment interests.[29]

III. THE FIFTH CIRCUIT PAIRS ANALYZING NLRA & FAA

A. D.R. Horton, Inc. v. NLRB

D.R. Horton involved a company that was a home building operation across several states.[30] In 2006, Horton implemented a Mutual Arbitration Agreement and required all new and existing employees to execute the agreement as a condition of their employment.[31] The agreement set forth that employees consent to have all disputes and claims, including claims for wages benefits and other compensation, determined exclusively by arbitration and that the arbitrator has no authority to consolidate claims or "fashion a proceeding as a class or collective action."[32] Accordingly, all employment disputes would be resolved solely through individual arbitration.[33]

Michael Cuda worked for Horton as a superintendent from July 2005 to April 2006 and had executed the agreement during that time.[34]

24. *See* J.I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944); *see also* Nat'l Licorice Co. v. NLRB, 309 U.S. 350, 360 (1940).

25. *See* Anchem Prods., Inc. v. Windsor, 521 U.S. 591, 612-13 (1997).

26. *See* 29 U.S.C. §§ 157-158.

27. *See* 127 Rest. Corp., 331 N.L.R.B. 269, at 275 (May 26, 2000) (stating that a concerted action, in accordance with section 7, "is protected activity unless done with malice or in bad faith").

28. *See* 644 F.3d 661, 673 (8th Cir. 2011).

29. *See* 29 U.S.C. § 157 (2012).

30. D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 348 (5th Cir. 2013).

31. *Id.*

32. *Id.*

33. *Id.* at 349.

34. *Id.*

In 2008, Mr. Cuda and a class of other superintendents commenced an arbitration proceeding, alleging they were misclassified as exempt from overtime protection in violation of the Fair Labor Standards Act ("FLSA").[35] In response, Horton pointed to the Mutual Arbitration Agreement, and posited that each employee can seek resolution of his or her claim individually through arbitration.[36] Thereafter, Mr. Cuda filed an unfair labor practice charge, alleging the class action waiver violated the NLRA.[37]

The Administrative Law Judge ("ALJ") found that the agreement violated sections 8(a)(1) and 8(a)(4) of the NLRA because an employee could reasonably interpret the agreement as prohibiting him or her from filing unfair labor practice charges with the Board, but dismissed the allegation that the class action waiver violated section 8(a)(1).[38]

In January 2012, the Board reversed the decision of the ALJ and found that the agreement prohibited the exercise of substantive rights protected by section 7 of the NLRA in violation of section 8(a)(1).[39] Section 8(a)(1) states that "it is an unfair labor practice for an employer to 'interfere with, restrain, or coerce employees in the exercise of rights guaranteed in' [s]ection 7."[40] In order to evaluate whether section 8(a)(1) is violated, the Board will examine whether the employer rule explicitly prohibits or limits activities that are protected by section 7.[41] If there is no explicit prohibition, then the claimant must show either that employees would reasonably interpret the rule as prohibiting section 7 activity, that the rule was enacted in response to union activity, or that the rule has been applied to curtail section 7 rights.[42] In this circumstance, the Board found that the agreement was an explicit prohibition.[43]

Under section 7, employees have a right "'to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.'"[44] Relying on *Eastex, Inc. v. NLRB*,[45] the Board interpreted "mutual aid or protection" to include any employee

35. *Id.*
36. *Id.*
37. *Id.*
38. D.R. Horton, Inc., 357 N.L.R.B. 2277, 2278 (Jan. 3, 2012).
39. *Id.*
40. *Id.* at 2280 (citations omitted).
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 2278 (citations omitted).
45. 437 U.S. 556 (1978).

effort to improve their terms and conditions of employment, which includes improving conditions through administrative and judicial forums.[46] The Board stated that it has consistently held "that the NLRA protects employees' ability to join together to pursue workplace grievances, including through litigation."[47] The Board further explained that dispute resolution through arbitration is also protected as a concerted activity under section 7.[48] Moreover, examining and discussing the congressional intent when enacting the NLRA, the Board highlighted that Congress recognized an inequality in bargaining between employers and employees, and full freedom of association in order to correct that inequality.[49] Accordingly, the Board interpreted collective action as "the core of what Congress intended to protect by adopting the broad language of [s]ection 7."[50]

After finding that the employer's conduct violated the NLRA, the Board discussed the interaction of the NLRA with the FAA and concluded that the two statutes are not in conflict under the facts of the case.[51] The FAA was enacted with the intent to "'reverse the longstanding judicial hostility to arbitration agreements.'"[52] However, the agreements still remain subject to the same defenses as other contracts.[53] The Board highlighted that the Supreme Court has permitted the resolution of statutory claims through arbitration, unless the party gives up a substantive right granted by the statute.[54] The Board explained that the right to engage in collective action, including legal action in a judicial or arbitral forum, is a substantive right under the NLRA.[55] As such, it clarified that while FRCP 23 and the collective class action procedures in the FLSA are procedural rules, employees acting concertedly by invoking these procedural rules to improve the terms and conditions of their employment is a substantive right protected by section 7.[56] Further, the Board supported its determination that the FAA and NLRA are not in conflict with one another by finding that its

46. *D.R. Horton, Inc.*, 357 N.L.R.B. at 2278; *see also Eastex*, 437 U.S. at 565-566.

47. *D.R. Horton, Inc.*, 357 N.L.R.B. at 2278.

48. *Id.* at 2278-79 ("No one doubts that the processing of a grievance in such a manner is concerted activity within the meaning of [section] 7." (quoting NLRB v. City Disposal Sys., Inc., 456 U.S. 822, 836 (1984))).

49. *Id.* at 2279 (citations omitted).

50. *Id.*

51. *See id.* at 2283-84.

52. *Id.* at 2284 (quoting Gilmer v. Interstate/ Johnson Lane Corp., 500 U.S. 20, 24 (1991)).

53. *Id.* at 2284.

54. *Id.* at 2285 (citations omitted).

55. *Id.* at 2286.

56. *Id.*

interpretation of the class-action waiver as violating the NLRA falls within the savings clause of section 2 of the FAA, which provides that an agreement may be invalidated upon "any 'grounds as exist at law or in equity for the revocation of any contract.'"[57] Relying on *J.I. Case Co. v. NLRB*[58] and its progeny—which held private agreements could be invalidated if they restrict NLRA rights—the Board concluded that an arbitration agreement could be invalidated for restricting NLRA rights, as it falls squarely within the savings clause exception to the FAA.[59]

The Board further examined the underlying policy associated with the FAA as iterated in *AT&T Mobility, LLC v. Concepcion*[60] and *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[61] and concluded that while the Supreme Court found the purpose of the FAA was enforcement of arbitration agreements to ensure an informal and streamlined process, this policy is not in tension with the policies of the NLRA.[62] Unlike the agreement in *Concepcion* that involved a consumer contract of adhesion involving thousands of consumers, the case at issue involved a limited set of employees and, as such, did not have the same concerns of efficiency, cost, and informality as *Concepcion*.[63]

Lastly, the Board maintained that even in the event of a direct conflict, the FAA should yield since the Norris-La Guardia Act was enacted after the FAA and, as such, repealed all parts of the FAA in conflict with it.[64] The Norris-La Guardia Act states that a private agreement is unenforceable if it prohibits "a 'lawful means [of] aiding any person participating or interested in' a lawsuit arising out of a labor dispute."[65] Accordingly, if the agreement violates the Act, the FAA must give way to the later promulgated statute and the agreement cannot be enforced.[66]

The Fifth Circuit was unconvinced by the Board's interpretation of the FAA's savings clause in relation to section 7 of the NLRA in light of

57. *Id.* at 2287.

