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## The NLRB v. The Courts: Showdown Over the Right to Collective Action in Workplace Disputes

By Stephanie Greene\* & Christine Neylon O'Brien\*\*

“Do I believe in arbitration? I do. But not in arbitration between the lion and the lamb, in which the lamb is in the morning found inside the lion.” Samuel Gompers, Founder and former President of the American Federation of Labor

“The parties to the labor contract must be nearly equal in strength if justice is to be worked out....” Supreme Court Associate Justice Louis Brandeis

### INTRODUCTION

Sprouts Farmers Market required employees to sign an agreement that all employment-related disputes would be resolved by individual arbitration.<sup>1</sup> The agreement also required employees to waive any rights they had to resolve such disputes through collective or class action.<sup>2</sup> Laura Christensen refused to sign the agreement and, consequently, her employment was terminated, solely on the basis of her failure to sign the agreement.<sup>3</sup> Does Christensen have grounds to challenge her termination? The National Labor Relations Board (NLRB or Board) would find that the agreement is not enforceable because it violates the employee’s right to engage in collective action, a right that is protected under the National Labor Relations Act (NLRA).<sup>4</sup> Most courts, however, would find that the Federal Arbitration Act (FAA) requires enforcement of the arbitration agreement.<sup>5</sup>

The NLRB and the courts disagree on how to interpret the NLRA and the FAA when the policies and goals of these federal statutes intersect. In upholding mandatory arbitration agreements, courts have followed the trend established by the United States Supreme Court which has consistently emphasized the

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<sup>1</sup> SF Markets, LLC, d/b/a/ Sprouts Farmers Mkt., N.L.R.B. No. 21-CA-99065, at 3, 7-8 (A.L.J. Ira Sandron, Feb. 18, 2014).

<sup>2</sup> Collective actions include those brought under the Fair Labor Standards Act where employees have an opportunity to opt-in under 29 U.S.C. § 216(b) (2012), and class actions are those traditionally brought under Rule 23 of the Federal Rules of Civil Procedure, or joinder of parties under Rule 20. See FED. R. CIV. P. 20, 23; Charles A. Sullivan & Timothy P. Glynn, Horton *Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013, 1022-23 (2013) (discussing class and collective actions).

<sup>3</sup> *Sprouts Farmers Mkt.*, No.21-CA-99065, at 8.

<sup>4</sup> 29 U.S.C. § 152(3) (2012). The NLRA covers most private sector employees. Employees not covered by the Act include those: covered under the Railway Labor Act; working for employers not covered by the Act; independent contractors; domestic servants in the home; employed by parents or spouses; agricultural workers; and supervisors. *Id.* Employees engaging in protected concerted activities are covered by the Act regardless of whether they are union members, thus making employees’ Section 7 rights broadly applicable.

<sup>5</sup> See *infra* notes 117-98 and accompanying text (discussing overwhelming support for enforcement of waiver clauses).

strong federal policy articulated in the FAA of enforcing arbitration agreements as written, even when the agreements are thrust upon employees or consumers.<sup>6</sup> The NLRB, however, maintains that individual employees cannot be required to waive their right to collective action. The NLRB's position is based on Section 7 of the NLRA which provides in relevant part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .<sup>7</sup>

Thus, by definition, Section 7 insures an employee's right to proceed collectively. According to the NLRB, employers cannot require employees to surrender the very rights that a federal statute guarantees.<sup>8</sup>

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<sup>6</sup> See Jerett Yan, *A Lunatic's Guide to Suing for \$30: Class Action Arbitration, the Federal Arbitration Act and Unconscionability After AT&T v. Concepcion*, 32 BERKELEY J. EMP. & LAB. L. 551, 552 (2011) (noting that most contracts are written by the employer and are nonnegotiable).

<sup>7</sup> 29 U.S.C. § 157 (2012).

<sup>8</sup> See *D. R. Horton*, 357 N.L.R.B. 184, at \*11. This conclusion is based on Section 8(a)(1) of the NLRA which provides as follows: "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7]." 29 U.S.C. § 158(a)(1).

It should be noted that the constitutionality of the NLRB's decision in *D.R. Horton* was in question due to the composition of the Board membership serving at that time. Chairman Pearce and Member Hayes were both serving as Senate-confirmed appointees, but the validity of the third person's status was in question, because Member Becker was appointed by the President at a time when Congress was in recess. See <http://www.nlr.gov/who-we-are/board/members-nlr-1935> (last visited October 30, 2014). Presidential recess appointment powers are derived from U.S. Constitution, Article II, Section 2, Clause 2. Decisions made by Boards composed of some recess appointees were successfully challenged by a number of circuit court decisions including the District of Columbia, Third, Fourth, Sixth, and Eighth Circuits. See *Noel Canning v. NLRB*, 705 F.3d 490, 507 (D.C. Cir. 2013); *NLRB v. Enter. Leasing Co.*, 722 F.3d 609 (4<sup>th</sup> Cir. 2013); *NLRB v. Relco Locomotives, Inc.*, 734 F.3d 764 (8<sup>th</sup> Cir. 2013); *GGNSC Springfield LLC v. NLRB*, 721 F.3d 403 (6<sup>th</sup> Cir. 2013); *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203 (3<sup>rd</sup> Cir. 2013). This created significant problem with respect to many three-member NLRB decisions where one member was a recess appointee because without a quorum of three validly appointed members, the NLRB is without power, and therefore any decisions are invalid until reconsidered by a properly constituted Board. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 680-83 (2010). When the Fifth Circuit considered *D.R. Horton* on appeal, the court ruled that it had jurisdiction, regardless of any alleged defect in the Board's composition, and specifically left the constitutional issue for the Supreme Court to decide in *NLRB v. Canning*. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 351 & n.5 (5<sup>th</sup> Cir. 2013). The District of Columbia Circuit in *Noel Canning v. NLRB*, 705 F.3d 490, 507 (D.C. Cir. 2013) had ruled that NLRB Board member appointments that took place on January 4, 2012 were unconstitutional as not within the presidential recess appointment powers because Congress was not officially on an *inter session* recess, and the vacancies occurred prior to the recess rather than during it. The Supreme Court granted certiorari in *NLRB v. Canning*, 133 S. Ct. 2861, 81 U.S.L.W. 3629 (No. 12-1281) (June 24, 2013), and held that the appointments made on January 4, 2012, were invalid. The majority specifically addressed appointments made in other pending cases, including those NLRB decisions involving Board Member Becker (who was the third and critical voting member on *D.R. Horton*), setting criteria regarding recess appointments that removed all constitutional concerns regarding the composition of the NLRB in its *D.R. Horton* decision. See *National Labor Relations Board v. Noel Canning*, 573 U.S. \_ (2014) (No.12-1281) (slip. op. 4-5), *\_WL\_*, (June 26, 2014) (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.). The Court noted the Member Becker's appointment arose during an intrasession recess "that was not punctuated by *pro forma* sessions and the vacancy Becker filled had come into existence prior to that recess." *Id.* (citations omitted). The Court decided that an intrasession recess of at least ten days would permit the President to exercise his appointment power under U.S. Constitution, Article II, Section 2, Clause 2, even if the vacancy occurred prior to the recess. *Id.* at 14-21, 22-24, 29-30. Recess appointee

The NLRB also maintains that the FAA's savings clause, which exempts agreements that would be invalid under contract law, accommodates Section 7 rights.<sup>9</sup>

Many people may associate the NLRA with union rights and the collective bargaining agreements that arise from negotiations between labor and management representatives. But as Section 7 states, the NLRA also protects employees, who seek "to engage in other concerted activities . . . for the purpose of . . . other mutual aid or protection." Thus, the NLRA protects employees in the private sector whether they are unionized or not.<sup>10</sup> It is clear from the language of the statute that in protecting "other mutual aid or protection," Section 7 extends to activities beyond the collective bargaining process.<sup>11</sup> As union membership has declined, the collective rights of nonunion employees under the NLRA are more important than ever.<sup>12</sup> Because more employees are covered by these forced binding pre-dispute arbitration agreements than by collective bargaining agreements,<sup>13</sup> the interpretation of Section 7 rights is critical to the argument that the NLRA requires employers to give employees some option for collective action in addressing workplace grievances.

The difficulty in reconciling the NLRA and the FAA is embodied in the *D.R. Horton* case, a case considered by both the NLRB and the Court of Appeals for the Fifth Circuit.<sup>14</sup> The NLRB reviewed an arbitration agreement that barred collective action through both the arbitral and judicial forums, leaving individual arbitration as the sole forum for employees to address their workplace grievances. The Board found that the agreement violated the NLRA by interfering with protected concerted activities under

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Member Becker served from April 5, 2010, until January 3, 2012. See <http://www.nlr.gov/who-we-are/board/board-members-1935> (last visited October 30, 2014). The recess period during which Member Becker was appointed exceeded ten days. See Calendar of the United States Senate, 113<sup>th</sup> Congress (1<sup>st</sup> Sess. 2013), [https://www.senate.gov/legislative/resources/pdf/2013\\_calendar.pdf](https://www.senate.gov/legislative/resources/pdf/2013_calendar.pdf) (reflecting sixteen-day recess). Thus, in light of the Supreme Court's decision in *NLRB v. Canning*, the *D.R. Horton* case was decided by a constitutionally valid Board.

<sup>9</sup> *D.R. Horton*, 357 N.L.R.B. 184, at 1, 10-12.

<sup>10</sup> See JEFFREY M. HIRSCH, PAUL M. SECUNDA & RICHARD A. BALES, UNDERSTANDING EMPLOYMENT LAW 80 (2d ed. 2013) (noting NLRA Section 7 protects union and nonunion employees in the private sector).

<sup>11</sup> One author asserts that the Board's interpretation of Section 7 in *Horton* was "contorted," because the NLRA was "designed to protect concerted strikes and union organization from employer interference." See George Padis, *Arbitration Under Siege: Reforming Consumer and Employment Arbitration and Class Actions*, 91 TEX. L. REV. 665, 700 & n.220 (2013). Clearly the statute's protection extends to a broad array of employee activity. See Michael D. Schwartz, Note, *A Substantive Right to Class Proceedings: The False Conflict Between the FAA and the NLRA*, 91 FORDHAM L. REV. 2945, 2963-65 (2013) (detailing the broad construction courts, including the Supreme Court, have given to "concerted activity" and "mutual aid or protection").

<sup>12</sup> See generally Cynthia Estlund, *Labor Law Reform Again? Reframing Labor Law as a Regulatory Project*, 16 N.Y. U. J. LEGIS. & PUB. POL'Y 383, 390 (2013) (noting in a post-collective bargaining world, workers will increasingly rely upon legislated rights).

<sup>13</sup> See *Forced Arbitration*, THE EMPLOYEE RIGHTS ADVOCACY INST. FOR LAW & POL'Y, <http://www.employeerightsadvocacy.org/article.php/binding> (last visited Feb. 24, 2014); Katherine V. W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration under the Labor Law*, 61 U.C.L.A. L. REV. DISC. 164, 168 (2013) (noting that "arbitration has become so frequent that more employees are covered by arbitration clauses than by collective bargaining agreements").

<sup>14</sup> *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344 (5th Cir. 2013); *D. R. Horton, Inc.*, 357 N.L.R.B.184 (Jan. 3, 2012).

Section 7 of the Act.<sup>15</sup> According to the Board, Section 7 requires an employer to preserve some forum for collective action—either arbitral or judicial.<sup>16</sup> The Court of Appeals for the Fifth Circuit rejected the NLRB’s conclusion, finding that the Board gave inadequate weight to the policy of the FAA—to enforce arbitration provisions as written.<sup>17</sup>

Labor law scholars and litigators who represent employees view the NLRB’s position in *D.R. Horton* as a welcome departure from the trend toward foreclosing the collective action rights of employees<sup>18</sup> or as an “escape hatch” from the death of class actions expected after the Supreme Court’s decision in *AT&T v. Concepcion*.<sup>19</sup> By contrast, the Fifth Circuit’s decision reinforces the pro-employer position that most courts have taken in upholding mandatory arbitration clauses. The Fifth Circuit’s decision is similar to that followed by most courts.<sup>20</sup> Administrative Law Judges (ALJs), however, have largely followed and will continue to follow the NLRB’s decision to strike down mandatory arbitration agreements that

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<sup>15</sup> *D. R. Horton*, 357 N.L.R.B. at 13. Section 8 (a)(1) provides: “It shall be an unfair labor practice for an employer ... to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.” 29 U.S.C. § 158(a)(1) (2012).

<sup>16</sup> *D. R. Horton*, 357 N.L.R.B. at 12-13.

<sup>17</sup> *D.R. Horton*, 737 F.3d at 359-62.

<sup>18</sup> See Julius Getman & Dan Getman, *Worlds of Work Employment Dispute Resolution Systems Across the Globe: Winning the FLSA Battle: How Corporations Use Arbitration Clauses to Avoid Judges, Juries, Plaintiffs, and Laws*, 86 ST. JOHN’S L. REV. 447, 461-62 (2012) (finding *D.R. Horton* a “well-reasoned opinion” that “is careful and compelling,” and if the courts accept it, *Horton* will limit the damage to employee rights contained in the Supreme Court’s 2011 *Concepcion* opinion, in part by making class arbitration waivers less desirable); David L. Gregory, Ian Hayes, Amanda Jaret, *Reflections on the NLRB’s Labor Law Jurisprudence after Wilma Liebman*, 44 LOY. U. CHI. L. J. 923, 935 (2013) (noting that *D.R. Horton* “propped open a door to collective action that had been closing steadily”); Stone, *supra* note 13, at 173-77 (discussing employees’ right to engage in collective action as a substantive NLRA right, and *D.R. Horton*’s holding that class action waiver of collective action interferes with substantive right at core of labor law statute); Sullivan & Glynn, *supra* note 2, at 1015-17 (2013) (agreeing with the Board’s conclusion in *Horton* that substantive rights of employees to engage in concerted activity were violated by *Horton*’s mutual arbitration agreement, and outlining the agency’s correct statutory interpretation of the NLRA and its predecessor, the Norris-LaGuardia Act, 29 U.S. C. §101-15 (2012). *But cf.* Austin Leland Fleishour, *Horton [Helps] a Who??\* Playing Linguistic Hopscotch with the NLRB and Discussing Implications for Employees’ Section 7 Rights*, 80 TENN. L. REV. 449, 449 (2013) (noting limitations in language of *D.R. Horton* that will result in, at best, a narrow categorical exemption for employment contracts from the pro-arbitration Supreme Court precedents).

<sup>19</sup> See Brian J. Murray, *I Can’t Get No Arbitration: The Death of Class Actions That Isn’t, at Least So Far*, FED. LAW. 62, 63 (Sept. 2013), available at <http://www.fedbar.org/Publications/The-Federal-Lawyer/Features/Focus-On-I-Cant-Get-No-Arbitration-The-Death-of-Class-Actions-That-Isn't-at-Least-So-Far.aspx?FT=pdf> (stating that the Board in *D.R. Horton* held that Section 7 “protects and preserves class actions in all contexts - arbitration included - as Section 7 ‘concerted activities’ ... [thus rejecting *Concepcion*] by declaring this right to be nonwaivable”). The author cites *AT & T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011) for support. *Id. Cf. Arbitration Trends, The Future of Class Action in the United States*, Quinn Emmanuel Urquhart & Sullivan, LLP, at 8-9 (Winter 2013), available at <http://quinnemanuel.com/media/371211/arbitration%20trends%20-%20winter%202013%20-%20final.pdf> (noting the post-*D.R. Horton* decision of the Third Circuit in *Quilloin v. Tenet HealthSystem, Inc.*, 673 F. 3d 221 (3d Cir. 2012) where the court enforced an arbitration agreement in an employment case). The *Quilloin* court found that the arbitration agreement did not contain an express class action waiver, reasoning that silence generally indicates a prohibition against class arbitration, but left the decision as to whether a class action was prohibited to the arbitrator. *Id.* at 232.