58. 321 U.S. 332 (1944).

59. *See id.* at 334-37; *D.R. Horton, Inc.*, 357 N.L.R.B. at 2287 (citations omitted).

60. *D.R. Horton, Inc.*, 357 N.L.R.B. at 2287; *see also* AT&T Mobility LLC, v. Concepcion, 563 U.S. 333, 344 (2011) ("The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements. . . . Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.").

61. *See* 559 U.S. 662, 682 (2010) (arguing that an arbitration arising out of a maritime transaction is not only valid and enforceable, but it is also irrevocable) (citations omitted).

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

63. *Id.* (citations omitted).

64. *Id.* at 2288.

65. *Id.* (citations omitted).

66. *Id.* at 2287.

the Supreme Court's decision in *Concepcion*.[67] As explained in *Concepcion*, class action procedure runs afoul of the main advantage of arbitration, which is its informality.[68] Accordingly, "requiring the availability of class actions interferes with fundamental attributes of arbitration and creates a scheme inconsistent with the FAA."[69] As such, in interpreting *Concepcion*, the Fifth Circuit concluded that the savings clause is inapplicable in this case and that the agreement would be unenforceable if the NLRA contains a congressional command to override the FAA.[70] The Fifth Circuit further indicated in *D.R. Horton, Inc.* that there is no argument of explicit congressional intent within the NLRA to override the FAA, but rather that the structure and purpose of the statutes is where the congressional intent can be inferred.[71] Relying on the Supreme Court's prior decisions where it refused to find an override of the FAA even with specific collective action procedures within a statutory scheme to protect the statutory right,[72] the Fifth Circuit refused to interpret general language without more as insufficient to infer congressional command to override the FAA.[73] The court further reasoned that other circuits that have considered this issue have not deferred to the NLRB's rationale and enforced the class waivers.[74]

67. D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 359 (5th Cir. 2013) (citations omitted).

68. *Id.* at 359-60 (citations omitted).

69. *Id.* (internal quotation marks and citations omitted).

70. *Id.* at 360.

71. *Id.* at 361 (citations omitted).

72. *See id.* at 360 (citations omitted).

73. *Id.* at 360-61.

74. *See id.* at 348, 362 (citing Richards v. Ernst & Young, LLP, 734 F.3d 871 (9th Cir. 2013); Sutherland v. Ernst & Young, LLP, 726 F.3d 290 (2d Cir. 2013); Owen v. Bristol Care, Inc., 702 F.3d 1050, 1055 (8th Cir. 2013)). It should be noted that since the *Richards* decision in 2013, the Ninth Circuit has rendered a decision in 2016 that found prohibiting a concerted legal claim in any forum regarding wages, hours or terms of employment violates the NLRA. *See infra* Part IV. Additionally, the Eighth Circuit reaffirmed its decision in *Owen*. Cellular Sales of Missouri v. NLRB, 824 F.3d 772, 776 (8th Cir. 2016). Also of note, while the Second Circuit has found class action waivers enforceable, a recent decision by the Second Circuit has hinted a change in its view. In Patterson v. Raymours Furniture Co., Inc., 15-cv-2820, 2016 WL 4598542 (2d Cir. Sept. 14, 2016), while the court affirmed its own precedent in *Sutherland*, it noted in dicta that if the court were reviewing the issue "on a clean slate," it very well may have been persuaded by the reasoning set forth in the Seventh and Ninth Circuits in finding the class waivers unenforceable. In addition to the circuits that have addressed the application of the Board's analysis in *D.R. Horton*, numerous federal district courts across the country have also rejected the Board's reasoning and found class waivers to be enforceable. *See* Diaz v. Mich. Logistics Inc., 167 F. Supp. 3d 375, 382 (E.D.N.Y. 2016); Nanavati v. Adecco USA, Inc., 99 F. Supp. 3d 1072, 1077-79 (N.D. Cal. 2015); Ortiz v. Hobby Lobby Stores, Inc., 52 F. Supp. 3d 1070, 1082-83 (E.D. Cal. 2014); Longnecker v. Am. Express Co., 23 F. Supp. 3d 1099, 1112-13 (D. Ariz. 2014); Green v. Zachry Indus., Inc., 36 F. Supp. 3d 669, 675 (W.D. Va. 2014); Dixon v. NBCUniversal Media, LLC, 947 F. Supp. 2d 390, 403, 403 n. 11 (S.D.N.Y. 2013); Ryan v. JPMorgan Chase & Co., 924 F. Supp. 2d 559, 563

As such, the Fifth Circuit, in an effort to avoid a circuit split, declined to defer to the NLRB's interpretation of *Concepcion* and its application in the context of administering the NLRA.[75]

Although it rejected the NLRB's analysis pertaining to the claimant's section 8(a)(1) claim that the class waiver interfered with his section 7 rights granted by the NLRA, the Fifth Circuit affirmed the Board's finding that the agreement violated section 8(a)(1) and 8(a)(4) because the language of the agreement could result in the employee reasonably believing that he or she is prohibited from filing an unfair