<sup>20</sup> See *infra* notes 117-97 and accompanying text (discussing the federal cases supporting waivers).

eliminate all collective recourse.<sup>21</sup> From both a practical and theoretical point of view, the issue is far from settled. The courts may continue the current trend to uphold provisions that require mandatory individual arbitration or a circuit split may develop, requiring the United States Supreme Court to resolve the issue.<sup>22</sup> Decisions by the courts, however, hold no sway over the NLRB and its ALJs in light of the NLRB's "policy of non-acquiescence" that instructs ALJs to follow Board precedent rather than the precedent of courts of appeal where such conflict.<sup>23</sup> This article supports the Board's conclusion that agreements barring employees from resolving disputes through class or collective action in both arbitral and judicial forums are invalid because they obliterate the protection of concerted activity guaranteed by labor laws. Part I reviews Supreme Court decisions that impact forced arbitration in employment, noting that even in a climate most favorable to enforcing arbitration agreements, the Court has left room to protect concerted activity. Part II examines the NLRB's decision in *D. R. Horton*, as well as the decision by the Court of Appeals for the Fifth Circuit. Part III addresses decisions by the federal circuit courts of appeal and federal district courts post-*D.R. Horton*. Like the courts of appeal, district courts have largely discredited the NLRB's ruling, finding that pro-arbitration decisions by the Supreme Court require enforcement of the agreements. Part IV reviews recent decisions by ALJs who have considered the impact of the *D.R. Horton* decision. Nearly unanimously, ALJs have adhered to the Board's decision to invalidate agreements requiring individual arbitration as well as agreements that seek to avoid unfair labor practice liability through opt-out provisions. In Part V, the article argues that courts have been too easily swayed by the proarbitration climate, without giving adequate consideration to the implications of Section 7 rights. Although the Fifth Circuit's decision tackles the issue of Section 7 rights, this paper maintains that the court's analysis is misguided, as the court did not properly consider the substantive nature of Section 7 rights and Congress's intention that the right to collective action could not be waived as a condition of employment. The paper concludes that the Supreme Court's interpretation of the FAA leaves room for exempting Section 7 rights and that courts should follow the Board's decision. Employees should not be required to surrender substantive statutory rights as a condition of employment.

## **I. SUPREME COURT DECISIONS: THE FAA REQUIRES ENFORCEMENT OF MOST ARBITRATION AGREEMENTS BUT LEAVES ROOM FOR EXCEPTIONS**

In several closely divided decisions, the Court has interpreted the FAA as a statute that insists that arbitration provisions be "rigorously enforced" as written, even when such provisions force employees or consumers to surrender their rights to collective action.<sup>24</sup> Cases indicate that exceptions to enforcement will be rare. In fact, the Court has yet to invalidate an arbitration provision. The Court has rejected arguments that the FAA should not cover employment contracts;<sup>25</sup> it has found that the FAA preempts

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<sup>21</sup> See *infra* notes 198-250 and accompanying text (discussing the NLRB ALJ decisions declining to enforce waivers).

<sup>22</sup> The NLRB may seek a rehearing of the Fifth Circuit's decision. See Lawrence E. Dube, *NLRB: NLRB Leaders Outline Active Year Ahead With General Counsel, Full Confirmed Board*, Daily Lab. Rep. (BNA) No. 39, at C-1 (Feb. 28, 2014) (reporting from ABA's Section on Labor and Employment Law Midwinter Meeting of Committee on Development of Law under the NLRA where NLRB General Counsel Richard Griffin announced the likelihood that Board will file a petition seeking rehearing of *D.R. Horton*).

<sup>23</sup> See, e.g., *S.F. Markets, LLC, d/b/a Sprouts Farmers Market*, N.L.R.B. No. 21-CA-99065, at 9 (A.L.J. Ira Sandron, Feb. 18, 2014) (citing *D. L. Baker, Inc.*, 351 N.L.R.B. 515, 529 n.42 (2007)).

<sup>24</sup> See *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (citing *Rent-A-Center, Inc. v. Jackson*, 130 S. Ct. 2772 (2010)).

<sup>25</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

state laws that foreclose class proceedings as unconscionable,<sup>26</sup> and it has been unmoved by claims that a contractual waiver left plaintiffs with little economic incentive to pursue their antitrust claims individually.<sup>27</sup> In fact, the Court stated that it has little interest in preserving class proceedings “as necessary to prosecute claims ‘that might otherwise slip through the legal system.’”<sup>28</sup>

The FAA was enacted in 1925 to “reverse a longstanding judicial hostility to arbitration agreements” and to put arbitration contracts on the “same footing as other contracts.”<sup>29</sup> The FAA states that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>30</sup> Over the past half century, since the Supreme Court decided the *Steelworkers Trilogy*,<sup>31</sup> the United States Supreme Court has expanded its “policy favoring arbitration . . . far outside the context of collectively bargained agreements to arbitrate.”<sup>32</sup> The Court’s increasingly strong preference for arbitration, however, is reserved for individual arbitration. The Court has placed class arbitration in a distinctly less favorable category, stating that class arbitration is not “arbitration as envisioned by the FAA . . . .”<sup>33</sup> Unless a contract specifically calls for class arbitration, the Court is

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<sup>26</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

<sup>27</sup> *Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

<sup>28</sup> *Id.* at 2312. The Court has also signaled its preference for bilateral lawsuits over class litigation, stating that “[t]he class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’” *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (citing *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)).

<sup>29</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

<sup>30</sup> 9 U.S.C. § 2 (2012).

<sup>31</sup> *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Am. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960). Collectively known as the *Steelworkers Trilogy*, through these decisions the Supreme Court enhanced the status of arbitration with its view that performance of a grievance/arbitration provision could be compelled, and that arbitration awards could be enforced under Section 301 of the Labor Management Relations Act. *See* DAVID P. TWOMEY, *LABOR & EMPLOYMENT LAW*, 285-86 (2013) (discussing the *Steelworkers Trilogy*). Notably, the *American Manufacturing* case establishes that courts should limit their inquiry to determining if the party seeking arbitration was making a claim that was governed by the contract. *Id.* The *Enterprise Wheel* case cautions that courts should not substitute their judgment for that of the arbitrator. *Id.* The *Warrior & Gulf* case noted the congressional policy favoring of a strong presumption of arbitrability. *Id.* The expansion of arbitration in *Steelworkers Trilogy* line of cases was aimed at the collective bargaining process, but effectively expanded arbitration generally. *See* Padis, *supra* note 11, at 675.

<sup>32</sup> *See* Craig Becker, *The Continuity of Collective Action and the Isolation of Collective Bargaining: Enforcing Federal Labor Law in the Obama Administration*, 33 BERKELEY J. EMP. & LAB. L. 401, 403-04 (2012). Former NLRB Member Becker, who joined Chairman Pearce in authoring the NLRB’s *D.R. Horton* decision, noted that the *Steelworkers Trilogy* involved collectively bargained agreements to arbitrate, and that the Supreme Court has since extended the policy in favor of arbitration to individual agreements to arbitrate. *Id.* at 403, n.n.10-11. Former Member Becker, in discussing the Board’s *D.R. Horton* decision, also noted that “concerted legal action is a necessary counter to more systematic workplace inequities” and that “the right to take collective action is essential to the enforcement of the most basic guarantees of workplace fairness.” Craig Becker, *33rd Annual Sullivan Lecture: Labor Law—The Law of a Balanced Society: A Reply to Professor Epstein*, 41 CAPITAL UNIV. L. REV. 35, 44-45 (2013).

<sup>33</sup> *Concepcion*, 131 S. Ct. at 1753.

unlikely to find it available.<sup>34</sup> According to the Court, “[t]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”<sup>35</sup> Class arbitration, according to the Court, has additional disadvantages because it may involve hundreds or thousands of parties, binds absent parties, and sacrifices the confidentiality typical in bilateral arbitration.<sup>36</sup>

In dissent, some members of the Court have questioned the Court’s idea that “individual, rather than class, arbitration is a ‘fundamental attribut[e]’ of arbitration.”<sup>37</sup> This faction of the Court suggested that, at the time the FAA was passed, it would have been reasonable to assume that arbitration would be used primarily for merchants to resolve questions of fact, and, therefore, that there would be “roughly equivalent bargaining power” between the contracting parties.<sup>38</sup> The majority of the Court, however, has not raised the issue of inequality of bargaining power in reviewing arbitration provisions in either employment or consumer contracts. In the employment context, the Court has recognized that arbitration is an appropriate way to resolve employment disputes. In *Gilmer v. Interstate/Johnson Lane Co.*, the Court enforced a class waiver in an arbitration agreement, even though the federal statute involved, the Age Discrimination in Employment Act (ADEA), expressly permits collective actions.<sup>39</sup> The Court held that statutory permission did “not mean that individual attempts at conciliation were intended to be barred.”<sup>40</sup> The Court stated that “by 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>41</sup>

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<sup>34</sup> The Court has emphasized that arbitration is a matter of consent. See *Oxford Health Plans, LLC v. Sutter*, 133 S. Ct. 2064, 2066 (2013); *Stolt-Nielsen v. AnimalFeeds Int’l*, 559 U.S. 662, 684 (2010). Despite the Court’s antipathy towards class arbitration, it has recognized that an arbitrator may determine whether an agreement permits class arbitration. In *Oxford Health*, the Court held that the arbitrator did not exceed his powers in determining that the agreement allowed class arbitration because the parties agreed that the arbitrator would construe the agreement. 133 S. Ct. at 2068. Whether the arbitrator properly construed the agreement was immaterial, the Court held, as long as he made a good faith attempt to interpret the agreement. *Id.* The Court distinguished *Oxford Health* from *Stolt-Nielsen*, since in that case the arbitrator could not find that a contract that was silent on the issue of class arbitration allowed for class arbitration, because he made no attempt to interpret the parties’ intent, merely imposing his own policy decision. *Stolt-Nielsen*, 559 U.S. at 685.

<sup>35</sup> *Concepcion*, 131 S. Ct. at 1751; see also *Italian Colors Rest.*, 133 S. Ct. at 2312; *Stolt-Nielsen*, 559 U.S. at 685 (discussing the “the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration”).

<sup>36</sup> *Concepcion*, 131 S. Ct. at 1750-1752.

<sup>37</sup> *Concepcion*, 131 S. Ct. at 1759 (Breyer, J., dissenting).

<sup>38</sup> *Id.*

<sup>39</sup> *Gilmer*, 500 U.S. 30-32.

<sup>40</sup> *Id.* at 32.

<sup>41</sup> *Id.* at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).



In *Circuit City Stores v. Adams*,<sup>42</sup> the Court further expanded the reach of the FAA, interpreting it to cover most employment contracts. Some members of the Court were alarmed by this conclusion, noting that the Court's interpretation brought to fruition the very fears that labor representatives had expressed in opposing the Act.<sup>43</sup> Concerned about the inequality of bargaining power between individual employees and larger employers, labor believed the FAA would require courts to enforce unfair employment contracts.<sup>44</sup>

The Supreme Court addressed forced arbitration provisions in consumer contracts in *AT&T Mobility LLC v. Concepcion*,<sup>45</sup> holding that a provision requiring individual arbitration had to be enforced.<sup>46</sup> Consumers were not entitled to class arbitration, according to the Court, even though under California law, the waiver of class rights was considered unconscionable.<sup>47</sup> The Court held that California's law was preempted by the FAA,<sup>48</sup> reasoning that by requiring the preservation of class arbitration, the California law interfered with the FAA's fundamental purpose of enforcing "arbitration agreements according to their terms so as to facilitate streamlined proceedings."<sup>49</sup> Concerns about unfairness to the consumers in *Concepcion* were allayed by the fact that the arbitration provision had sufficient incentives for individuals to bring their claims and "to be made whole."<sup>50</sup> But in *American Express Co. v. Italian Colors Restaurant*,<sup>51</sup> the Court demonstrated that it was more concerned with the strict enforcement of arbitration provisions than with fairness to those denied access to class procedures.

In *Italian Colors*, the Court continued to expand the force of the FAA, holding that a contract prohibiting class actions or class arbitration was valid even though it was economically infeasible for the plaintiffs to pursue their claims individually.<sup>52</sup> Merchants claimed that American Express violated federal antitrust laws by forcing them to pay high credit card fees. Crucial to the merchants' claims of antitrust violation

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<sup>42</sup> 532 U.S. 105, 109 (2001). The Court construed Section 1 of the FAA to exempt only transportation workers. *Id.* at 109. The FAA excludes from coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (2012).

<sup>43</sup> See *Circuit City Stores*, 532 U.S. at 126-29 (Stevens, J., dissenting).

<sup>44</sup> *Id.* at 132.

<sup>45</sup> 131 S. Ct. 1740 (2011) (5-4 decision).

<sup>46</sup> *Id.* at 1753.

<sup>47</sup> See *id.* at 1745. California courts first interpreted individual arbitration provisions to be unconscionable in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005). The *Discover Bank* rule provided that clauses were per se unconscionable and unenforceable under California law if: (1) the agreement "predictably involves small amounts of damages;" (2) "the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money;" and (3) "the waiver becomes in practice the exemption of the party from responsibility." *Id.*

<sup>48</sup> *Concepcion*, 131 S. Ct. at 1753.

<sup>49</sup> *Id.* at 1748.

<sup>50</sup> *Id.* The arbitration clause provision stated that AT&T would pay claimants \$7,500 and twice their attorney's fees if they obtained an award greater than AT&T's last settlement offer. *Id.*

<sup>51</sup> 133 S. Ct. 2304 (2013) (5-3 decision).

<sup>52</sup> *Id.* at 2311.

and injury was expert economic testimony projected to cost in the vicinity of \$1 million.<sup>53</sup> Even with treble damages allowed under antitrust laws, awards to individual merchants would not exceed \$40,000, making the costs of proceeding individually untenable.<sup>54</sup>

The merchants argued that the policies of antitrust law were flouted because it was impracticable for them to pursue their claims individually.<sup>55</sup> The Court, however, found that rigorous enforcement of the arbitration provisions did not conflict with the goals of antitrust laws. According to the Court, only a “contrary congressional command” can override the FAA’s mandate.<sup>56</sup> The Court found no evidence that antitrust laws intend to disallow waivers of class procedures, stating that “antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.”<sup>57</sup>

The merchants argued that enforcement of the individual arbitration agreement prevented them from the “effective vindication” of a statutory right.<sup>58</sup> The Court was not persuaded. The Court characterized this argument as one that “originated as dictum in *Mitsubishi Motors*, where [the Court] expressed a willingness to invalidate on ‘public policy’ grounds, arbitration agreements that ‘operat[e] . . . as a prospective waiver of a party’s *right to pursue* statutory remedies.”<sup>59</sup> The Court distinguished foreclosure of a right to pursue a statutory claim from an argument that it is too expensive to prove the statutory remedy.<sup>60</sup> According to the Court, the merchants were able to vindicate their rights by pursuing arbitration individually.<sup>61</sup>

The Court’s decisions suggest that in most cases employers are on firm ground when they require individual arbitration and prohibit class procedures. Nevertheless, the Court’s decisions leave room for exceptions in enforcing such provisions. Two specific exceptions have been raised by the Court, although neither has yet been successful in defeating an arbitration provision. First, the Court recognized that the FAA’s mandate to uphold arbitration agreements could “be overridden by a contrary congressional command.”<sup>62</sup> Second, the Court recognized a judge-made exception to the FAA, which allows courts to invalidate agreements that prevent the effective vindication of a federal statutory right.<sup>63</sup> Although the Court refused to apply the exception broadly in *Italian Colors*, it explained that the exception would

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<sup>53</sup> *Id.* at 2308.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 2309.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 2310.