(S.D.N.Y. 2013); Long v. BDP Int'l, Inc., 919 F. Supp. 2d 832, 852 n. 11 (S.D. Tex. 2013); Delock v. Securitas Sec. Servs. USA, Inc., 883 F. Supp. 2d 784, 789-91 (E.D. Ark. 2012); Morvant v. P.F. Chang's China Bistro, Inc., 870 F. Supp. 2d 831, 845 (N.D. Cal. 2012); Jasso v. Money Mart Exp., Inc., 879 F. Supp. 2d 1038, 1049 (N.D. Cal. 2012); Levison v. MasTec, Inc., No. 8:15-cv-1547-T26AEP, 2015 WL 5021645, at *2 (M.D. Fla. Aug. 25, 2015) (citing Walthour v. Chipio Windshield Repair, LLC, 745 F.3d 1326, 1332 (11th Cir. 2014)); Martinez v. Leslie's Poolmart, Inc., No. 8:14-cv-01481-CAS(CWx), 2014 U.S. Dist. LEXIS 156218, at *12-13, *12 n.5 (C.D. Cal. Nov. 3, 2014); Chico v. Hilton Worldwide, Inc., No. CV 14-5750-JFW (SSx), 2014 WL 5088240, at *13 (C.D. Cal. Oct. 7, 2014); Fardig v. Hobby Lobby Stores, Inc., No. SACV 14-561 JVS(ANx), 2014 WL 2810025, at *7 (C.D. Cal. June 13, 2014); Cohn v. Ritz Transp., Inc., No. 2:11-CV-1832 JCM NJK, 2014 WL 1577295, at *3 (D. Nev. Apr. 17, 2014) (citations omitted); Appelbaum v. AutoNation Inc., No. SACV 13-01927 JVS(RNBx), 2014 WL 1396585, at *10 (C.D. Cal. Apr. 8, 2014) (citations omitted); Hickey v. Brinker Int'l Payroll Co., L.P., No. 1:13-cv-00951-REB-BNB, 2014 WL 622883, at *2-3 (D. Colo. Feb. 18, 2014) (citations omitted); Zabelny v. CashCall, Inc., No. 2:13-cv-00853-PAL, 2014 WL 67638, at *12-14 (D. Nev. Jan. 8, 2014) (citations omitted); Siy v. CashCall, Inc., No. 2:13-cv-00953-PAL, 2014 WL 37879 at *12-15 (D. Nev. Jan. 6, 2014); Fimby-Christensen v. 24 Hour Fitness USA, Inc., No.: 5:13-cv-01007-EJD, 2013 WL 6158040, at *4 (N.D. Cal. Nov. 22, 2013) (citations omitted); Smith v. BT Conferencing, Inc., No. 3:13-cv-160, 2013 WL 5937313, at *21-22 (S.D. Ohio Nov. 5, 2013); Sylvester v. Wintrust Fin. Corp., No. 12 C 01899, 2013 WL 5433593, at *7-9 (N.D. Ill. Sept. 30, 2013); Lloyd v. J.P. Morgan Chase & Co., Nos. 11 Civ. 9305(LTS), 12 Civ. 2197(LTS), 2013 U.S. Dist. LEXIS 129102, at *20, *20 n.7 (S.D.N.Y. Sept. 9, 2013); Cunningham v. Leslie's Poolmart, Inc., No. CV 13-2122 CAS (CWx), 2013 WL 3233211, at *12 n.11 (C.D. Cal. June 25, 2013); Brown v. Citicorp Credit Servs., No. 1:12-CV-62-BLW, 2013 U.S. Dist. LEXIS 59616, at *4-5 (D. Id. Apr. 24, 2013); Noffsinger-Harrison v. LP Spring City, LLC, No. 1:12-CV-161, 2013 WL 499210, at *5-6 (E.D. Tenn. Feb. 7, 2013); Miguel v. JPMorgan Chase Bank, N.A., No. CV 12-3308 PSG (PLAx), 2013 U.S. Dist. LEXIS 16865, at *21-25 (C.D. Cal. Feb. 5, 2013); Cohen v. UBS Fin. Servs., Inc., No. 12 Civ. 2147(BSJ)(JLC), 2012 WL 6041634, at *3-4 (S.D.N.Y. Dec. 4, 2012); Carey v. 24 Hour Fitness USA, Inc., No. H-10-3009, 2012 U.S. Dist. LEXIS 143879, at *3-7 (S.D. Tex. Oct. 4, 2012); Spears v. Mid-America Waffles, Inc., No. 11-2273-CM, 2012 WL 2568157, at *2-3 (D. Kan. July 2, 2012); Luciana De Oliveira v. Citicorp N. Am., Inc., No. 8:12-cv-251-T-26TGW, 2012 U.S. Dist. LEXIS 69573, at *6-7 (M.D. Fla. May 18, 2012); Palmer v. Convergys Corp., No. 7:10-cv-145(HL), 2012 WL 425256, at *3 n.2 (M.D. Ga. Feb. 9, 2012); LaVoice v. UBS Fin. Servs., Inc., No. 11 Civ. 2308(BSJ)(JLC), 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012); Iskanian v. CLS Transportation Los Angeles, LLC, 59 Cal. 4th 348, 371-73 (2014); Reyes v. Liberman Broad., Inc., 146 Cal.Rptr.3d 616, 633-35 (Cal. App. 2d 2012); Truly Nolen of America v. Superior Court, 145 Cal.Rptr.3d 432, 452 (Cal. App. 2d 2012); Nelsen v. Legacy Partners Residential, Inc., 144 Cal.Rptr.3d 198, 212-14 (Cal. App. 1st 2012).

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

labor charge with the Board.[76]

B. Murphy Oil USA, Inc. v. NLRB

Murphy Oil USA, Inc. ("Murphy Oil") operates retail gas stations.[77] The charging parties worked at its Alabama facility beginning in November 2008.[78] Employees were required to sign a binding arbitration agreement consenting to resolution of all employment disputes by arbitration and waiving the right to pursue collective claims in arbitral or judicial forum.[79] In June 2010, four employees filed a collective action in the District Court for the Northern District of Alabama alleging violations of the FLSA.[80] In response, Murphy Oil moved to dismiss the action, citing the agreement as the basis for dismissal.[81] The employees opposed, arguing that the agreement interfered with their rights under the NLRA to engage in section 7 protected concerted activity and filed an unfair labor practice charge with the Board in January 2011.[82]

While this matter was pending, the Board rendered its decision in *D.R. Horton*,[83] and consequently Murphy Oil implemented a revised arbitration agreement to provide that employees are not prohibited from adjudicating unfair labor charges before the Board.[84] Nevertheless, the agreement was inapplicable to the claimants in *Murphy Oil*, as they were hired prior to the date of the adoption of the revised agreement.[85] While the Board was contemplating the unfair labor practice charge in this matter, the Fifth Circuit rendered its decision in *D.R. Horton*, which rejected the Board's interpretation of the NLRA and FAA.[86] Nevertheless, the Board remained unconvinced by the Fifth Circuit decision and, instead, reaffirmed its own *D.R. Horton* decision,[87] holding that Murphy Oil violated section 8(a)(1) by requiring its employees to agree to resolve all employment disputes through

76. *See id.* at 363-64.
77. Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1015 (5th Cir. 2015).
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 1015-16.
83. *Id.* at 1016 (citations omitted).
84. *Id.*
85. *Id.*
86. *Id.* (citations omitted).
87. *Id.* at 1017 (citations omitted).

individual arbitration in contravention to section 7 of the NLRA.[88]

The Fifth Circuit reversed the Board's decision and reaffirmed its reasoning in *D.R. Horton*.[89] While the court did not repeat its analysis and reasoning from *D.R. Horton*, it simply explained that its prior decision forecloses the argument set forth in the Board's order in the Fifth Circuit.[90] The court highlighted that "[t]hough the Board might not need to acquiesce in [its] decisions, it is a bit bold for [the Board] to hold that an employer who followed the reasoning of [the court's] *D.R. Horton* decision had no basis in fact or law or an 'illegal objective' in doing so."[91] The court further recommended the Board "strike a more respectful balance between its views and those of circuit courts reviewing its orders."[92]

In September 2016, the NLRB filed a petition for writ of certiorari with the Supreme Court.[93]

IV. SUBSEQUENT NLRB DECISIONS AND FEDERAL APPELLATE REVIEW

The Board has remained obstinate despite contrary decisions emanating from the Fifth Circuit and the other circuits that have addressed this issue;[94] instead, it continues to reaffirm its own *D.R. Horton* decision. Currently, there are numerous cases involving the *D.R. Horton* issue pending in the federal appellate courts on review from

88. *Id.* at 1017-18.