<sup>59</sup> *Id.* (citing *Mitsubishi Motors*, 473 U.S. at 637 n.19).

<sup>60</sup> *Italian Colors Rest.*, 133 S. Ct. at 2311.

<sup>61</sup> *Id.* (“The class action waiver merely limits arbitration to the two contracting parties.”).

<sup>62</sup> *Id.*

<sup>63</sup> *See id.* at 2310.

“certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights.”<sup>64</sup>

The Supreme Court’s decisions emphasize the strength of the FAA. The Court has interpreted the statute to compel arbitration even in situations where the lack of a class or collective remedy leaves a party at a distinct disadvantage. Nevertheless, the Court has left room for exceptions. The scope of such exceptions has yet to be defined. The different interpretations that the NLRB and the courts have taken to Section 7 rights require clarification of the scope of the FAA and its exceptions. Part II summarizes the different approaches that the NLRB and the Fifth Circuit have taken to interpreting Section 7 rights in the *D.R. Horton* case.

## II. THE *D.R. HORTON* DECISION

The NLRB issued its decision in *D.R. Horton* before the Supreme Court decided *Italian Colors*. Nevertheless, the Board focused on the question of whether or not rights under Section 7 are substantive, a focus which was prescient given the Supreme Court’s determination that the FAA does not compel arbitration where substantive rights would be waived.<sup>65</sup> Subsequently, the Fifth Circuit disagreed, concluding that the right to collective action is not a substantive right and that there is no contrary congressional command to invalidate the arbitration provisions that require individual arbitration.<sup>66</sup>

### *A. The NLRB: Employment Agreements Must Preserve the Right to Collective Action for Workplace Disputes*

With full recognition of Supreme Court decisions favoring enforcement of arbitration agreements, the NLRB found that requiring individual employees to sign away their right to act collectively with respect to workplace disputes, in the absence of a collective bargaining agreement, was an unfair labor practice. In *D.R. Horton*,<sup>67</sup> the Board concluded that the agreement requiring individual arbitration prohibited employees from exercising substantive rights protected by Section 7 of the NLRA.<sup>68</sup> In reaching this conclusion, the Board emphasized that its decision did not implicate a conflict between the NLRA and the FAA because the Supreme Court has interpreted the FAA to exempt from its requirements provisions that would deprive parties of substantive rights.<sup>69</sup>

The Board’s *D. R. Horton* decision involved a case with underlying wage and hour claims brought under the FLSA.<sup>70</sup> The Charging Party, Michael Cuda, claimed that he and other employees were misclassified as superintendents by the employer so that they would be exempt from overtime pay requirements.<sup>71</sup>

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<sup>64</sup> *Id.* As an example, the Court suggested that the exception might apply if an arbitration clause imposed fees that made access to the forum impractical. *Id.* at 2310-11.

<sup>65</sup> *D.R. Horton, Inc. v. N.L.R.B.*, 357 N.L.R.B. 184 (Jan. 3, 2012).

<sup>66</sup> *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 359-62 (5th Cir. 2013).

<sup>67</sup> 357 N.L.R.B. 184 (Jan. 3, 2012) (Chairman Pearce and former Member Becker joined in the Board’s opinion, Former Member Hayes was recused). *Id.* at 1 & n.1.

<sup>68</sup> *Id.* at 2.

<sup>69</sup> *Id.* at 4.

<sup>70</sup> *Id.* at 1.

<sup>71</sup> *Id.*

When the employees sought to pursue their claims collectively, the employer sought to enforce the arbitration agreement requiring individual arbitration.<sup>72</sup> The Mutual Arbitration Agreement (MAA) that D.R. Horton required employees to sign mandated that employees must submit all employment-related claims to individual arbitration. The MAA provided that “all disputes and claims relating to employment . . . be determined exclusively by final and binding arbitration.”<sup>73</sup> The provision also required that the arbitrator “only hear Employee’s individual claims” and prohibited the arbitrator from consolidating claims, fashioning a class or collective action, or awarding relief to a group or class from one proceeding.<sup>74</sup> The employee was required to waive the right “to file a lawsuit or other civil proceeding relating to Employee’s employment with the Company” and specifically waived the right to proceed before a judge or jury.<sup>75</sup> Because the MAA mandated that all employment disputes be resolved by individual arbitration, the Board concluded that the MAA precluded the type of concerted activity that Section 7 protects.<sup>76</sup>

In support of its argument that Section 7 rights are substantive, the Board noted that it has long recognized “with uniform judicial approval” that the NLRA protects employees who join together to address workplace grievances.<sup>77</sup> In *Eastex v. NLRB*, the Supreme Court concluded that Section 7 “protects employees from retaliation by their employer when they seek to improve working conditions through resort to administrative and judicial forums.”<sup>78</sup> Such protection must also cover employees who collectively “resort to arbitration,” according to the Board.<sup>79</sup> The Board also found support in the Supreme Court’s decision, *NLRB v. City Disposal System*, which involved a grievance procedure under a collective bargaining agreement.<sup>80</sup> The Court stated that “[n]o one doubts that the processing of a grievance in such a manner is concerted activity within the meaning of § 7.”<sup>81</sup> The Board reasoned that this language led to the reasonable conclusion that “[c]ollective pursuit of a workplace grievance in arbitration is equally protected.”<sup>82</sup>

The Board emphasized that through the NLRA, Congress “expressly” sought to address the inequality of bargaining power between employers and employees by giving employees “full freedom of association . . . for the purpose of . . . mutual aid or protection.”<sup>83</sup> Collective action, the Board asserted, makes it more

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 4.

<sup>77</sup> *Id.* at 2.

<sup>78</sup> *Id.* (quoting *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 565-66 (1978)).

<sup>79</sup> *D.R. Horton*, 357 N.L.R.B. at 2.

<sup>80</sup> 465 U.S. 822 (1984).

<sup>81</sup> *Id.* at 836.

<sup>82</sup> *D.R. Horton*, 357 N.L.R.B. at 3.

<sup>83</sup> *Id.* at 3 (citing 29 U.S.C. § 151 (2012)).

likely that employees will assert their rights and that they will do so effectively.<sup>84</sup> The Board cited language in Supreme Court decisions recognizing that the NLRA protects “the right of workers to act together to better their working conditions.”<sup>85</sup> Thus, the Board concluded that by prohibiting class action or class arbitration, the employer’s MAA interfered “clearly and expressly” with long protected substantive Section 7 rights.<sup>86</sup> The NLRB noted further that “[f]rom its earliest days, the Board, again with uniform judicial approval, has found unlawful employer-imposed, individual agreements that employees will pursue claims against their employer only individually.”<sup>87</sup>

The Board went on to find that the employer’s MAA created an unfair labor practice.<sup>88</sup> To protect the employee’s rights to concerted activity, Section 8 of the Act makes it an unfair labor practice for employers to interfere with such rights.<sup>89</sup> Under Section 8(a)(1) of the NLRA, an employer may not “interfere with, restrain, or coerce employees in the exercise of” Section 7 rights.<sup>90</sup> The Board cited Supreme Court decisions that specifically prohibited employers from requiring employees to enter into agreements that conflicted with the policies of the NLRA.<sup>91</sup> Notably, in *J.I. Case Co. v. NLRB*, the Court stated: “Individual contracts no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act . . . .”<sup>92</sup>

To further support its conclusions that the MAA violated rights that lay at the core of both Sections 7 and 8 of the NLRA, the Board turned to the history and values underlying the NLRA and modern labor law.<sup>93</sup>

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<sup>84</sup> *D.R. Horton*, 357 N.L.R.B. at 3.

<sup>85</sup> *Id.* at 4 (citing *Eastex*, 437 U.S. at 567). Furthermore the Board quoted *N.L.R.B. v. Washington Alum. Co.*, 370 U.S. 9, 14 (1962).

<sup>86</sup> *D.R. Horton*, 357 N.L.R.B. at 4.

<sup>87</sup> *Id.* n.7. The Board has the responsibility to adapt the statute “to the changing patterns of industrial life” and its interpretation of the Act is entitled to deference. See *N.L.R.B. v. J. Weingarten*, 420 U.S. 251, 265-66 (1975) (upholding Board’s interpretation of Section 7 as including employee right to union representation at investigatory interviews that reasonably could lead to discipline). Clearly, the pervasive use of mandatory individual arbitration agreements by employers in the absence of collective bargaining agreements is part of the changing pattern of industrial employment that the Board was required to address as a matter of first impression in *D.R. Horton*. See 357 N.L.R.B. 184, at 8 (noting issue is one of first impression for the Board).

<sup>88</sup> *D.R. Horton*, 357 N.L.R.B. at 4-6. The express restriction on Section 7 rights makes the MAA an unfair labor practice under Section 8(a)(1) which prohibits an employer from interfering with Section 7 rights. 29 U.S.C. § 158(a)(1) (2012). The Board’s *Lutheran Heritage* test inquires initially whether an employer’s rule explicitly restricts protected activity. If so, it is unlawful. See *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004). Violations may also be found if employees would reasonably construe the rule to prohibit Section 7 activity; or if the rule was promulgated in response to union activity; or if the rule was applied to restrict the exercise of Section 7 activity. *Id.*

<sup>89</sup> 29 U.S.C. § 158(a)(1) (2012).

<sup>90</sup> *Id.*

<sup>91</sup> *D.R. Horton*, 357 N.L.R.B. at 4-5 (citing *J.I. Case Co. v. N.L.R.B.*, 321 U.S. 332 (1944); and *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350 (1940)).

<sup>92</sup> 321 U.S. at 337.

<sup>93</sup> *D.R. Horton*, 357 N.L.R.B. at 5.

The Board traced the values inherent in Section 7 rights to the Norris-LaGuardia Act of 1932, an Act which established the fundamental tenets of labor law.<sup>94</sup> Even before Congress passed the NLRA, it recognized that employers must not be allowed to compel individuals to waive their rights to engage in concerted activity. Section 2 of Norris-LaGuardia states that the “individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment.”<sup>95</sup> Recognizing Section 2 to be the “public policy of the United States,” Section 3 of the Act declares that “any . . . undertaking or promise in conflict with the public policy declared in” Section 2 is “contrary to the public policy of the United States, shall not be enforceable in any court of the United States . . . .”<sup>96</sup> For example, the legislation prohibited contracts that required individual employees to sign “yellow dog contracts,” which prevented them from forming or joining a union.<sup>97</sup>

The protections that the Norris-LaGuardia gave to workers were expanded by the National Labor Relations Act, landmark legislation originally passed in 1935 as the Wagner Act.<sup>98</sup> The NLRA recognizes that restraints on collective action and on representation inevitably result in the individual being pitted against the employer who has superior bargaining power.<sup>99</sup> The Board emphasized that the right of collective action was considered *the* right that would balance the power that employers had and employees lacked.<sup>100</sup> If the right was to be waived at all, it was to be waived collectively, in the course of collective bargaining, not individually. In collective bargaining, employees, represented by their union, have a modicum of strength from their sheer numbers, if not from the threat of a work stoppage, and generally gain other valuable concessions from the employer if they give up a collective right. Individuals who are forced to waive their collective rights under the NLRA in order to obtain employment have no chance to exercise their rights before they waive them, and are powerless to protest. Supreme Court cases that followed the enactment of the NLRA made it clear that individual private contracts that sought to thwart the NLRA’s purposes were not valid.<sup>101</sup>

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<sup>94</sup> *Id.* See Stone, *supra* note 13, at 174-75, (discussing history of the labor laws, including sections 2 and 4 of the Norris-LaGuardia Act of 1932, 29 U.S.C. §§ 102,104 (2012)).

<sup>95</sup> 29 U.S.C. § 102.

<sup>96</sup> 29 U.S.C. § 103.

<sup>97</sup> See TWOMEY, *supra* note 31, at 11.

<sup>98</sup> 29 U.S.C. § § 151-69 (2012). See Stone, *supra* note 13, at 175.

<sup>99</sup> See *D.R. Horton*, 357 N.L.R.B. at 3.

<sup>100</sup> *Id.* (citing *N.L.R.B. v. City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984) (explaining enactment of Section 7 was to equalize bargaining power of employee with employer by allowing employees to band together to confront employer about terms and conditions of employment); Becker, *supra* note 19, at 406 (discussing purpose of Section 7 and Supreme Court’s *City Disposal* decision).

<sup>101</sup> *D.R. Horton*, 357 N.L.R.B. at 6. The Board cited *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350 (1940) in which the Court struck down a contract that required a discharged employee to present his grievance personally, rather than through a representative or union. Additionally, the Board cited *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332 (1944) in which the Court held that individual employment contracts that pre-dated certification of a union could not limit the employer’s obligation to bargain with the union.

The Board's conclusion that Section 7 rights are substantive was critical to its determination that the NLRA's preservation of collective action does not conflict either with the FAA or with the Supreme Court's decisions favoring bilateral arbitration.<sup>102</sup> In fact, the Board found that the language of the FAA and Supreme Court precedent supported its conclusion that the FAA's insistence on arbitration and that the NLRA's insistence on employees' right to collective action can peacefully co-exist. Because the FAA recognizes that substantive statutory rights must be preserved, Section 7 rights are not at odds with the FAA's objectives, the Board stated.<sup>103</sup> In other words, to uphold an arbitration agreement that categorically prohibits "joint, class, or collective federal state or employment law claims in any forum" would violate "the substantive rights vested in employees by Section 7 of the NLRA."<sup>104</sup>

The Board's focus on the substantive nature of Section 7 rights is critical in making a distinction between cases involving NLRA rights to collective activity and those involving individual employment claims. In *Gilmer*, for example, the Supreme Court held that an individual's age discrimination claim could be decided in an arbitral rather than a judicial forum without sacrificing any substantive rights.<sup>105</sup> But employees who assert Section 7 rights would, by definition, be sacrificing substantive rights to collective action if they agreed to individual arbitration, according to the Board. The Board emphasized that the D.R. Horton employee alleged that the MAA violates his right to engage in collective action under the NLRA; the employee does not claim that wage and hour disputes under the FLSA cannot be arbitrated.<sup>106</sup>

The Board also distinguished the MAA from collective bargaining agreements that waive employees' right to bring an action in court.<sup>107</sup> In *14 Penn Plaza v. Pyett*, the Supreme Court recognized that a union may agree to an arbitration clause waiving employees' rights to bring an action in court in cases involving Title VII or the ADEA.<sup>108</sup> The Board reasoned that this decision has no bearing on a case involving an employment agreement that requires an individual to waive his Section 7 rights.<sup>109</sup> The Board explained that unions exercise Section 7 rights when they negotiate through the collective bargaining process, a process that allows the union to waive employees' Section 7 rights in exchange for other concessions from the employer.<sup>110</sup> Collective bargaining agreements that waive Section 7 rights as part of a

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<sup>102</sup> *D.R. Horton*, 357 N.L.R.B. at 7-12.

<sup>103</sup> *D.R. Horton*, 357 N.L.R.B. at 9 (citing *Gilmer v. Interstate/Johnson Lane Co.*, 500 U.S. 20, 26 (1991) with further reference to *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985)).

<sup>104</sup> *D.R. Horton*, 357 N.L.R.B. at 9.

<sup>105</sup> 500 U.S. at 26. As counsel for the NLRB noted in oral arguments before the Court of Appeals for the Fifth Circuit, *Gilmer* did not raise Section 7 issues. In fact the complainant there was a manager/supervisor who probably was not entitled to Section 7 protections. For further research, see the Fifth Circuit's Oral Argument Recordings Page, available at <http://www.ca5.uscourts.gov/OralArgumentRecordings.aspx?prid=99408>.

<sup>106</sup> *D.R. Horton*, 357 N.L.R.B. at 9.

<sup>107</sup> *Id.* at 10-11.

<sup>108</sup> 556 U.S. 247, 260 (2009).