89. *Id.* at 1018.

90. *Id.*

91. *Id.* at 1021.

92. *Id.*

93. Reply Brief for Petitioner, Murphy Oil, USA, Inc. v. NLRB, 808 F.3d 1013 (No. 16-307) (5th Cir. Sept. 9, 2016).

94. Johnmohammadi v. Bloomingdales, Inc., 755 F.3d 1072, 1075 (9th Cir. 2014) (distinguishing this case from *D.R. Horton*, where execution of the agreement was a condition of employment, the Ninth Circuit held that a class action waiver is enforceable if the employee entered freely into the agreement) (citations omitted); Walthour v. Chipio Windshield Repair, LLC, 745 F.3d 1326, 1332, 1334 (11th Cir. 2014) (relying on the Fifth Circuit's decision in *D.R. Horton* where it found FLSA does not prohibit an employer from including a collective action waiver in an arbitration agreement) (citations omitted); Sutherland v. Ernst & Young, 726 F.3d 290, 297-98 n.8 (2d Cir. 2013) (noting that the Second Circuit declined to follow the Board's decision in *D.R. Horton*, and that it owed no deference to the Board's reasoning as it trended upon federal statutes and policies unrelated to the NLRA); Owen v. Bristol Care, Inc., 702 F.3d 1050, 1053-54 (8th Cir. 2013) (finding *D.R. Horton* inapplicable as the Board's limited decision involved agreements that foreclose all concerted action, whereas the facts presented in the instant case did not preclude filing with an administrative body; moreover, it noted that the court is under no obligation to defer to the Board's interpretation of Supreme Court precedent).

decisions of the Board.[95] Pursuant to section 10(f) of the NLRA, a final order of the Board is reviewable by the U.S. Court of Appeals in the circuit wherein the unfair labor practice in question was alleged to have occurred, wherein the employer transacts business, or in the D.C. Circuit.[96] As a result, several national companies have petitioned for review in the Fifth Circuit.[97] In addition, the Board's appellate strategy has also included filing *amicus curiae* briefs in private actions that do not involve review of a Board decision.[98]

Recently, the Board has had success in its efforts to create a circuit split—the Seventh and Ninth Circuits have ruled in the Board's favor, adopting its interpretation of the NLRA in relation to Supreme Court precedent pertaining to enforcement of arbitration agreements pursuant to the FAA.[99] In the interest of brevity, this Article will only discuss the decisions in the Seventh and Ninth Circuits, which created a circuit split with the Fifth, Second, Eighth and Eleventh Circuits.[100]

A. Lewis v. Epic Systems Corporation

Jacob Lewis worked for Epic Systems Corporation ("Epic Systems") and as a condition of his employment executed an arbitration

95. *See* Russ Bleemer, *Cutting Arbitration Classes: Facing Court Defeats on Workplace Waivers, the NLRB Refuses To Back Down*, JOSSEY-BASS (Jan. 2016), http://www.altnewsletter.com/sample-articles/cutting-arbitration-classes.aspx.

96. 29 U.S.C. § 160(f) (2012).

97. *See* BNA—Workplace Law Report, *NLRB, Employers Urge Justices to Rule on Class Waivers*, BNA (Sept. 16, 2016, 12:00 AM), https://convergenceapi.bna.com/ui/content/articleStandalone/24553152000000005/372617?redirect=1&ReportGuid=E4D0BEAF-01A0-4EE6-9AAA-CE9FBF3F2C1F.

98. *See, e.g.*, Brief for the NLRB as Amicus Curiae Urging Reversal in Support of Plaintiffs-Apellants, Patterson v. Raymours Furniture Co., 659 F. App'x 40 (2d Cir. Dec. 23, 2015) (No. 15-2820); Brief for the NLRB as Amicus Curiae Urging Affirmance in Support of Plaintiff-Appellee, Lewis v. Epic Sys. Corp., No. 15-cv-82-bbc, 2015 WL 5330300 (7th Cir. Dec. 16, 2015) (No. 15-2997); Brief for the NLRB as Amicus Curiae Urging Partial Reversal in Support of Plaintiffs-Appellants, Morris v. Ernst & Young, 834 F.3d 975 (9th Cir. Nov. 6, 2015) (No. 13-16599).

99. *See, e.g.*, Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016), *petition for cert. filed*, (U.S. Sept. 8, 2016) (No. 16-300); Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016), *petition for cert. filed*, (U.S. Sept. 3, 2016) (No. 16-285).

100. *See* Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1015 (5th Cir. 2015); Johnmohammadi v. Bloomingdales, Inc., 755 F.3d 1072, 1077 (9th Cir. 2014) (citations omitted); Sutherland v. Ernst & Young, LLP, 726 F.3d 290, 297-98, n.8 (2d Cir. 2013); D.R. Horton v. NLRB, 737 F.3d 344, 348 (5th Cir. 2013); Owen v. Bristol Care, Inc., 702 F.3d 1050, 1053-54 (8th Cir. 2013). Disputes arising from enforcement of a class action arbitration waiver are also pending for appellate review in the Third, Fourth, Sixth, Tenth and D.C. Circuits. *See* Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015), *petition for cert. granted* (U.S. Jan. 13, 2017) (No. 16-307) (citation omitted). Appellants in all these matters are advocating for adoption of the Board's rule, relying on the same arguments set forth before the Fifth, Seventh and Ninth Circuits.

agreement wherein he consented to individually arbitrate all claims arising out of his employment.[101] Lewis and other similarly situated employees filed a claim under the FLSA that they were misclassified as exempt from overtime wages.[102] Epic Systems filed a motion to dismiss the case on the ground that the employee's claims are subject to an arbitration agreement.[103] The employees opposed the motion, arguing the agreement was unconscionable and, alternatively, the waiver of class claims should be invalidated as inconsistent with *D.R. Horton*.[104]

The district court, after briefly discussing the Board's analysis in *D.R. Horton*, noted "courts must give considerable deference to the Board's interpretations of the NLRA."[105] Regarding the Fifth Circuit's reversal of the Board in *D.R. Horton*, the court explained that "the majority never persuasively rebutted the board's conclusion that a collective litigation waiver violates the NLRA and never explained why, if there is tension between the NLRA and the FAA, it is the FAA that should trump the NLRA, rather than the reverse."[106] Accordingly, the court found that absent a contrary ruling from its regional circuit or the Supreme Court, it will defer to the Board's interpretation and, as such, dismissed Epic System's motion.[107]