<sup>109</sup> *D.R. Horton*, 357 N.L.R.B. at 10.

<sup>110</sup> *Id.*

negotiation between a union and management are clearly different from an MAA imposed on individual employees as a condition of employment, the Board explained.<sup>111</sup>

The Board determined that its holding “accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible.”<sup>112</sup> In *AT&T Mobility v. Concepcion*, the Supreme Court stated that the “overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”<sup>113</sup> While recognizing that the FAA’s policy “to facilitate streamlined proceedings” might conflict with the NLRA’s policy of protecting concerted activity, the Board noted that the employment agreements at issue in cases such as *D.R. Horton* represented a much more limited group than the large consumer classes governed by arbitration clauses in cases such as *Concepcion*.<sup>114</sup>

The Board’s *D.R. Horton* decision was self-limiting in its language, creating “an exception rather than a rule of categorical exemption from employment contracts from the pro-arbitration Supreme Court precedents.”<sup>115</sup> The Board’s decision emphasizes that an employer cannot eliminate all options of concerted activity as a condition of employment. Section 7 rights would be effectively preserved, the Board stated, if an employment agreement eliminated the option of class arbitration, but preserved class action through litigation.<sup>116</sup>

*B. The Fifth Circuit’s Decision: Section 7 Claims are Not Substantive and Must Yield to the FAA’s Mandate*

The Court of Appeals for the Fifth Circuit, in a 2 to 1 decision, rejected the NLRB’s conclusions, holding that Section 7 claims are not substantive and that the Board gave insufficient weight to the FAA.<sup>117</sup> The court noted that the Supreme Court has found that class actions are not a substantive right,<sup>118</sup> that the

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 12.

<sup>113</sup> 131 S. Ct. at 1748.

<sup>114</sup> *D.R. Horton*, 357 N.L.R.B. at 11.

<sup>115</sup> *Id.* at 12. See Fleishour *supra* note 18, at 449, 457 (noting Board’s language was circumspect and pointing to an important distinction between the arbitration provisions in individual contracts, and collective bargaining agreements, in that the latter was collectively bargained with “give-and-take” and “correlating concessions”).

<sup>116</sup> *D.R. Horton*, 357 N.L.R.B. at 12.

<sup>117</sup> *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 362 (5<sup>th</sup> Cir. 2013).

<sup>118</sup> *Id.* at 357 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997); *Deposit Guar. Nat’l Bank v. Rober*, 445 U.S. 326, 332 (1980)).



Supreme Court held that there is no substantive right to class procedures under the ADEA,<sup>119</sup> and that several courts have held there is no substantive right to collective action under the FLSA.<sup>120</sup>

In assessing the Board's reasoning, the court considered whether the FAA's saving clause applied to Section 7 rights and whether there was a contrary congressional command that precluded application of the FAA.<sup>121</sup> The FAA states that written arbitration provisions ". . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>122</sup> Unlike the Board, the court found that the FAA's saving clause did not apply. The court found that the Board's interpretation prohibiting class action waivers was like the state statute struck down by the Supreme Court in *Concepcion*.<sup>123</sup> The court recognized that the Board's conclusion that employees must have access to collective procedures in either an arbitral or judicial forum was "facially neutral," but concluded that the result of such an interpretation would "disfavor arbitration."<sup>124</sup>

The court also concluded that the NLRA does not contain a congressional command to override the FAA.<sup>125</sup> In *Gilmer*, the Supreme Court noted that a contrary congressional command may be found in a statute's text, legislative history, or "an 'inherent conflict' between arbitration and the [statute's] underlying purposes."<sup>126</sup> The NLRA's text, according to the court, provides only general language supporting "freedom of association" for "mutual aid or protection."<sup>127</sup> Such language, which does not even mention arbitration, is "an insufficient congressional command" the court concluded.<sup>128</sup> The court summarized the legislative history of the NLRA by stating that it indicated Congress's intent to empower unions to engage in collective bargaining, with no indication of a right to file collective claims against employers.<sup>129</sup> Consequently, the legislative history of the NLRA could not support an argument for a congressional command contrary to the FAA, according to the court.

The court found that there was not an inherent conflict between the purposes of the FAA and the NLRA. First, the court noted that the NLRB has long admitted that arbitration is an appropriate way to resolve disputes.<sup>130</sup> Second, the court found that the Supreme Court's decision in *Gilmer* foreclosed "a

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<sup>119</sup> *D.R. Horton*, 737 F.3d at 357 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991)).

<sup>120</sup> *D.R. Horton*, 737 F.3d at 357-58 (citing *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir. 2002); *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319-20 (9th Cir. 1996)).

<sup>121</sup> *D.R. Horton*, 737 F.3d at 358.

<sup>122</sup> 9 U.S.C. § 2 (2012).

<sup>123</sup> *D.R. Horton*, 737 F.3d at 359. *See supra* notes 113-14 and accompanying text (discussing *Concepcion* decision).

<sup>124</sup> *D.R. Horton*, 737 F.3d at 359.

<sup>125</sup> *Id.* at 362.

<sup>126</sup> *Gilmer*, 500 U.S. at 26.

<sup>127</sup> *D.R. Horton*, 737 F.3d at 360.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 361.

<sup>130</sup> *Id.*

substantive right to proceed collectively” and also recognized that inequality in bargaining power is not grounds to invalidate an arbitration agreement.<sup>131</sup>

In dissent, Judge Graves recognized that Section 7 rights to engage in collective action are the “core substantive rights” of the NLRA and that the MAA impermissibly interfered with such rights.<sup>132</sup> Judge Graves also agreed with the Board’s conclusion that the FAA’s saving clause accommodates its conclusion that the MAA is unenforceable.<sup>133</sup>

### III. COURTS HAVE LARGELY REJECTED THE BOARD’S *D.R. HORTON* ANALYSIS

Since January 2012, when the Board decided *D.R. Horton*, no federal circuit court of appeals has supported its ruling and most federal district courts have declined to follow it.<sup>134</sup> Even before the *D.R. Horton* case, the Fourth and Fifth Circuit Courts of Appeal had concluded that the FLSA does not preclude the waiver of collective action claims.<sup>135</sup> The Fifth Circuit’s decision in *D.R. Horton* continues

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<sup>131</sup> *Id.*

<sup>132</sup> *D.R. Horton*, 737 F.3d at 364 (Graves, J., dissenting).

<sup>133</sup> *Id.*

<sup>134</sup> See *Owen v Bristol Care, Inc.*, 702 F.3d 1050, 1054 & n.3 (8<sup>th</sup> Cir. 2013) (citing *Carey v. 24 Hour Fitness USA, Inc.*, 2012 U.S. Dist. LEXIS 143879, 2012 WL 4754726 (S.D. Tex. Oct. 4, 2012)). Furthermore, the court refused to certify a class. *Id.*; see also *Tenet HealthSystem, Inc. v. Rooney*, 2012 U.S. Dist. LEXIS 116280, 2012 WL 3550496 (E.D. Pa. Aug. 17, 2012); *Reyes v. Liberman Broad., Inc.*, 208 Cal. App. 4th 1537, 146 Cal. Rptr. 3d 616 (C.D. Cal. 2012), *superseded by* 288 P.3d 1287, 149 Cal. Rptr. 3d 675 (Cal. 2012); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 2012 WL 1604851, at \*\*8-12 (N.D. Cal. 2012); *Delock v. Securitas Sec. Serv., Inc.*, 2012 U.S. Dist. LEXIS 107117, 2012 WL 3150391, at \*\*1-6 (E.D. Ark. Nov. 16, 2012); *LaVoice v. UBS Fin. Serv., Inc.*, 2012 U.S. Dist. LEXIS 5277, 2012 WL 124590, at \*6 (S.D.N.Y. Jan 13, 2012). *But see* *Herrington v. Waterstone Mortg. Corp.*, 2012 U.S. Dist. LEXIS 36220, 2012 WL 1242318 (W.D. Wis. Mar. 16, 2012).

<sup>135</sup> See *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5<sup>th</sup> Cir. 2004); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502 (4<sup>th</sup> Cir. 2002). Interestingly, in *Adkins*, the MAA specifically excluded claims arising under the NLRA. *Id.* at 500. Otherwise, the court found that nothing in the text, legislative history or purpose of the FLSA suggest that Congress intended that the right to class action is nonwaivable. *Id.* at 503. This case appears to seek to strike down the arbitration agreement to allow a class action; it is not arguing for class arbitration so it is quite different. The employee argued that FLSA claims are “categorically immune from mandatory arbitration. *Id.* at 506. But the court found that the Supreme Court’s decision in *Gilmer* applied and that FLSA claims, like ADEA claims, are compatible with the FAA. *Id.* In *Carter v. Countrywide*, the Fifth Circuit found as the Fourth Circuit did in *Adkins* that nothing in the text or legislative history of the FLSA precludes arbitration. *Carter*, 362 F.3d at 297. Other circuit courts of appeal have also been pro-arbitration in FLSA cases. The Ninth Circuit also stated that there is nothing in the text or legislative history of the FLSA that restricts the enforcement of contracts to arbitrate. See *Horenstein v. Mort. Mktg., Inc.*, 9 Fed. App’x. 618, 619 (9<sup>th</sup> Cir. 2001) (unpublished); *Kuehner v. Dickinson*, 84 F.3d 316, 319-20 (9<sup>th</sup> Cir. 1996).

Other circuit courts of appeal have raised, but not decided the issue. The Eleventh Circuit considered whether the right to proceed collectively was unconscionable under Georgia state law and did not reach the issue of whether FLSA rights may be waived as a matter of federal law. *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11<sup>th</sup> Cir. 2005). The First Circuit expressly reserved decision on the question of whether collective action provisions of the FLSA are integral to its structure and function, and, as such, whether an agreement waiving that right can be enforced. In *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 62 (1<sup>st</sup> Cir. 2007), the court stated, “[w]e do not need to decide if class actions under the FLSA may ever be waived by agreement . . . We also do not reach the question of whether such waivers of FLSA class actions are per se against public policy under either the FLSA or the Massachusetts Fair Wage Law.” *Id.*

this trend, extending the reasoning that courts used in cases involving FLSA claims to Section 7 claims. Nevertheless, important issues remain regarding Section 7 rights, especially because ALJs will follow the Board's decision and strike down MAAs that violate Section 7 rights unless the Supreme Court overrules the Board.<sup>136</sup> Furthermore, with the exception of the Fifth Circuit, no circuit court of appeals has yet considered whether MAAs are unenforceable because they interfere with Section 7 rights. This Part summarizes how the circuit courts of appeal have viewed the NLRB's *Horton* decision. It then summarizes the major arguments that district courts have made against the Board's decision as well as the few decisions that have supported the Board's reasoning.

#### A. *The Circuit Courts of Appeal*

In stating that it was “loath to create a circuit split,” the Fifth Circuit cited three circuits that had “either suggested or expressly stated that they would not defer to the NLRB’s rationale.”<sup>137</sup> The decisions by the Eighth, Second, and Ninth Circuits indicated a lack of enthusiasm for the NLRB’s decision, but none of the decisions addressed the precise issue raised in the *D.R. Horton* case. All of the cases cited by the Fifth Circuit involved FLSA claims and therefore the courts did not directly address Section 7 claims, which make a stronger case for substantive rights.<sup>138</sup> The Board was very clear in *D.R. Horton* that it is Section 7 rights not FLSA rights that are upset by MAAs because the waivers of collective action violate “not the right to be paid the minimum wage or overtime under the FLSA, but the right to engage in collective action under the NLRA.”<sup>139</sup>

##### 1. *The Eighth Circuit: Owen v. Bristol Care*

After the NLRB’s decision in *Horton* and before the Fifth Circuit’s decision, only the Court of Appeals for the Eighth Circuit directly raised Section 7 rights, and then, only in a limited manner. In *Owen v. Bristol Care*, the court considered whether an employer could require employees to arbitrate FLSA claims

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<sup>136</sup> The Board’s policy of non-acquiescence dictates that the agency remains allegiant to its pronouncements even in the face of appellate court resistance, unless the Board decides to overturn its decision, or if the United States Supreme Court overrules the Board. The policy promotes uniformity nationwide. See *D.L. Baker, Inc.*, 351 N.L.R.B. 515, 529 n.42 (2007).

<sup>137</sup> *D.R. Horton*, 737 F.3d at 362.

<sup>138</sup> *Id.* The court cited *Richards v. Ernst & Young LLP*, 734 F.3d 871 (9th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); and *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 32013). The Court of Appeals for the Third Circuit was the first to address forced arbitration after the Board’s decision in *Horton*. *Quilloin v. Tenet HealthSystem, Inc.*, 673 F.3d 221 (3rd Cir. 2012). Nurse Quilloin had signed an agreement that required arbitration. In seeking to bring a collective action under the FLSA, Quilloin maintained that the agreement requiring arbitration was unconscionable under Pennsylvania state law which prohibited class action waivers. *Id.* at 232. Bound by the Supreme Court’s decision in *Concepcion*, the court held that the Pennsylvania law operated to obstruct the purposes and objectives of the FAA and was, therefore, preempted. *Id.* at 232-33 (citing *Concepcion*, 131 S. Ct. 1740, 1750-53 (2011)). Perhaps the most interesting aspect of the *Quilloin* case is that the court never mentions the NLRB’s *D.R. Horton* decision. The argument in *Quilloin* focused on unconscionability under state law, rather than any substantive rights under the NLRA or the FLSA. In a more recent federal district court decision within the Third Circuit regarding another case against Tenet HealthSystem, the trial court refused to vacate an arbitrator’s decision on the appellant’s asserted ground that the arbitrator “manifestly disregarded applicable law” when interpreting the arbitration agreement, because the arbitrator failed to apply the Board’s *D.R. Horton* decision. *Tenet HealthSystem, Inc. v. Rooney*, 2012 U.S. Dist. LEXIS 116280 (E.D. Penn. Aug. 14, 2012). The district court noted that there was not manifest disregard of applicable law because the controlling law on the issue was “unsettled.” *Id.* at \*\*11-12.

<sup>139</sup> *D.R. Horton*, 357 N.L.R.B. at 9-10.

individually.<sup>140</sup> Citing the Supreme Court’s “liberal federal policy favoring arbitration agreements”<sup>141</sup> the Eighth Circuit concluded that there was nothing in the FLSA that would bar a waiver of the right to class action. The *Owen* court found that neither the text nor the legislative history of FLSA contained the “contrary congressional command” that would require it to override the FAA.<sup>142</sup> Employees argued that the text of FLSA creates a congressional command to give employees the “right . . . to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to such action.”<sup>143</sup> The court stated, however, that FLSA requires employees who wish to opt in to a class action to do so in writing.<sup>144</sup> The court concluded that because the statute requires an affirmative act to opt in to class actions, it must allow employees to waive participation in class actions as well.<sup>145</sup>

The Eighth Circuit considered the NLRA’s legislative history as evidence that it was the “public policy of the United States’ . . . to protect workers’ rights to engage in concerted activities.”<sup>146</sup> The court considered whether the legislative history of the Norris-LaGuardia Act, passed in 1932, the NLRA, passed in 1935, and the FLSA, passed in 1938, created a congressional command to protect workers’ rights to engage in concerted activity.<sup>147</sup> The court concluded that the reenactment of the FAA in 1947, years after Norris-LaGuardia, the NLRA and the FLSA, was evidence that Congress intended the FAA’s protection of arbitration to remain intact after the passage of these labor laws.<sup>148</sup>

The court found that the NLRB’s *D.R. Horton* decision carried “little persuasive authority” in the case it was considering because the “the NLRB limited its holding to arbitration agreements barring all protected concerted action.”<sup>149</sup> The agreement at issue in *Owen* required submission of employment disputes, including FLSA claims, to individual arbitration, but the agreement did not waive an employee’s right to file a complaint with the Equal Opportunity Commission or other state or federal agencies.<sup>150</sup> The Eighth Circuit interpreted the NLRB’s holding to prohibit only agreements that barred “all protected concerted action.” The court maintained that the employer’s agreement allowed employees to file claims at numerous administrative agencies and therefore, did not bar access to all concerted activity.<sup>151</sup>

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<sup>140</sup> 702 F.3d 1050, 1052 (8th Cir. 2013).