Epic Systems appealed to the Seventh Circuit and the Board filed an *amicus curiae* brief in support of the employee.[108] The Board's brief set forth many of the same arguments expressed in its *D.R. Horton* and *Murphy Oil* decisions.[109] Additionally, the Board emphasized the inherent flaws it found in the Fifth Circuit's reasoning in reversing the Board.[110] Significantly, the Board highlighted that the Supreme Court had never addressed an arbitration agreement's concerted-action waiver on the NLRA rights of employees.[111] Unlike the Supreme Court cases relied upon by the Fifth Circuit in support of its holding which involved

101. *See* Lewis v. Epic Sys. Corp., No. 15-cv-82-bbc, 2015 WL 5330300, at *1 (Dist. Ct. Wisc. Sept. 11, 2015).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at *2.

106. *Id.*

107. *Id.* at *3.

108. Brief for NLRB as Amicus Curiae Urging Affirmance in Support of Plaintiff-Appellee, at 1-2, Lewis v. Epic Sys. Corp., No. 15-cv-82-BBC, 2015 WL 5330300 (7th Cir. Dec. 16, 2015) (No. 15-2997).

109. *See id.* at 2-4 (citations omitted).

110. *Id.* at 23-24.

111. *Id.* at 24-25.

other statutory frameworks,[112] the Board argued that the NLRA is a distinctive statute and the rights granted by it are materially different from other laws.[113] Specifically, the Board explained that the collective action provisions in federal statutes such as the FLSA and ADEA are procedural means to effectuate the ultimate goal of the statute and do not waive a substantive right by agreeing to individual arbitration.[114] On the contrary, the concerted activity in the NLRA is itself a core statutory right protected in section 7 of the Act, which is absent from those other federal statutes.[115] As such, the Board concluded that because a different statutory right is involved, there should be a different result with respect to the FAA's enforcement mandate.[116]

On May 26, 2016, the Seventh Circuit ruled that the agreement violated the NLRA and was unenforceable under the FAA, thereby diverging from its sister circuits' rulings and creating a split amongst federal appellate courts.[117] The court first addressed "other concerted activities" in section 7 of the NLRA, discussing the text, history and purpose of the provision.[118] The court determined that collective legal proceedings fall within the ordinary meaning of "other concerted activities."[119] The court then discussed the purpose and history of the provision, asserting that in enacting section 7, Congress intended to equalize bargaining power of the employer and employee.[120] Accordingly, it found that section 7 was meant to be interpreted broadly and include collective remedies.[121] The court further explained that even if the provision was deemed to be "ambiguous," the Board's interpretation is entitled to *Chevron* deference.[122] Finally, the court was unconvinced by Epic Systems' argument that class actions were not a concerted activity contemplated by Congress because Rule 23 was enacted subsequent to the NLRA.[123] In rejecting its argument, the court found there was no indication that Congress intended to protect only the

112. *See id.* at 23-24.
113. *Id.* at 24-25.
114. *Id.* at 25.
115. *Id.* at 25-26.
116. *Id.* at 27-28.
117. *See* Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1151 (7th Cir. 2016).
118. *Id.* at 1151-54.
119. *Id.* at 1153 (internal quotation marks and citations omitted) (defining "concerted" as "jointly arranged, planned, or carried out; coordinated" and activities as "thing[s] that a person or group does or has done" or "actions taken by a group in order to achieve their aims").
120. *Id.* (citations omitted).
121. *Id.*
122. *Id.* (citations omitted).
123. *Id.* at 1154 (citations omitted).

activities that were available at the time the NLRA was enacted and further noted that, nevertheless, Congress was aware of class and collective proceedings when it passed the NLRA.[124]

After examining the meaning of section 7, the court analyzed whether the arbitration provision at issue impinged on section 7 rights.[125] Epic System's contract required employee claims to be arbitrated on an individual basis and waived the right to class or collective proceedings in any forum.[126] The court reasoned that Epic System's contract impinged on the rights protected by section 7 by interfering with the employees' right to concerted activity, which included collective legal proceedings.[127] The court concluded that the arbitration provision violated section 7 and section 8 of the NLRA.[128]

Next, the court discussed at length the FAA and whether it supersedes the NLRA, thus mandating enforcement of the arbitration provision.[129] The court concluded that the two statutes do not conflict, because the FAA does not require the enforcement of the arbitration clause.[130] Noting the heavy burden on Epic Systems to demonstrate a conflict between the two statutes, the court concluded that because the clause is unlawful under section 7, it falls within the "savings clause" of the FAA.[131] Accordingly, the court held that the two statutes may be reconciled and given effect.[132]

The court addressed the Fifth Circuit's decision in *D.R. Horton*, specifically its reliance on dicta in *Italian Colors* and *Concepcion* that class arbitration procedures burden arbitration by negatively impacting its efficiency and cost-effectiveness.[133] The court explained these Supreme Court decisions cannot be read as requiring a finding that anything that "makes arbitration less attractive [will] automatically conflict[] with the FAA."[134] Indeed, it reasoned that protecting an arbitration agreement from judicial challenge would raise this type of contract above others.[135]

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124. *Id.*
125. *Id.* at 1154-56.
126. *Id.* at 1154.
127. *Id.* at 1155 (citations omitted).
128. *Id.* at 1155-56 (citations omitted).
129. *Id.* at 1156-61.
130. *Id.* at 1156.
131. *Id.* at 1157, 1159 (citations omitted) (noting that "illegality is a standard contract defense contemplated by the FAA's savings clause").
132. *Id.* at 1158.
133. *Id.* at 1157-58 (citations omitted).
134. *Id.* at 1158.
135. *See id.* at 1159-60.

Lastly, the court rejected Epic System's argument that section 7 is a procedural, as opposed to substantive, right.[136] The court reasoned that section 7 is the core substantive right in the NLRA, as all other provisions are for the enforcement of section 7.[137] Further, the court emphasized that section 7 is not a procedural right like Rule 23, the ADEA and the FLSA, but rather more akin to association rights like those protected by the First Amendment.[138]

Based on this reasoning, the Seventh Circuit strayed from the conclusions of other federal appellate courts and adopted the Board's reasoning in *D.R. Horton*.[139] Epic Systems has petitioned for a writ of certiorari to the Supreme Court.[140] In light of a similar decision from the Ninth Circuit, which is discussed more fully below, and the circuit split amongst the federal appellate courts that have addressed *D.R. Horton*, the issue appears ripe for Supreme Court review.