<sup>141</sup> *Id.* at 1052 (citing *CompuCreditCorp. v. Greenwood*, 132 S. Ct. 665, 669 (2012)).

<sup>142</sup> *Owen*, 702 F.3d at 1052.

<sup>143</sup> *Id.* (citing 29 U.S.C. 216(b) (2012)).

<sup>144</sup> *Owen*, 702 F.3d at 1052.

<sup>145</sup> *Id.* at 1052-53.

<sup>146</sup> *Id.* at 1053 (citing 29 U.S.C. § 102).

<sup>147</sup> *Owen*, 702 F.3d at 1053. *See supra* notes 7-13 and accompanying text (discussing the legislative history of NLRA).

<sup>148</sup> *Owen*, 702 F.3d at 1053; *see Sullivan & Glynn, supra* note 2, at 1046-51 (concluding that the enactment of the FAA does not disturb substantive rights under the NLRA).

<sup>149</sup> *Owen*, 702 F.3d at 1053.

<sup>150</sup> *Id.* at 1050.

<sup>151</sup> *Id.* at 1053-54. The Eighth Circuit’s misinterpretation was noted by at least one other court. In *Torres v. United Healthcare Systems*, the United States District Court for the Eastern District of New York agreed with the Eighth

## 2. The Second Circuit: *Sutherland v. Ernst & Young*

In *Sutherland v. Ernst & Young*, the Court of Appeals for the Second Circuit agreed with the reasoning and conclusions of the Eighth Circuit's decision in *Owen*. The Second Circuit addressed the NLRB's *Horton* decision only in a footnote, stating 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>152</sup> Like *Owen*, the case involved claims under the FLSA; and like the Eighth Circuit, the Second Circuit found that the FLSA contains "no contrary congressional command" barring waiver of class actions.<sup>153</sup> The Second Circuit also cited the FLSA's requirement that employees opt in to a collective action to imply that that the employee may also choose to opt out. The Supreme Court's decision in *Concepcion* also weighed against a finding of contrary congressional command, according to the Second Circuit, because finding that a statute required class wide arbitration would be "a scheme inconsistent with the FAA."<sup>154</sup>

The Second Circuit also considered whether pursuing individual arbitration would be prohibitively expensive for the employee, thereby preventing her from effectively vindicating a federal statutory right.<sup>155</sup> The employee claimed that her claim for unpaid overtime wages amounted to less than \$2,000 and that costs for individual arbitration, including attorney's fees and expert witness testimony would be close to \$200,000.<sup>156</sup> The Second Circuit had extensive experience with the argument that there is a "judge-made" exception to the FAA which "allow[s] courts to invalidate agreements that prevent the 'effective vindication' of a federal statutory right."<sup>157</sup> In *In re American Express Merchants' Litigation*, the Second Circuit had held that a class action waiver provision in an arbitration agreement was invalid when the plaintiffs showed that the costs to arbitrate on an individual basis would be prohibitively expensive and enforcing the arbitration agreement would "deprive them of substantive rights under the federal antitrust statutes."<sup>158</sup> The Supreme Court's decision in *Italian Colors* reversed this decision.

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Circuit's position that "an arbitration agreement with a collective action waiver falls outside the limitations of *D.R. Horton*'s holding when the agreement 'does not preclude an employee from filing a complaint with an administrative agency, such as the . . . Department of Labor,'" and nothing in the agreement prevents the DOL from filing suit against defendant on behalf of a class of employees." 902 F. Supp. 2d 368 (E.D.N.Y. 2013).

<sup>152</sup> *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013).

<sup>153</sup> *Id.* at 296.

<sup>154</sup> *Id.* at 297.

<sup>155</sup> *Id.* at 298.

<sup>156</sup> *Id.* at 294.

<sup>157</sup> In *In re American Express Merchants' Litigation*, the Second Circuit held that a class action waiver was not enforceable if it precluded plaintiffs from enforcing their statutory rights. (*Amex I*), 554 F.3d 300 (2d Cir. 2009). (Subsequent to the *Amex I* decision, the Supreme Court held in *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, that a panel of arbitrators could not compel class arbitration if the agreement was silent on that issue. 130 S. Ct. 1758, 1776 (2010). The Supreme Court had granted certiorari to hear the *Amex I* case, but remanded it to the Second Circuit in light of the *Stolt-Nielsen* decision. The Second Circuit reaffirmed its decision that the arbitration agreement was unenforceable because the class action waiver precluded plaintiffs from vindicating their statutory rights. *In re American Express Merchants' Litigation (Amex II)*, 634 F.3d 187 (2d Cir. 2011). Ultimately, the Supreme Court reversed the Second Circuit in *Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

<sup>158</sup> 554 F.3d 300, 315-16 (2d Cir. 2009).

Based on the *Italian Colors* decision, the Second Circuit stated in *Sutherland* that it “was bound to conclude” that even though the employee’s wage and hour claim was not economically worth pursuing on an individual basis, the class action waiver was not invalid.<sup>159</sup>

### 3. The Ninth Circuit: *Richards v. Ernst & Young LLP*

The Ninth Circuit briefly raised the NLRB’s *Horton* decision in *Richards v. Ernst & Young LLP*.<sup>160</sup> In upholding the enforceability of an arbitration agreement, the court noted that the appellant raised the NLRA issue from *D.R. Horton* too late.<sup>161</sup> In a footnote, the court stated that the Second and Eighth Circuits, as well as “the overwhelming majority of district courts” had declined to follow the NLRB’s decision in *D.R. Horton*.<sup>162</sup>

#### B. *Shortcomings of the Circuit Court Decisions*

The Fifth Circuit’s statement that “[e]veryone of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB’s rationale, and held arbitration agreements containing class waivers enforceable” is somewhat “misleading.”<sup>163</sup> None of the courts cited – the Eighth, Second, or Ninth - provided substantive reasons for not following the Board’s decision. Furthermore, the Court of Appeals for the Eighth Circuit, the court that most directly considered the Board’s decision, clearly misinterpreted its holding. In *Owen v. Bristol Care*, the Court of Appeals for the Eighth Circuit found that an agreement requiring individual arbitration did not interfere with Section 7 rights because it did not waive an employee’s right to file a complaint with the Equal Opportunity Commission or other state or federal agencies.<sup>164</sup> The Eighth Circuit interpreted the NLRB’s holding to prohibit only agreements that barred “all protected concerted action.”<sup>165</sup> The court maintained that the employer’s agreement allowed employees to file claims at numerous administrative agencies and therefore, did not bar access to all concerted activity.<sup>166</sup> The Board’s actual language in *Horton*, at the page cited by the Eighth Circuit, does *not* refer to provisions that bar all protected concerted action, rather the Board’s language singled out problematic provisions as those barring *collective* pursuit of: “litigation in *all* forums, arbitral and judicial.”<sup>167</sup> The Board in *Horton* stated:

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<sup>159</sup> *Sutherland*, 726 F.3d at 298. After its decision in *Sutherland*, the Second Circuit reversed a lower court decision that had recognized that FLSA prohibits MAAs that insist on individual arbitration. *Raniere v. Citigroup*, 533 Fed. Appx. 11 (2d Cir. 2013). In *Raniere v. Citigroup*, the United States District Court for the Southern District of New York found that rights under FLSA were substantive, and therefore cannot be waived. 827 F. Supp. 2d 294, 308-15 (S.D.N.Y. 2011).

<sup>160</sup> 2013 U.S. App. LEXIS 17488 (9th Cir. Aug. 21, 2013) (per curiam).

<sup>161</sup> *Id.* at \*5.

<sup>162</sup> *Id.* at \*\*5-6 & n.3.

<sup>163</sup> *D.R. Horton*, 737 F.3d at 362. See *Herrington v. Waterstone Mortg. Corp.*, 2014 U.S. Dist. LEXIS 9992, at \*15 (referring to the court’s statement as “a little misleading”).

<sup>164</sup> 702 F.3d 1050, 1050 (8th Cir. 2013).

<sup>165</sup> *Id.* at 1053.

<sup>166</sup> *Id.* at 1053-54.

<sup>167</sup> *D.R. Horton*, 357 N.L.R.B. at 12.

So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration. Employers remain free to insist that *arbitral* proceedings be conducted on an individual basis . . . an agreement requiring arbitration of any individual employment-related claims, but not precluding a judicial forum for class or collective claims, would not violate the NLRA, because it would not bar concerted activity.<sup>168</sup>

Contrary to the court's interpretation in *Owen*, the Board's language in *Horton* does not state that *individual* access to administrative agency processes will cure an otherwise problematic interference with protected concerted activity under Section 7 in a mandatory class action waiver. The court suggested that classes could be aggregated by the agencies themselves in administrative actions, noting that "nothing in [the employer's agreement] precludes any of these agencies from investigating and, if necessary, filing suit on behalf of a class of employees."<sup>169</sup> This is easier said than done in light of the actual terms of the agreement, which provide for resolution of all claims or controversies by arbitration including those under the FLSA, and that agreement specifically waives arbitrating class claims.<sup>170</sup> While there are regulatory procedures when a complaint is filed at administrative agencies, there is not necessarily a procedure to provide for, or encourage, aggregation of a class claim. This is especially true with respect to FLSA claims where it is clear that class claims were waived under the language of the employer's mandatory arbitration agreement. The arbitration agreement is at best ambiguous as to whether filing claims at administrative agencies could result in any action, but it is clear that the complaining or charging party would be bound by the duty to individually arbitrate a FLSA claim under its terms.

A faithful reading of the Board's *D.R. Horton* standard would have found that the MAA in *Owen* was an unfair labor practice because it barred class or collective action in both arbitral and judicial forums. As Part IV of this paper demonstrates, the NLRB's Acting General Counsel, and all but one of the Administrative Law Judges who are bound to follow the Board's decisions, have interpreted *D.R. Horton's* rule as requiring that class action waivers may not prevent concerted activity in both arbitral and judicial forums, even where such agreements provide an opt-out provision. The Eighth Circuit's interpretation of *Horton* suggests that an individual filing a claim at an administrative agency substitutes for the right to collective activity. It simply does not.<sup>171</sup>

In considering the decisions by the circuit courts of appeal, it is clear that the courts have not grasped the full import of allowing employers to require waiver of Section 7 rights. In its *D.R. Horton* decision, the Fifth Circuit noted the strength of several of the Board's arguments but hid behind decisions that reflect the strength of the FAA, without considering whether Section 7 rights are a unique exception to the FAA. The Fifth Circuit provides only perfunctory conclusions with little analysis of the issues. The decision seems somewhat constrained by the fact that the court was "loath to create a circuit split" and that no

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<sup>168</sup> *Id.* at 12-13.

<sup>169</sup> *Owen v. Bristol Care, Inc.*, 702 F.3d at 1053-54 (8th Cir. 2013).

<sup>170</sup> *Id.* at 1051.

<sup>171</sup> See *infra* note 242 (comparing NLRB procedure as reactive to complaints filed, in contrast to Department of Labor FLSA claims where the agency, in addition to reactive investigation of complaints filed, also uses public enforcement arm for proactive direct investigation of violations, sometimes industry-wide). See also Remarks of M. Patricia Smith, Solicitor, U.S. Department of Labor, 40th Annual Robert Fuchs Labor Law Conference, Suffolk University Law School, Boston, MA (Oct. 24, 2013) (regarding DOL direct investigation). (Notes on file with author.).

court had yet ruled that Section 7 “prohibited class action waivers in arbitration agreements.”<sup>172</sup> While it is true that three courts of appeal that have considered class waivers have found them to be enforceable,<sup>173</sup> these cases challenged MAAs under FLSA, with little or no analysis of the mandates and policies of Section 7 of the NLRA.<sup>174</sup> Subsequent to the Fifth Circuit’s decision, in *Walthour v. Chipio Windshield Repair, LLC*, the Court of Appeals for the Eleventh Circuit joined the other circuits in finding that the FLSA does not establish a nonwaivable right to a collective action. The court found that FLSA rights are procedural rather than substantive and that the statute does not create a congressional command requiring collective action. Thus, to date, no circuit court of appeals has upheld the principles expressed in the NLRB’s decision in *D.R. Horton*.

### C. The District Courts

Most district courts have declined to follow the NLRB’s *Horton* decision.<sup>175</sup> One court described the NLRB’s *Horton* decision as “widely criticized by many district courts who have refused to follow its ruling.”<sup>176</sup> Most district courts were persuaded that the Supreme Court’s decision in *Concepcion* was controlling.<sup>177</sup> In *Concepcion*, the Court held that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”<sup>178</sup> One district court interpreted *Concepcion* to mean that “the savings clause may not be applied in a manner that disfavors arbitration.”<sup>179</sup>

District courts also found that there was nothing in the FLSA’s text or legislative history to override the FAA’s mandate to enforce arbitration agreements according to their terms.<sup>180</sup> In other words, the FLSA

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<sup>172</sup> *D.R. Horton*, 737 F.3d at 356.

<sup>173</sup> *Owen*, 702 F.3d at 1054 (citing *Vilches v. Traveler's Cos.*, 413 Fed. App’x. 487, 494 n.4 (3d Cir. 2011); *Horenstein v. Mortg. Mkt., Inc.*, 9 Fed. App’x 618, 619 (9th Cir. 2011); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005); *Carter v. Countrywide Credit Indus. Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002)) See also *DeLock*, 2012 U.S. Dist. LEXIS 107117 at \*1 (explaining that it has generally “seemed settled law that an employee’s statutory right to pursue a wage claim as part of a collective action . . . could be waived in favor of individual arbitration”).

<sup>174</sup> See *Richards v. Ernst & Young LLP*, 2013 U.S. App. LEXIS 17488, at \*\*5-6 (9th Cir. Aug. 21, 2013) (per curiam); *Sutherland v. Ernst & Young*, 726 F.3d 290 (2d Cir. 2013) (per curiam); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Quilloin v. Tenet HealthSystem, Inc.*, 673 F.3d 221 (3d Cir. 2012).

<sup>175</sup> *LaVoice v. UBS Fin. Serv., Inc.*, 2012 U.S. Dist. LEXIS 5277, at \*20 (S.D.N.Y. Jan. 13, 2012).

<sup>176</sup> *Carey v. 24 Hour Fitness, Inc.*, 2012 U.S. Dist. LEXIS 143879 (S.D. Tex. Oct. 4, 2012) (citing *Morvant v. P.F. Chang’s China Bistro, Inc.*, 870 F. Supp. 2d 831 (N.D. Cal. May 7, 2012); *LaVoice v. UBS Fin. Servs., Inc.*, 2012 U.S. Dist. LEXIS 116280 (S.D.N.Y. Jan. 13, 2012)).

<sup>177</sup> See, e.g., *Zabelny v. Cashcall, Inc.*, 2014 U.S. Dist. LEXIS 2626, at \*18 (D. Nev. Jan. 8, 2014); *Dixon v. NBCUniversal Media, LLC*, 947 F. Supp. 2d 390, 405 (S.D.N.Y. 2013).

<sup>178</sup> 131 S. Ct. at 1748.

<sup>179</sup> *Zabelny v. Cashcall, Inc.*, 2014 U.S. Dist. LEXIS 2626, at \*18 (D. Nev. Jan. 8, 2014).