B. Morris v. Ernst & Young LLP

Plaintiffs Stephen Morris and Kelly McDaniel were offered employment with Ernst & Young LLP ("EY") through an offer letter which included a copy of EY's arbitration agreement.[141] The arbitration agreement included a provision requiring all employment-related disputes to be mediated or arbitrated individually.[142] Plaintiffs filed an action in federal court alleging claims of federal and state wage and hour violations, to which EY moved to dismiss or, alternatively, to stay and compel arbitration pursuant to the terms of the arbitration agreement.[143] In support of its motion, EY argued that the FAA mandates arbitration because there is no evidence of Congressional intent to preclude the waiver.[144] Persuaded by the Eighth Circuit's decision,[145] as well as a decision in the U.S. District Court Northern District of California,[146] the

136. *Id.* at 1160.
137. *Id.*
138. *Id.* at 1160-61.
139. *See id.* at 1160 (citations omitted).
140. Petition for Writ of Certiorari, Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. Sept. 2, 2016) (No. 16-285).
141. Morris v. Ernst & Young, No. 12-04964, 2013 WL 3460052, at *1 (N.D. Cal. July 9, 2013).
142. *Id.* at *4.
143. *Id.* at *1.
144. *Id.* at *3.
145. *See* Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013).
146. *See* Jasso v. Money Mart Exp., Inc., 879 F. Supp. 2d 1038, 1049 (N.D. Cal. 2012).

court rejected Plaintiffs' *D.R. Horton* argument.[147]

On August 22, 2016, the Ninth Circuit vacated the district court's order, and held that the NLRA is violated if an employer requires its employees to sign a waiver that compels the employees to individually arbitrate all claims regarding wages, hours, and terms and conditions of their employment.[148] Specifically, the court reasoned that there is no language in the NLRA that explicitly overrides the FAA and, as such, is bound by the Supreme Court's strong articulation of favoring enforcement of arbitration agreements in *Concepcion*.[149] Indeed, the court refused to give deference to the Board's interpretation because that interpretation impedes on the FAA.[150]

The Ninth Circuit, unconvinced by the district court's refusal to give the Board's interpretation deference, first reviewed the Board's determination in the context of this case by analyzing the Board's interpretation of section 7 and section 8 through the lens of the *Chevron* analysis.[151] The court concluded that the inquiry ends at the first step of *Chevron*, determining that Congress's intent is clear and unambiguous from the statute and consistent with the Board's interpretation.[152] It explained "[t]he pursuit of concerted work-related legal claim[s] 'clearly fall[] within the literal wording of interpretation of [section] 7.'"[153] Similarly, because the clause impeded exercise of the employee's section 7 right and the waiver was a condition of employment, the Court deferred to the Board's interpretation of section 8, and determined that provision of the NLRA was also violated.[154] Indeed, the court cites to the Seventh Circuit's decision in further support of its conclusion that a contract restraining the exercise of section 7, as a condition of employment, violates section 8 of the NLRA.[155]

Next, the court discussed the NLRA in relation to the FAA and ultimately reconciled both federal statutes by finding that the provision at issue is invalid, because it violates the NLRA and falls within the FAA's savings clause.[156] Consistent with the Seventh Circuit's reasoning, the Ninth Circuit found that the FAA does not require

147. *Morris*, 2013 WL 3460052, at *10.
148. Morris v. Ernst & Young, 843 F.3d 975, 990 (9th Cir. 2016).
149. *Id.* at 988 (citations omitted).
150. *See id.* at 988-89.
151. *Id.* at 980-83 (citations omitted).
152. *Id.* at 981, 983.
153. *Id.* at 982 (citing NLRB v. J. Weingarten, Inc., 420 U.S. 251, 260 (1975)).
154. *Id.* at 982, 984.
155. *Id.* at 983 (citations omitted).
156. *Id.* at 984-86, 988.

enforcement of the provision at issue.[157] Specifically, the savings clause prevents enforcement of an arbitration clause that has the contract defense of illegality.[158] Central to the court's analysis was its determination that section 7 is a substantive right—distinguishing the NLRA from other statutes with class or concerted action provisions which the Supreme Court found to be a procedural right.[159]

The dissent by Circuit Judge Ikuta focused on the Supreme Court's precedent regarding arbitration agreement enforcement decisions.[160] Relying on the Supreme Court's decisions, Circuit Judge Ikuta concluded that there must be an express Congressional mandate in the statute for enforcement of the arbitration agreement to be precluded.[161] Circuit Judge Ikuta rejected the conclusion drawn by the majority that section 7 creates a substantive right to arbitrate or litigate employment disputes as a group.[162] He reasoned that without explicit authorization of collective actions in the text of the statute or discussion of class action in the legislative history of the Act, there is no support for the majority's position that the NLRA prohibits enforcement of arbitration provision with a class action waiver provision.[163]

With respect to the FAA, the dissent argued that the majority inappropriately applied the savings clause to a federal statute.[164] Even if the savings clause was applicable, Circuit Judge Ikuta argued that Supreme Court jurisprudence demands for enforcement of the agreement because permitting such a right interferes with the purpose and policy of arbitration.[165] As expected, EY filed a petition for a writ of certiorari in September 2016.[166]

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157. *See id.* at 987. Like the Seventh Circuit, the Ninth Circuit distinguished the cases raising the *D.R. Horton* issue from other FAA enforcement cases. *Id.* Specifically, it highlights that unlike all other Supreme Court FAA enforcement cases, these cases involve the waiver of a federal substantive right. *Id.* at 987-88. Additionally, it argues that reliance on *Concepcion* and *Italian Colors* arguments regarding adequacy of arbitration is inapposite to cases involving the illegality of a contract term under the NLRA. *Id.* at 988 (citations omitted). Lastly, the Court rejects the argument that invalidating the clause would disfavor arbitration, since the result would be the same even if the restriction on concerted activity involved an exclusive forum other than arbitration. *Id.* at 989.

158. *See id.* 985-86.

159. *See id.* at 988.

160. *See id.* at 990, 997.

161. *Id.* at 997.

162. *See id.* at 995.

163. *See id.* at 996.

164. *Id.* at 997.

165. *Id.* (discussing AT&T Mobility LLV v. Concepcion, 563 U.S. 333, 344 (2011)).