<sup>180</sup> *Carey*, 2012 U.S. Dist. LEXIS, at \*\*5-6; *DeLock*, 2012 U.S. Dist. LEXIS 107117, at \*4.



contained no contrary congressional command as required by the Supreme Court in *CompuCredit* in which the Court held that “agreements to arbitrate must be enforced according to their terms, ‘even when the claims at issue are federal statutory claims.’”<sup>181</sup> Furthermore, courts have viewed the right to collective action under the FLSA as procedural and therefore waivable.<sup>182</sup> According to several courts, statutory rights under the FLSA may be waived because the statute specifically requires the “affirmative step of opting-in” and therefore must allow employees to opt out.<sup>183</sup>

Some courts raised the question of whether the FLSA, NLRA and Norris-LaGuardia Act create a substantive right to bring collective actions despite the FAA. But the courts did not evaluate whether or not there were substantive rights; instead, they merely cited other decisions that refused to follow the NLRB’s *D.R. Horton* decision, without explaining why these acts do not create substantive rights.<sup>184</sup> Some courts found that the NLRB’s decision in *Horton* was not binding or entitled to deference because the Board has no special authority to interpret the FAA.<sup>185</sup> Thus, some courts concluded that they did not owe deference to the NLRB in its interpretation of the FAA or the Norris-LaGuardia Act nor were they obligated to defer to the Board’s interpretation of Supreme Court precedent.<sup>186</sup>

At least two district courts have agreed with the NLRB’s analysis of Section 7 rights. In *Herrington v. Waterstone Mortgage Corp.*, the United States District Court for the Western District of Wisconsin characterized the Board’s reasoning as “straightforward.”<sup>187</sup> The court noted that the Fifth Circuit, in

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<sup>181</sup> See *Morvant*, 870 F. Supp. 2d at 832.

<sup>182</sup> Under Section 216(b) of the FLSA an employee has the right to bring an action on behalf of any employee and the right to become a party plaintiff to such an action. The statute does not specify whether these rights are substantive or procedural. One court noted that the Supreme Court has “expressed skepticism about whether the FLSA’s collective action provision is substantive.” *Dixon v. NBCUniversal Media*, 947 F. Supp. 2d 390, 404 (S.D.N.Y. 2013) (citing *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1423, 1530, 1532 (2013) (observing that, unlike a Rule 23 class, collective action certification “does not produce a class with an independent legal status, or join additional parties to the action. The sole consequence of conditional certification is the sending of court-approved written notice to employees, who in turn become parties to a collective action only by filing written with the court . . . Whatever significance ‘conditional certification’ may have in Section 216(b) proceedings, it is not tantamount to class certification under Rule 23.”).

Even before the Board’s decision, courts interpreted FLSA provisions to be procedural. See *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 164 (S.D.N.Y. 2008) (stating that “[i]t is far more natural to see the opt-in provisions of the FLSA, like the class action rules they resemble, simply as procedural mechanisms for vindication of the substantive rights provided by the FLSA.”).

<sup>183</sup> *Torres v. United Healthcare Serv., Inc.*, 920 F. Supp. 2d 368, 376 (E.D.N.Y. 2013); *Dixon*, 947 F. Supp. 2d at 403.

<sup>184</sup> See, e.g., *Zabelny v. Cashcall, Inc.*, 2014 U.S. Dist. LEXIS 2626, at \*\*33-37 (D. Nev. Jan. 8, 2014); *Siy v. Cashcall*, 2014 U.S. Dist. LEXIS 1472, at \*\*33-36 (Jan. 6, 2014); *Tenet Healthsystem, Inc. v. Rooney*, 2012 U.S. Dist. LEXIS 116280, 2012 WL 3550496, at \*10 (E.D. Pa. Aug. 17, 2012).

<sup>185</sup> See, e.g., *Carey*, 2012 U.S. Dist. LEXIS 143879, at \*4-5; *Tenet Healthsystem*, 2012 U.S. Dist. LEXIS 116280, at \*10; *DeLock*, 883 F. Supp. 2d at 787 (“the Board has no special competence in interpreting the Federal Arbitration Act”).

<sup>186</sup> See, e.g., *Torres*, 920 F. Supp. 2d at 378; *DeLock*, 883 F. Supp. 2d at 787.

<sup>187</sup> 2012 U.S. Dist. LEXIS 9992 (W.D. Wis. Jan. 28, 2014).

reviewing *Horton*, did not explain why the Board’s conclusions interpreting “concerted activity” were not given deference.<sup>188</sup> The court also wondered why the Fifth Circuit did not question whether certain rights are “substantive,” but merely restated that the right to litigate as a class has been viewed as procedural.<sup>189</sup> The court also questioned why the Fifth Circuit required specific language in the NLRA to override the FAA.<sup>190</sup> The court stated that “it is well established that an arbitration agreement may not require a party to waive a substantive federal right.”<sup>191</sup> The court agreed with the Board that its decision in *Horton* was distinguishable from *Concepcion*, because *Concepcion* did not involve the waiver of a substantive right.<sup>192</sup> The court also noted that the Fifth Circuit “never persuasively rebutted the board’s conclusion that a collective litigation waiver violated 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; after all, the court noted, “the NLRA includes express language protecting the rights of employees to engage in concerted action whereas the FAA contains no language in the FAA prohibiting collective litigation.”<sup>193</sup>

In *Brown v. Citicorp Credit Services*, the United States District Court for the District of Idaho also found that cases raising Section 7 rights under the NLRA are distinct from other cases that have upheld waivers of a right to collective action.<sup>194</sup> The court found that it must give deference to the Board’s “rational” interpretation of Section 7 of the NLRA.<sup>195</sup> According to the court, “[a] collective action seeking recovery of wages for off-the-clock work falls easily within the language of Section 7 protecting ‘concerted action’ brought for the ‘mutual aid and protection’ of the employees.”<sup>196</sup> The court concluded that the arbitration agreement prohibited employees from “asserting a substantive right that is critical to national labor policy.”<sup>197</sup>

Unlike most of the decisions discrediting the Board’s decision in *D.R. Horton*, ALJs have had the opportunity to consider not only FLSA claims but also claims specifically asserting Section 7 rights. Although ALJs must follow Board precedent as opposed to court decisions, ALJs have generally embraced the Board’s decision with enthusiasm, taking steps beyond the Board’s *D.R. Horton* decision to protect employees’ rights to collective action.

#### **IV. ADMINISTRATIVE LAW JUDGES UPHOLD THE BOARD’S *D.R. HORTON* DECISION**

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<sup>188</sup> *Id.* at \*8.

<sup>189</sup> *Id.* at \*10-11.

<sup>190</sup> *Id.* at \*11.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at \*15.

<sup>193</sup> *Id.* at \*17.

<sup>194</sup> 2013 U.S. Dist. LEXIS 24913, at \*9 (D. Idaho Feb. 21, 2013) (citing *Chevron, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

<sup>195</sup> 2013 U.S. Dist. LEXIS 24913, at \*8.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at \*9 (citing *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975) (Section 7 rights are protected “not for their own sake but as an instrument of the national labor policy”).

ALJs have generally embraced the Board's ruling and paid little heed to the Fifth Circuit's decision in *Horton* or to decisions by other courts that refused to follow the NLRB's ruling. The Board follows a nonacquiescence policy to appellate court decisions that conflict with Board law.<sup>198</sup> Consequently, ALJs are bound to follow the NLRB's decision as controlling unless the Supreme Court reverses the Board.<sup>199</sup>

#### A. *The Impact of Italian Colors*

In terms of Supreme Court precedent, ALJs had to consider whether *Italian Colors*, which came down after the Board decided *Horton*, overruled the Board's decision. Most ALJs concluded that it did not. Moreover, at least one ALJ has applied the Board's reasoning to strike down not only MAAs that expressly compel individual arbitration, but also MAAs that implicitly threaten Section 7 rights. ALJs have also made it clear that provisions in MAAs that specify employees may bring charges to the NLRB are not sufficient to preserve Section 7 rights and that employers who insist on such agreements commit an unfair labor practice under Section 8(a)(1) of the NLRA. Most ALJs have also concluded that an employer cannot cure an MAA by giving an employee the choice to opt out of the class or collective action waiver. There are, however, a few decisions that question the reach of the Board's decision. This section summarizes how ALJs have responded to the *Italian Colors* decision; how ALJs have responded to opt-out provisions in MAAs; and how ALJs have responded to claims that the option of bringing charges to the NLRB satisfies Section 7 rights.

Some ALJs have not only endorsed the NLRB's *Horton* ruling, but have gone further in supporting employees' Section 7 rights.<sup>200</sup> In *Leslie's Poolmart, Inc.* for example, the ALJ found that an employer commits an unfair labor practice by seeking individual arbitration, even if the arbitration agreement did not contain an express prohibition on class or collective claims.<sup>201</sup> The ALJ reasoned that the arbitration agreement effectively prohibited class or collective lawsuits because the employer moved to compel individual arbitration of the employee's claims.<sup>202</sup> The ALJ stated that, "[w]hile the agreement is silent as to collective or class actions, in practice, [the employer] closed the avenue to pursue collective and/or classwide litigation when it sought to limit [the Plaintiff] and other similarly situated employees to

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<sup>198</sup> See, e.g., SF Markets, LLC, d/b/a/ Sprouts Farmers Market, N.L.R.B., No.21-CA-99065 (A.L.J. Ira Sandron, Feb. 18, 2014), at 3, 7-8 (citing D. L. Baker, Inc., 351 N.L.R.B. 529 n.42 (2007); Arbin Indus., 285 N.L.R.B. 753, 757 (1987)).

<sup>199</sup> See *Waco, Inc.*, 273 N.L.R.B. 746, 749 n.14 (1984) ("We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed.").

<sup>200</sup> Former NLRB General Counsel Ronald Meisburg wrote that the ALJ's decision in *Leslie's Poolmart* takes the Board's decision in *D.R. Horton* a "significant step further" by holding that even if an employer's arbitration agreement is silent as to a class or collective action waiver, the employer can still violate the NLRA if it seeks to have a court dismiss a class action and compel individual arbitration of each employee's claims. The effect of the employer's action was thus to preclude a class action and require individual arbitration, even in the absence of specific language referencing a class waiver in the agreement. See Ronald Meisburg, *NLRB ALJ Says That Under D.R. Horton, Actions Speak As Loudly as Words*, Labor Relations Update (Jan. 21, 2014), available at <http://www.proskauer.com/blogs/labor-relations-update-blog/january-21-2014/>.

<sup>201</sup> *Leslie's Poolmart, Inc.*, N.L.R.B. 21-CA-1023022, 198 L.R.R.M. (BNA) ¶ 1292, 2014 WL 204208 (A.L.J. Lisa D. Thompson, Jan. 17, 2014).

<sup>202</sup> *Id.* at \*7.

arbitration of their individual claims.”<sup>203</sup> The ALJ noted that the collective action of the employees, in filing a class action lawsuit in court, was conduct that the Board referenced as ““central to the Act’s purposes.””<sup>204</sup>

In deciding *Leslie’s Poolmart*, the ALJ specifically addressed the Supreme Court’s decision in *Italian Colors*, a case decided by the high Court after the Board decided *D.R. Horton*.<sup>205</sup> The ALJ stated that “the Court has not addressed or resolved the issue of exclusive arbitration over class and/or collective actions.”<sup>206</sup> Most ALJs agree that *Italian Colors* did not change the Board’s *D.R. Horton* decision.<sup>207</sup> For example, in *Cellular Sales of Missouri*, the ALJ stated that “the Supreme Court did not expressly overrule the finding in *D.R. Horton*” and found the case distinguishable because Section 7 rights to collective relief are substantive rights.<sup>208</sup>

One ALJ, however, found that *Italian Colors* changed the landscape for evaluating MAAs. In *Chesapeake Energy Corp.*,<sup>209</sup> the ALJ considered an MAA much like that the Board considered in *D.H. Horton*, requiring employees to agree to individual arbitration as the sole remedy for addressing workplace disputes, including claims under the NLRA.<sup>210</sup> The ALJ noted that in *Italian Colors*, the Supreme Court refused to strike down an agreement requiring individual arbitration even though the process was economically impractical for the plaintiffs.<sup>211</sup> The Supreme Court upheld the arbitration agreement because it found that the antitrust statutes that were at the heart of the plaintiffs’ action did not mention the right to class or collective action or create a contrary congressional command.<sup>212</sup> Furthermore, the Court noted that the antitrust statutes were enacted long before Rule 23 which allowed class actions as an exception to the usual rule of litigation by individual parties.<sup>213</sup>

According to the ALJ in *Chesapeake Energy*, the NLRB’s *Horton* decision cannot survive *Italian Colors* because the NLRA is like the antitrust statutes – it does not mention a specific right to class or collective

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.* (quoting *D.R. Horton*, 357 N.L.R.B. at 2).

<sup>205</sup> *Leslie’s Poolmart, Inc.*, 2014 WL 204208, at \*7 (citing *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013)).

<sup>206</sup> *Leslie’s Poolmart, Inc.*, 2014 WL 204208, at \*7.

<sup>207</sup> See, e.g., *Cellular Sales, LLC*, N.L.R.B. No. 14-CA-094714 (A.L.J. Christine E. Dibble, Aug. 9, 2013); *Ralph’s Grocery Co.*, N.L.R.B. No. 21-CA-073942 (A.L.J. Eleanor Laws, July 31, 2013).

<sup>208</sup> *Cellular Sales*, No. 14-CA-094714, at 7.

<sup>209</sup> N.L.R.B. No. 14-CA-100530; 197 L.R.R.M. (BNA) ¶ 1633, 2013 WL 5984336 (A.L.J. Bruce D. Rosenstein, Nov. 8, 2013).

<sup>210</sup> *Id.* at \*1.

<sup>211</sup> *Id.* at \*9 (citing *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013)).

<sup>212</sup> *Italian Colors Rest.*, 133 S. Ct. at 2309-10.

<sup>213</sup> *Id.* at 2307.

action and it predates Rule 23.<sup>214</sup> Thus, the ALJ concluded that the MAA provisions requiring individual arbitration were enforceable.<sup>215</sup>

### B. *The Impact of Opt-Out Provisions*

In the wake of the Board's *D.R. Horton* decision, some employers sought to change their arbitration agreements in a manner that would still require mandatory arbitration but would, perhaps, avoid a finding that it interfered with Section 7 rights. With one exception, ALJs have found that attempts to cure otherwise unenforceable agreements by recognizing administrative rights or by inserting opt-out clauses are not effective.

Opt-out provisions are a strategy that some employers thought would cure MAAs that the NLRB would find unenforceable. Presumably, employers believed that arbitration provisions that provide employees with the right to opt out of a class waiver would survive *Horton* analysis, because the opt-out provision gives the employee a choice. The Board's Acting General Counsel announced the agency's position that a class action waiver that violates the *Horton* standard but adds an opt-out provision still interferes with NLRA rights.<sup>216</sup> Most ALJs have concluded that opt-out provisions are not truly a voluntary choice and, consequently, will not save an employment agreement that requires employees to waive their rights to collective action.<sup>217</sup> For example, in *Kmart Corp.*, the ALJ addressed opt-out provisions, a situation which it described as "anticipated by but not reached in" the Board's decision.<sup>218</sup> Like the MAA in *D.R. Horton*, Kmart's arbitration policy insisted on individual arbitration. The policy did, however, give employees thirty days from the date of hire to opt out of the restriction on collective action. Employees who did not

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<sup>214</sup> Chesapeake Energy Corp., N.L.R.B. No. 14-CA-100530, at \*9.

<sup>215</sup> *Id.* at \*\*9-10. As a separate issue, the ALJ found that one provision in the agreement interfered with employees' rights to bring charges before the Board, creating an unfair labor practice and ordered the employer to remedy that portion of its policy. *Id.* The ALJ cited *D.R. Horton* in his decision to require remedial action at all facilities where the arbitration agreement was in effect. *Id.*

<sup>216</sup> Former Acting NLRB General Counsel Lafe Solomon spoke about *D.R. Horton* and new post-*D.R. Horton* cases including the *24 Hour Fitness* case, noting that his office decided to issue a complaint in that case. He expressed the opinion that an employer providing an opt-out from an otherwise problematic class action/concerted activity waiver would not avoid an NLRA violation, comparing such to cases where an employee would be waiving Section 7 rights forever, and concluding that such a waiver would be illegal. Remarks of Lafe Solomon, Acting General Counsel, NLRB, Thirty-Ninth Annual Robert Fuchs Labor Law Conference, Suffolk University Law School, Boston, MA (Oct. 18, 2012). (Notes on file with author.) The new General Counsel Richard Griffin is expected to continue the policies created by his predecessor. See Lisa Milam-Perez, *With Senate signing off on general counsel nominee, NLRB fully functional for first time in a decade*, Wolters Kluwer Law and Business (Oct. 30, 2013), available at <http://www.employmentlawdaily.com/index.php/2013/10/30/with-senate-signing-off-on-general-counsel-nominee-nlr-fully-functional-for-first-time-in-a-decade/#sthash.OPf4WMgz.dpuf>.

<sup>217</sup> See *24 Hour Fitness*, N.L.R.B. No. 20-CA-35419; *Mastec Serv. Co.*, N.L.R.B. No. 16-CA-86102 (A.L.J. Joel P. Biblowitz, June 3, 2013) (finding class action waiver violated NLRA despite opt-out provision and individual access to administrative agencies). Both cases have been appealed to the N.L.R.B. See also Lawrence E. Dube, *NLRB ALJ Finds Class Action Waiver Lawful, Ruling Opt-Out Made ADR Program Voluntary*, Daily Lab. Rep. (BNA) No. 124 at A-4, A-6 (June 27, 2013) (discussing appeals in *24 Hour Fitness* and *Mastec*).

<sup>218</sup> *Kmart Corp.*, N.L.R.B. No. 06-CA-091823, at 13; 197 L.R.R.M. (BNA) ¶ 1689, 2013 WL 6115697 at \*1 (A.L.J. David Goldman, Nov. 19, 2013).

return the opt-out form were presumed to have agreed to the individual arbitration provision.<sup>219</sup> After the opt-out period expired, however, the ban on collective action applied “irrevocably” to the employee.<sup>220</sup> The ALJ found that the opt-out provision did not save an otherwise unlawful agreement.<sup>221</sup> The ALJ noted that the “issue is whether an employer and an individual employee may enter into an agreement to waive *irrevocably* future rights protected by the Act.”<sup>222</sup> The ALJ concluded that an employer may not make a binding agreement with an individual employee to waive substantive rights, in this case, to engage in collective grievances, no more than it could waive a future right to join a union.<sup>223</sup> As the judge noted, individual agreements with employers are permitted, but not those that conflict with and waive substantive rights under the Act.<sup>224</sup> The ALJ distinguished agreements between employers and individual employees from collective bargaining agreements. A union may collectively bargain to waive statutorily protected rights of the employees it represents, but that is the essence of the collective bargaining process.<sup>225</sup> In contrast, the court found that an employee cannot waive substantive rights such as those in Section 7.<sup>226</sup>

Most ALJs have agreed that opt-out provisions do not save an MAA that requires individual arbitration. ALJs have expressed concern that opt-out provisions are not truly voluntary because they require an affirmative act to preserve Section 7 rights.<sup>227</sup> Thus ALJs have found that opt-out provisions place an unlawful burden on collective employee rights.<sup>228</sup> ALJs have also noted that opt-out provisions would inhibit access to other employees who failed to opt out, as well as prohibit discussion of claims that took place in arbitration, all of which interfere with Section 7 rights.<sup>229</sup> Moreover, ALJs have noted that employees might fear angering their employer if they asserted their right to opt out.<sup>230</sup>

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<sup>219</sup> *Id.* at 8.

<sup>220</sup> *Id.* at 2.

<sup>221</sup> *Id.* at 13.

<sup>222</sup> *Id.* at 11.

<sup>223</sup> *Id.* at 7.

<sup>224</sup> *Id.* at 8.

<sup>225</sup> *Id.* at 9.

<sup>226</sup> *Id.* at 10; see also Lawrence E. Dube, *NLRB Judge Finds Kmart ADR Policy Illegal, Rejecting Defense Based on Opt-Out Provision*, Daily Lab. Rep. (BNA) No. 225 at A-2 (Nov. 20, 2013) (noting ALJ supported validity of NLRB’s decision in *D.R. Horton* despite the U.S. Supreme Court’s decisions in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), and *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013)).

<sup>227</sup> See *24 Hour Fitness*, No. 20-CA-35419, at 7, 13, 16; *Mastec Serv. Co.*, N.L.R.B. No. 16-CA-86102, at 12-13 (A.L.J. Joel P. Biblowitz, June 3, 2013); *GameStop Corp.*, N.L.R.B. No. 20-CA-080497, at 13 (A.L.J. Gerald M. Etchingham, Aug. 29, 2013).

<sup>228</sup> *24 Hour Fitness*, N.L.R.B. No. 20-CA-35419, at 7, 13, 16.

<sup>229</sup> *Mastec Serv. Co.*, No. 16-CA-86102, at 12-13.

<sup>230</sup> *Id.* at 16. The same ALJ, in a ruling in the *Applebees* case, found that Applebee’s agreement requiring waiver of class arbitration violated the NLRA, even though the policy did not exclude access to administrative claims for workers compensation, unemployment compensation or individual claims before the NLRB, Department of Labor,

In *GameStop Corp.*, another case in which the ALJ invalidated arbitration provisions with opt-outs, the ALJ pointed out the reality of the situation for employees.<sup>231</sup> The ALJ noted that GameStop's program imposed a waiver at a time when employees were unlikely to be aware of employment issues that would benefit from collective action, and that the employer followed that up with a confidentiality clause that prevented discussion with other employees surrounding the arbitration process or results.<sup>232</sup> The judge noted that the waiver took place in the context of a situation where employees were not informed as to the substance of their Section 7 rights.<sup>233</sup> The ALJ stated that "the Supreme Court has found the FAA to be the Swiss Army knife of the dispute resolution world for complex commercial cases, large class action consumer lawsuits, and to preempt various proceedings involving state laws," but the judge drew the line on the "FAA's utility" regarding collective or representative claims under the NLRA.<sup>234</sup>

In contrast to these cases, one ALJ held that an opt-out provision *did* make the class waiver voluntary, and, therefore, enforceable.<sup>235</sup> In *Bloomingtondale's*, the ALJ stated that this case was different from *Horton* because the opt-out provision allowed employees to opt out of arbitration completely and preserve their right to sue individually or collectively, and excluded claims under the NLRA from arbitration.<sup>236</sup> The ALJ found that the *Horton* decision was not conclusive on such opt-out provisions because the NLRB referred to such voluntary agreements as the "more difficult question" which it did not resolve.<sup>237</sup> The ALJ rejected the argument that *Bloomingtondale's* unlawfully sought to trade away the future exercise of Section 7 rights in exchange for arbitration.<sup>238</sup> The exchange is lawful according to the ALJ because

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or the Equal Employment Opportunity Commission. *Applebees Neighborhood Grill and Bar*, N.L.R.B. No. 18-CA-103319, at 6-7 (A.L.J. Joel P. Biblowitz, Sept. 30, 2013). *Applebees* did not have an opt-out provision, unlike the class waiver provision in *Mastec* and other cases. The critical problem with the *Applebees* provision was that it excluded all class or collective action. *See also* *JP Morgan Chase & Co.*, N.L.R.B. No. 02-CA-088471 & No. 02-CA-098118 (A.L.J. Steven Fish, Aug. 21, 2013) (upholding *D.R. Horton* rule in case involving waiver of class and collective actions); *Ralph's Grocery Co.*, N.L.R.B. No. 21-CA-073942 (A.L.J. Eleanor Laws, July 31, 2013).

<sup>231</sup> *GameStop Corp.*, N.L.R.B. No. 20-CA-080497, at 13 (A.L.J. Gerald M. Etchingham, Aug. 29, 2013).

<sup>232</sup> *Id.* at 15.

<sup>233</sup> *Id.* at 15-16.

<sup>234</sup> *Id.* at 16.

<sup>235</sup> *Bloomingtondale's*, N.L.R.B. No. 31-CA-07128, at 7-1 (A.L.J. Jeffrey Wedekind, June 25, 2013). The ALJ noted ambiguity between the company brochures, booklets, and other documents summarizing the company's process. Thus, the company violated Section 8(a)(1) by not reconciling the various documents to avoid misleading reasonable employees who might believe that their right to file charges at the Board were prohibited or restricted. *Id.* at 6-7.

<sup>236</sup> *Id.* at 3, 6, 7. The exclusion of NLRA claims means only that nothing in the company's plan prohibits an employee from filing a charge or complaint with an administrative agency such as the EEOC or NLRB. The ALJ stated that, "upon receipt of a right to sue letter or similar administrative determination, the employee's claim becomes subject to arbitration." *Id.* at 6 n.6.

<sup>237</sup> In *Horton*, the Board stated that the more difficult question was: "Whether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court." *D.R. Horton*, 357 N.L.R.B. 184 at 13 n.28.

<sup>238</sup> *Bloomingtondale's, Inc.*, No. 31-CA-07128, at 8.

arbitration “is a federally favored and supported benefit.”<sup>239</sup> Thus, the ALJ concluded that “the Board should look away when employees voluntarily enter into mandatory arbitration agreements, even if they are conditioned on employees completely and irrevocably relinquishing their right under the NLRA to engage in collective legal action against their employer.”<sup>240</sup> In upholding the arbitration provision, the ALJ found that the opt-out procedure rendered the individual arbitration program voluntary; that employees had adequate notice of their options and a reasonable time period to opt out (30 days from hire); that there were no allegations of threats by the employer; and that the administrative burden of filing the opt-out provision on employees was minimal.<sup>241</sup>

To date, all ALJ decisions, with the exception of the ALJ deciding *Bloomingtondale’s*, support the view that opt-out provisions will not save what is an otherwise invalid class action waiver under the *D.R. Horton* standard.<sup>242</sup> The reality of these opt-out provisions is that they create a presumption in favor of the waiver because they require affirmative action on the part of the employee in order for the employee to retain existing statutory rights. Only a very small percentage of employees actually opt out, and those who do will be able to join collectively only with others who opt out, thus diminishing the potential size of any class or collective action. In addition, confidentiality clauses generally surround arbitration provisions,

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<sup>239</sup> *Id.* at 10.

<sup>240</sup> *Id.* at 10-11.

<sup>241</sup> Tellingly, only 3% of Bloomingtondale’s 10,000 employees returned the opt-out form. *Bloomingtondale’s*, No. 31-CA-07128, at 6. In the *Kmart* case, over 10% opted out. *Kmart Corp.*, N.L.R.B. No. 06-CA-091823, at 13; 197 L.R.R.M. (BNA) ¶ 1689, 2013 WL 6115697 at 5-6 (A.L.J. David I. Goldman, Nov. 19, 2013). Undoubtedly influenced by the case, the opt out rate was close to 62 % at the store where the charging party worked. *Id.*

<sup>242</sup> In *Bloomingtondale’s*, the class action waiver excluded the right to bring NLRA actions, in contrast to the facts in *D.R. Horton*. It should be noted, however, that the ability to bring an individual claim before an administrative agency does not cure the problem of the class action waiver in *Bloomingtondale’s* because that provision still eliminates all class or collective action in violation of the Board’s standard in *Horton*. The ALJs in both *Gamestop* and *JP Morgan* noted that adding access to administrative agencies would not cure the waiver of the right to engage in collective and concerted activities. See *Gamestop Corp.*, No. 20-CA-080497, at 12 (citing *JP Morgan Chase & Co.*, N.L.R.B. No. 02-CA-088471 & No. 02-CA-098118 (A.L.J. Steven Fish, Aug. 21, 2013)).

What is different about the NLRA and other employment statutes such as the FLSA, Title VII, and the ADEA, is that the NLRA’s foundational right is that of engaging in protected concerted activities, rights that cease to exist if collective action is barred. In addition, other agencies that enforce employment statutes, such as the Department of Labor and Equal Employment Opportunity Commission (EEOC), operate quite differently from the NLRB. As the Supreme Court noted in *Gilmer v. Interstate/Johnson Lane Co.*, “the EEOC’s role in combating age discrimination is not dependent on filing of a charge; the agency . . . has independent authority to investigate age discrimination. *Gilmer*, 500 U.S. at 38 (1991) (citing 29 CFR §§ 1626.4, 1626.13 (1990)). Thus, the EEOC investigates pattern or practice of discrimination cases in addition to the agency’s response to complaints brought by charging parties. Similarly, the Department of Labor has the authority to direct investigations to determine if FLSA is being violated under its public enforcement authority in addition to its investigation of complaints brought to it. See Remarks of M. Patricia Smith, *supra* note 171 (regarding DOL direct investigation). In contrast, the NLRB receives complaints of unfair labor practices from individuals, unions, and employers at its regional offices, and its agents proceed to investigate to determine if there is merit for the agency to file a complaint. The NLRB’s complaint procedure (C-case) for investigating unfair labor practices is thus a reactive procedural scheme rather than a proactive one. In these individual forced arbitration cases, the individuals who are enabled to file complaints at regional offices are not represented by unions, and the ability to file complaints with the NLRB does not preserve collective action as *D.R. Horton* requires. While the current General Counsel Richard Griffin has not yet spoken to the opt-out issue, he is very likely to follow the same path as the former AGC. See *supra* note 216 and accompanying text.



and these illegally limit discussion of claims that relate to Section 7 protected activities.<sup>243</sup> Clearly, opt-out provisions should not be permitted to save waivers that violate the *Horton* standard because such provisions impose yet another hurdle for employees to clear in order to exercise their federal statutory rights. If employers are allowed to eliminate group action and even discussion about protected subject areas under Section 7 with individual employment contracts, then the statute has been strategically and illegally undermined.

### C. Other Efforts to Avoid Section 7 Problems

Employers have also sought to avoid findings of unfair labor practices by inserting language that makes it clear that the arbitration provision does not prohibit employees from filing claims with the NLRB. While some courts have found that such language removes the Section 7 problems that the Board found in *Horton*,<sup>244</sup> ALJs have been clear that such language does not cure the Section 7 problem.<sup>245</sup> For example, in *Sprouts Farmers Market*, an employer maintained that its MAA requiring individual arbitration was enforceable because the agreement specifically stated that employees were not prohibited or discouraged from filing charges with the NLRB.<sup>246</sup> The ALJ, however, found that this provision did not satisfy the standard articulated in *Horton* which insists that employees have the right to pursue their claims collectively either in court or in arbitration.<sup>247</sup>

An ALJ also was not convinced that an MAA requiring individual arbitration could be cured by a provision allowing employees to challenge the agreement collectively. In *Advanced Services, Inc.*, the employer argued that the agreement was not like that in *D.R. Horton* because it contained the following language, “nothing in this Procedure prohibits employees from acting concertedly to challenge the terms of [the agreement] by pursuing class or collective actions and they will not be subject to discipline or retaliation by the Company for doing so.”<sup>248</sup> According to the ALJ, this language did not change the requirement that employees bring their claims individually rather than collectively.<sup>249</sup> Moreover, the ALJ

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<sup>243</sup> See *Advanced Serv., Inc.*, N.L.R.B. Nos. 26-CA-63184; 26-CA-71805, at 7-8 (A.L.J. Margaret Brakebusch, July 2, 2012) (finding confidentiality provision surrounding arbitration violated Section 8 (a)(1) of the Act); *24 Hour Fitness*, N.L.R.B. No. 20-CA-35419, at 17 (noting “nondisclosure requirement in arbitration policy imposes extreme limitations on activities protected by Section 7).