166. *See* Kat Greene, *Ernst & Young Urges High Court to Take on Class Waivers*, LAW360, (Sept. 8, 2016, 5:36 PM), http://www.law360.com/articles/837913/ernst-young-urges-high-court-to-

V. POTENTIAL SUPREME COURT TREATMENT

It is evident from the Supreme Court's treatment of the FAA that the statute is given a broad interpretation and is regarded with substantial deference. As such, the trend of the Supreme Court has been to enforce arbitration agreements, including class action waivers, under the FAA, despite conflicting federal statutory regimes or state law.[167] Moreover, several of the cases involving issues pertaining to class action or interpretation of the FAA have been narrow five-to-four decisions that have been split along ideological lines.[168]

Based on Supreme Court jurisprudence to date, it would have been reasonable to anticipate that if the Supreme Court was to grant certiorari to address the issues raised by *D.R. Horton*, it would enforce the class arbitration waiver under the FAA. However, with the death of Justice Scalia, who authored several majority opinions interpreting the FAA, there is now uncertainty surrounding the outcome of these issues.[169] The four justices that dissented in *Concepcion* remain on the court, and are unlikely to push for stricter application of *Concepcion* in future cases.[170] Moreover, commentators have opined that Justice Scalia's successor will likely be "less hostile to class claims than he was."[171] As such, "there is a good chance that the court will begin limiting the effect of *Concepcion* when it next considers state law rules regarding adhesive employment contracts."[172]

In light of the recent Presidential election, which results in Republican control of the executive branch, the future composition of the Supreme Court, by the time the petition for writ of certiorari is reviewed by the Court, is nebulous.[173]

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take-on-class-waivers.

167. *See, e.g.*, DirectTV, Inc. v. Imburgia, 577 U.S. _,136 S. Ct. 463, 471 (2015) (explaining the decision "falls well within the confines of [] present well-established law").

168. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 334 (2011); Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 75-76 (2010).

169. *See* Gordon W. Renneisen, *The Post-Scalia Fate of Employment Class Waivers*, LAW360 (Mar. 9, 2016, 11:25 AM), http://www.law360.com/articles/768875/the-post-scalia-fate-of-employment-class-waivers.

170. *See id.*

171. *Id.*

172. *Id.*

173. During the campaign, President Trump released a list of candidates he is considering for nomination to the Supreme Court. *See Donald J. Trump Finalizes List of Potential Supreme Court Justice Picks*, DONALDJTRUMP.COM (Sept. 23, 2016) https://www.donaldjtrump.com/press-releases/donald-j.-trump-adds-to-list-of-potential-supreme-court-justice-picks. The twenty-one

Assuming arguendo that the appointment of Circuit Judge Garland occurs, and he fills a vacant Supreme Court seat when the *D.R. Horton* issue is reviewed, an examination of his past judicial rulings may provide insight into how the Court may come out on this issue.[174] While Circuit Judge Garland has not opined on a matter directly discussing the applicability of FAA where an arbitration agreement waives a statutory right or class action,[175] he has reviewed several Board decisions.[176] Of

candidates included: Keith Blackwell, Charles Canady, Steven Colloton, Allison Eid, Neil Gorsuch, Raymond Gruender, Thomas Hardiman, Joan Larsen, Mike Lee, Thomas Lee, Edward Mansfield, Federico Moreno, William Pryor, Margaret A. Ryan, Amul Thapar, Timothy Tymkovich, David Stras, Diane Sykes, Don Willett, and Robert Young. *Id.* Since President-Elect Trump's victory to the White House, his transition team has narrowed down the potential nominees to the following: Circuit Judge William Pryor of the Eleventh Circuit; Circuit Judge Diana Sykes of the Seventh Circuit; Circuit Judge Raymond Kethledge of the Sixth Circuit; Justice Joan Larsen of the Michigan Supreme Court; Circuit Judge Neil Gorsuch of the Tenth Circuit; Circuit Judge Steven Colloton of the Eighth Circuit; Circuit Judge Raymond Gruender of the Eighth Circuit; and Circuit Judge Thomas Hardiman of the Third Circuit. *See* Josh Gerstein, *A Closer Look at Trump's Potential Supreme Court Nominees*, POLITICO (Jan. 3, 2017, 6:38 AM) http://www.politico.com/story/2017/01/trumps-supreme-court-nominees-233115. All the potential nominees in the pared-down list are conservative jurists, several of which have clerked for conservative Supreme Court Justices, including Justice Antonin Scalia. *Id.* It is clear that President Trump wants to fill the vacant seat with a judge in the image of Justice Scalia. While many of these candidates serve as judges on Circuit Courts that have addressed the issue of the enforceability of class action arbitration waivers, Circuit Judges Colloton and Gruender have actually ruled on the issue. *See* Cellular Sales of Missouri, LLC v. NLRB, 824 F.3d 772 (8th Cir. 2016) (relying on Fifth Circuit case law and *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013), the Court declined to enforce the Board's order finding the class action waiver violates sections 7 and 8 of the NLRA); Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013) (Gruender, C.J.). Should either of these judges be appointed to the Supreme Court in the future, there is no doubt that they will rule in line with the Fifth Circuit's interpretation of the law and enforce class action waiver provisions in arbitration agreements. On January 31, 2017, President Trump nominated Circuit Judge Neil Gorsuch to fill the vacant U.S. Supreme Court seat. Matt Ford, *Trump Nominates Neil Gorsuch for the U.S. Supreme Court*, THE ATLANTIC (Jan. 31, 2017, 8:50 PM), https://www.theatlantic.com/politics/archive/2017/01/gorsuch-trump-supreme-court/515232/. Circuit Judge Gorsuch and Justice Scalia, both originalists, are cut from the same cloth. *Id.* Nevertheless, given the contentious environment in the Senate and the Democratic party's resentment towards the Republicans' treatement of Circuit Judge Garland, it is difficult to predict whether Circuit Judge Gorsuch will be approved by the Senate by the time the Supreme Court rules on the pending matters regarding the enforceability of class action arbitration waivers.

174. *See* Vin Gurrieri, A Justice Garland Could Benefit Employees At High Court, LAW360 (Mar. 16, 2016, 10:56 PM) http://www.law360.com/articles/772391/a-justice-garland-could-benefit-employees-at-high-court.

175. *But see* Kurke v. Oscar Gruss & Son, Inc., 454 F.3d 350, 354 (D.C. Cir. 2006) (Garland, C.J.) (ruling that the FAA only permits four grounds upon which an arbitration award may be vacated, and that the "manifest disregard of the law" standard is extremely difficult to satisfy).

176. *See* Spurlino Materials, LLC v. NLRB, 805 F.3d 1131 (D.C. Cir. 2015); Pacific Coast Supply, LLC v. NLRB, 801 F.3d 321 (D.C. Cir. 2015); Monmouth Care Center v. NLRB, 672 F.3d 1085 (D.C. Cir. 2012); Wayneview Care Center v. NLRB, 664 F.3d 341 (D.C. Cir. 2011); Spectrum Health—Kent Community Campus v. NLRB, 647 F.3d 341 (D.C. Cir. 2011); Bally's Park Place, Inc. v. NLRB, 646 F.3d 929 (D.C. Cir. 2011); Guard Publishing Co. v. NLRB, 571 F.3d 53 (D.C.

the twenty-three decisions involving review of the NLRB, only four of these decisions ruled against the Board.[177] Indeed, in his review of the Board, Circuit Judge Garland has deferred to the Board's rulings, applying *Chevron* analysis in his review.[178] Although granting deference to an agency reflects a judicial restraint, since the judiciary is unwilling to reverse an agency's ruling or opinion even if the reviewing judge would have ruled differently had it been in the shoes of the Board members, deeper examination of Circuit Judge Garland's decisions reflect an employee-side leaning.[179]

For example, in *Guard Publishing Co. v. NLRB*,[180] one of the four cases where Circuit Judge Garland ruled against the Board, the circuit court's ruling set aside a Board finding that an employer's actions were not an unfair labor practice.[181] Similarly in *United Food & Commercial Workers International Union Local 400, AFL-CIO v. NLRB*, the circuit court reviewed the Board's findings *de novo* and concluded that the Board incorrectly found the employees were lawfully ejected and excluded from the employer's premises.[182] As such, even in the limited

Cir. 2009); Dean Transp., Inc. v. NLRB, 551 F.3d 1055 (D.C. Cir. 2009); Carpenters & Millwrights, Local Union 2471 v. NLRB, 481 F.3d 804 (D.C. Cir. 2007); Flying Food Group, Inc. v. NLRB, 471 F.3d 178 (D.C. Cir. 2006); Ceridian Corp. v. NLRB, 435 F.3d 352 (D.C. Cir. 2006); ITT Industries, Inc. v. NLRB, 413 F.3d 64 (D.C. Cir. 2005); Shamrock Foods Co. v. NLRB, 346 F.3d 1130 (D.C. Cir. 2003); Ark Las Vegas Restaurant Corp. v. NLRB, 334 F.3d 99 (D.C. Cir. 2003); Lee Lumber & Bldg. Material Corp. v. NLRB, 310 F.3d 209 (D.C. Cir. 2002); Antelope Valley Bus Co. v. NLRB, 275 F.3d 1089 (D.C. Cir. 2002); Pacific Bell v. NLRB, 259 F.3d 719 (D.C. Cir. 2001); Tasty Baking Co. v. NLRB, 254 F.3d 114 (D.C. Cir. 2001); Halle Enterprises, Inc. v. NLRB, 247 F.3d 268 (D.C. Cir. 2001); Ross Stores, Inc. v. NLRB, 235 F.3d 669 (D.C. Cir. 2001) (Garland, J. concurring); United Food & Commercial Workers Int'l Union Local 400 v. NLRB, 222 F.3d 1030, 1031 (D.C. Cir. 2000); Mohave Elec. Co-op, Inc. v. NLRB, 206 F.3d 1183 (D.C. Cir. 2000); Pioneer Hotel, Inc. v. NLRB, 182 F.3d 939 (D.C. Cir. 1999).

177. *See Guard Publishing Co.*, 571 F.3d 53, 62; *Carpenters & Millwrights, Local Union 2471*, 481 F.3d 804, 813; *United Food & Commercial Workers Int'l Union*, 222 F.3d 1030, 1039; *Pioneer Hotel, Inc.*, 182 F.3d 939, 948 (holding against the Board in part).

178. *See Ceridian Corp.*, 435 F.3d 352, 356-57 (citing to *Chevron*, the court concludes "[l]ike other administrative agencies, the NLRB is entitled to judicial deference when it interprets an ambiguous provision of a statute that it administers"); *see also* ITT Industries, Inc. v. NLRB, 413 F.3d 64, 76 (D.C. Cir. 2005) (applying *Chevron* analysis to Board's interpretation of the Act and ultimately deferring and upholding the Board's rule as "'rational and consistent' with the NLRA, 'even if [the Court] would have formulated a different rule had [it] sat on the Board") (citations omitted).

179. *See, e.g.*, *Ceridian Corp.*, 435 F.3d at 356 ("[T]he NLRB is entitled to judicial deference when it interprets an ambiguous provision of a statute that it administers." (internal quotation marks and citations omitted)).

180. *See Guard Publishing Co.*, 571 F.3d at 53.

181. *See id.* at 62.

182. 222 F.3d 1030, 1035, 1039 (D.C. Cir. 2000) (The Court reasoned that *de novo* review was appropriate because the case involved Virginia law, and the Board does not have any expertise with respect to that law.).

occasions where the Court set aside the Board's findings, it still found in favor of the Union.[183]

In light of his consistent deference to Board rulings and reliance of *Chevron*,[184] it is conceivable that Circuit Judge Garland would find the Seventh and Ninth Circuit's analyses convincing and adopt the Board's interpretation of section 7 and application of FAA.

VI. CONCLUSION

D.R. Horton and its progeny highlight the tension between the broad application of the FAA and the rights granted and protected by the NLRA. While the Supreme Court's construction of the FAA is such that one assumes that enforceability of arbitration agreements overrides any other statutory right, the Board has outlined and advocated that the NLRA is unique to all other statutory rights because it confers the right to act concertedly to employees.[185] In light of the distinct statutory structure that is unlike any other federal statute, Supreme Court precedent does not necessarily demand that the NLRA should yield to the FAA as it pertains to class arbitration waivers.

The Board has had several successes in its upward battle of convincing the federal courts to adopt its interpretation of section 7 and Supreme Court precedent of the FAA.[186] As discussed in this Article, although several circuits have already ruled for enforcement of class arbitration waivers, along with numerous district courts across the country, the Seventh and Ninth Circuits have adopted the Board's interpretation.[187] With pending petitions for writ of certiorari before the Supreme Court, it is clear the highest court will likely settle the issue. While four dissenting justices from *Concepcion* are still on the court, the

183. *Guard Publishing Co.*, 571 F.3d at 62; *United Food & Commercial Workers Int'l*, 222 F.3d at 1039; *see also* Carpenters & Millwrights, Local Union 2471 v. NLRB, 481 F.3d 804, 813 (D.C. Cir. 2007) (vacating the Board's refusal to pierce the employer company's corporate veil). *But see* Pioneer Hotel, Inc. v. NLRB, 182 F.3d 939, 948 (D.C. Cir. 1999) (finding in part against the Board's determination and in favor for the employer).

184. *See* Morris v. Ernst & Young, LLP, 834 F.3d 975, 983 (9th Cir. 2016) (citations omitted); *Ceridian Corp.*, 435 F.3d at 356-57 (citations omitted).

185. *See infra* notes 148-166.

186. *See* Lewis v. Epic Sys. Corp., 823 F.3d 1153, 1161 (7th Cir. 2016); *Morris*, 834 F.3d at 987.

187. *See, e.g.*, *Lewis*, 823 F.3d at 1155, 1161 (holding the arbitration provision violates sections 7 and 8 of the NLRA because it "precludes employees from seeking any class, collective, or representative remedies to wage-and-hour disputes"); *Morris*, 834 F.3d at 987 (stating that it "join[s] the Seventh Circuit in treating the interaction between the NLRA and the FAA in a very ordinary way . . . prevent[ing] enforcement of that waiver").

latest election results indicate that Justice Scalia's successor will likely be a conservative jurist in the mold of his or her predecessor. As a result, the path to victory for the Board seems to be married with further obstacles.