<sup>244</sup> See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Torres v. United Healthcare Sys.*, 902 F. Supp. 2d 368 (E.D.N.Y. 2013) (stating that “an arbitration agreement with a collective action waiver falls outside the limitations of *D.R. Horton* holding when the agreement ‘does not preclude an employee from filing a complaint with an administrative agency, such as the . . . Department of Labor,’ and nothing in the agreement prevents the DOL from filing suit against defendant on behalf of a class of employees”).

<sup>245</sup> See, e.g., *SF Markets, LLC, d/b/a/ Sprouts Farmers Market*, N.L.R.B. No.21-CA-99065, at 7 (A.L.J. Ira Sandron, Feb. 18, 2014); *Applebees Neighborhood Grill and Bar*, N.L.R.B. No. 18-CA-103319, at 10 (A.L.J. Joel P. Biblowitz, Sept. 30, 2013); *Gamestop Corp.*, No. 20-CA-080497, at 12 (citing *JP Morgan Chase & Co.*, N.L.R.B. No. 02-CA-088471 & No. 02-CA-098118 (A.L.J. Steven Fish, Aug. 21, 2013)).

<sup>246</sup> *SF Markets, LLC, d/b/a/ Sprouts Farmers Market*, N.L.R.B. No.21-CA-99065, at 7 (A.L.J. Ira Sandron, Feb. 18, 2014).

<sup>247</sup> *Id.* at 10-11.

<sup>248</sup> *Advanced Serv., Inc.*, N.L.R.B. Nos. 26-CA-63184; 26-CA-71805, at 5 (A.L.J. Margaret Brakebusch, July 2, 2012).

<sup>249</sup> *Id.* at 6.

rejected the employer’s argument that class waiver clauses could be waived if the employer and employee agreed to do so. According to the ALJ, such “language is hollow” because there would be “few, if any, circumstances in which the [employer] would agree to relinquish the class-waiver clause.”<sup>250</sup>

## V. DISCUSSION: IN DEFENSE OF THE BOARD’S POSITION IN *D.R. HORTON*

Although most courts have chosen to discredit the Board’s *D.R. Horton* decision, few have given serious consideration to the merits of the Board’s analysis and the fact that the case raises issues that have not been addressed by the Supreme Court. In succumbing to the pro-arbitration tide, most courts have overlooked the fact that the Supreme Court has left the door open to consider whether Section 7 contains language, history, and policy considerations that make it unique in its resistance to mandatory individual arbitration. The Board makes two points that distinguish its findings in *D.R. Horton* from the Supreme Court’s pro-arbitration decisions. First, the Board does not seek to discourage arbitration; it seeks only to ensure that employees have the opportunity to band together either in arbitration or in court to address workplace disputes. Second, the Board asserts that Section 7’s guarantee to protect concerted activity cannot be waived through arbitration because the right is *the* core right that the statute protects.<sup>251</sup> The following sections argue that the Board’s *D.R. Horton* decision is consistent with the Supreme Court’s requirements in *Italian Colors*; that Section 7 is unique because it furthers Congress’s intent to increase the bargaining power of employees through the option of collective action; and that the few courts that have considered Section 7 rights have not given appropriate deference to the Board’s interpretation of Section 7’s meaning and reach.

### A. Section 7 Rights Survive *Italian Colors*

Because the Board did not have the benefit of the Court’s *Italian Colors* decision when it decided *Horton*, it is particularly important to consider the implications of that case. The Supreme Court made it clear that there are two questions to consider when a federal statute raises issues that might conflict with the FAA’s purpose of rigorously enforcing arbitration agreements. First, does the federal statute contain a “contrary congressional command?” Second, does Section 7 contain statutory rights that fit within the FAA’s saving clause? The Fifth Circuit is the only court of appeals to consider how Section 7 rights and the FAA should be reconciled. In its review of the Board’s decision, however, the Fifth Circuit gave inadequate consideration to the Board’s analysis and conclusions on these questions.

#### 1. The NLRA Commands that Employees Have the Right to Act Concertedly

In *Italian Colors*, the Court summarily concluded that “[n]o contrary congressional command requires us to reject the waiver of class arbitration here.”<sup>252</sup> Beginning with its interpretations of the FAA, the Court noted that its precedent dictates that arbitration is a matter of contract and that courts must rigorously enforce arbitration agreements according to their terms.<sup>253</sup> These rules are true even if employees maintain that a federal statute has been violated, unless the FAA’s mandate has been “overridden by a

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<sup>250</sup> *Id.*

<sup>251</sup> *D.R. Horton*, 357 N.L.R.B. 184, at 3.

<sup>252</sup> *Italian Colors Rest.*, 133 S. Ct. at 2309.

<sup>253</sup> See, e.g., *Italian Colors Rest.*, 133 S. Ct. at 2309 (citing *Rent-A-Center, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

contrary congressional command.”<sup>254</sup> The Court found nothing in the antitrust laws to indicate class actions may not be waived.<sup>255</sup> The Court noted that “[t]he Sherman and Clayton Acts make no mention of class actions.”<sup>256</sup> Furthermore, the Court noted that these statutes were passed before Rule 23 which was “designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.”<sup>257</sup>

The rights protected by the NLRA certainly do not discourage arbitration, but unlike the antitrust statutes the Court considered in *Italian Colors*, this statute does contain language that emphasizes the right to collective action. In *Gilmer*, the Supreme Court stated that a contrary congressional command may be found in a statute’s text, legislative history, or an inherent conflict between the arbitration and the statute’s underlying purpose.<sup>258</sup> Both the text and legislative history of the NLRA demonstrate that individual arbitration is not what Congress anticipated in cases involving Section 7 rights. The text of Section 7 provides that employees “shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>259</sup> Although Rule 23 provided an exception to the usual practice of individual suits, the NLRA clearly anticipates collective, rather than individual action, or at least insists that employees, not employers, have the right to choose whether to resolve disputes through individual or collective procedures. Moreover, Section 8 makes it clear that employers may not interfere with this right.<sup>260</sup> Thus, the text of the NLRA certainly contains a requirement or a “congressional command” that employees be allowed to redress workplace disputes collectively and that employers not interfere with these rights.

In examining the language of Section 7, the Fifth Circuit found there was no “contrary congressional command” because the statute does not mention arbitration.<sup>261</sup> But the Fifth Circuit misses the point – that Congress was concerned with the ability of employees to act together, not with whether they sought relief in the courts or through arbitration. The Fifth Circuit also mischaracterized the legislative history of the NLRA by stating that it indicated Congress’s intent to empower unions to engage in collective bargaining, with no indication of a right to file collective claims against employers.<sup>262</sup> This interpretation ignores the language, history, and purpose of the NLRA.

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<sup>254</sup> *Italian Colors Rest.*, 133 S. Ct. at 2309 (citing *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) and quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 220 (1987)).

<sup>255</sup> *Italian Colors Rest.*, 133 S. Ct. at 2309 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 617, 628 (1985)).

<sup>256</sup> *Italian Colors Rest.*, 133 S. Ct. at 2309.

<sup>257</sup> *Id.* (citing *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979)).

<sup>258</sup> *Gilmer*, 500 U.S. 20, 26 (1991).

<sup>259</sup> 29 U.S.C. § 157 (2012).

<sup>260</sup> Section 8 (a)(1) of the NLRA provides: “It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.” 29 U.S.C. § 158(a)(1).

<sup>261</sup> *D.R. Horton*, 737 F.3d at 360.

<sup>262</sup> *Id.* at 361.

In addition to language in Section 7 and the Board’s extensive recitation of the legislative history of the NLRA and labor law in general,<sup>263</sup> Supreme Court precedent supports the policy behind the Board’s conclusion that Section 7 rights are nonwaivable. In *Brooklyn Savings Bank v. O’Neil*, the Court specifically recognized that labor law addresses the inequality of bargaining power between employers and employees when minimum wage and maximum hours are disputed.<sup>264</sup> Although the decision involved rights under the FLSA rather than Section 7, the Court’s interpretation of FLSA rights supports the Board’s interpretation of Section 7 rights. According to the Court, FLSA recognized that “due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency . . . .”<sup>265</sup> In a footnote, the Court stated that the “legislative debates indicate that the prime purpose of the legislation was to aid the unprotected, unorganized and lowest paid of the nation’s working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage.”<sup>266</sup> Agreements that insist on individual arbitration undermine the policy of protecting employees from “private contracts” that take advantage of employees. Consistent with this purpose, courts should recognize that when employees are required to waive their right to collective action, the deterrent and remedial intent of the statute are thwarted.<sup>267</sup>

## 2. Section 7 Rights Fit Within the FAA’s Saving Clause

In *Italian Colors* the Court stated that the FAA’s saving clause “would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights.”<sup>268</sup> The right to collective action under Section 7 must be viewed as such a statutory right. In considering the issue of statutory rights in *D.R. Horton*, the Fifth Circuit considered language from the Supreme Court’s decision in *City Disposal* and concluded that “Section 7 effectuated Congress’s intent to equalize bargaining power between employees and employers ‘by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment’ and that ‘[t]here is no indication that Congress intended to limit this protection to situations in which an employee’s activity and that of his fellow employees

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<sup>263</sup> See summary *supra* at text accompanying notes 93-101.

<sup>264</sup> 324 U.S. 697, 706-07 (1945).

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 707, n.18 (citations omitted).

<sup>267</sup> See *Raniere v. Citigroup*, 827 F. Supp. 2d 294, 308 (S.D.N.Y. 2011), *rev’d* 533 Fed. App’x. 11 (2d Cir. 2013). In *Raniere*, the United States District Court for the Southern District of New York found that a collective action waiver was unenforceable because it would prevent employees from vindicating their substantive statutory rights under the FLSA. 827 F. Supp. at 308. Although the Second Circuit, in the wake of *Italian Colors*, reversed the decision, the lower court noted that one of the important aspects of the FLSA is “the ability of employees to pool resources in order to pursue a collective action, in accordance with the specific balance struck by Congress.” *Id.* at 314. In overturning the lower court, the Second Circuit characterized the claims in *Raniere* as “virtually identical to those in *Italian Colors*,” without any consideration of the language or legislative history of the FLSA and how it might differ from the antitrust claims. 552 Fed. App’x. 13-14. After its lengthy battle to preserve merchants’ rights to proceed collectively in the *American Express* litigation, the Second Circuit may have been unwilling to reengage in the battle to preserve collective action in the employment context.

<sup>268</sup> *Italian Colors Rest.*, 133 S. Ct. at 2310-11. The Court noted that the exception would “perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable. *Id.* (citing *Green Tree Financial Corp. Ala. v. Randolph*, 531 U.S. 79, 90 (2000)).

combine with one another in any particular way.”<sup>269</sup> The Fifth Circuit cited other cases under the NLRA which it found “gave some support to the Board’s analysis that collective and class claims, whether in lawsuits or in arbitration, are protected by Section 7.”<sup>270</sup> Despite such cases and the Supreme Court’s strong language explicitly recognizing employees’ right to “band together in confronting an employer,” the Fifth Circuit took a dismissive approach, stating that courts “repeatedly have rejected litigants’ attempts to assert a statutory right that cannot be effectively vindicated through arbitration.”<sup>271</sup> Instead of exploring whether or not Section 7 rights are statutory rights that are at odds with individual arbitration, the Fifth Circuit merely concluded that it is a difficult case to prove.<sup>272</sup> The Fifth Circuit recognized that the Supreme Court has yet to consider “a Section 7 right to pursue legal claims concertedly,”<sup>273</sup> but it made no effort to distinguish Section 7 claims from other kinds of claims that were ineffective in displacing the FAA. Thus, the Fifth Circuit failed to consider whether Section 7 rights fit within the exception for statutory rights that the Supreme Court articulated in *Italian Colors*.

Aside from the Fifth Circuit’s cursory approach to Section 7 rights, no other court has considered the arguments put forth by the Board in its *D.R. Horton* decision. Importantly, the Board has distinguished Section 7 rights from rights under the ADEA, which the Supreme Court found could be decided through individual arbitration. In *Gilmer*, the Court enforced an arbitration agreement with a class waiver even though the ADEA expressly permits collective actions. The Court stated that statutory permission did “not mean that individual attempts at conciliation were intended to be barred.”<sup>274</sup> The difference between Section 7 rights and ADEA claims, however, are evident. As the Board explained, *Gilmer* involved “neither Section 7 nor the validity of a class action waiver.”<sup>275</sup> Because the NLRA is concerned with protecting employees in general rather than the individual employee, the NLRA protects the employee’s right to choose whether he wants to vindicate his own rights through individual action or to choose concerted activity “either because he believes it will enable him more effectively to vindicate his own rights or because he has decided to subordinate personal advantage . . . to achieve benefits for a greater number of employees.”<sup>276</sup> The right to be free from discrimination based on age can be addressed through individual arbitration; by definition, the right to collective action to address workplace issues cannot be vindicated through individual arbitration. The Fifth Circuit, however, ignored the distinctions that the Board emphasized, concluding merely that the Board’s interpretation would discourage arbitration.

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<sup>269</sup> *D.R. Horton v. NLRB*, 737 F.3d 344, 356 (2013) (citing *NLRB v. City Disposal Sys., Inc.* 465 U.S. 822, 835 (1984)).

<sup>270</sup> *D.R. Horton*, 737 F.3d at 357.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Gilmer*, 500 U.S. at 32.

<sup>275</sup> *D.R. Horton*, 357 N.L.R.B. at 9.

<sup>276</sup> Brief of Respondent/Cross-Petitioner at 33, *D.R. Horton v. N.L.R.B.*, No. 12-60031 at 38 (5th Cir., Sept. 4, 2012) available at <http://www.laborrelationscounsel.com/BriefOfNLRBReDRHortonFifthCircuit.pdf>.

The Board also made a distinction between FLSA claims and claims under Section 7. Section 7 rights often arise in cases involving wage and hour disputes under the FLSA.<sup>277</sup> According to the Board, FLSA claims can be vindicated through individual arbitration because the right to be remedied in such cases involves appropriate compensation under laws regulating minimum wage and maximum hours, not the right to collective action.<sup>278</sup> But when an employee asserts her right to resolve these disputes collectively, Section 7 steps in to protect that right. The Board explained in *Horton* that “[w]hen employees band together to assert FLSA claims, they are pursuing concerted activities for mutual aid and protection, which the NLRA protects.”<sup>279</sup> While there are strong arguments that FLSA rights are themselves substantive and require a collective option to address disputes under the statute, Section 7 rights present a more compelling case and more clearly satisfy the requirements established by the Court in *Italian Colors*.

### B. Courts Have Not Given the Board’s Decision Adequate Deference

Courts that have considered the Board’s decision have paid lip service to the requirement that its interpretation of Section 7 requires *Chevron* deference.<sup>280</sup> Nevertheless, they have found that the Board’s interpretation of the NLRA has little import because the Board has no expertise in interpreting the FAA or Supreme Court decisions that construe the FAA.<sup>281</sup> The Fifth Circuit gave no deference to the Board’s decision, nor to its attempt to accommodate the FAA’s objectives with those of the NLRA.<sup>282</sup> Rather, the Fifth Circuit’s decision seemed to conclude that the FAA must trump the NLRA. There is nothing in the Board’s interpretation of Section 7 in *Horton* that is an impermissible construction, or arbitrary,

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<sup>277</sup> Section 216(b) provides:

Any employer who violates [the FLSA] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages . . . . An action . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought . . . . The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title.

29 U.S.C. § 216(b).

<sup>278</sup> *D.R. Horton*, 357 N.L.R.B. at 10.

<sup>279</sup> *Id.*

<sup>280</sup> *See, e.g.*, *D.R. Horton*, 737 F.3d 344, 349 (“This court will uphold the Board’s decision ‘if it is reasonable and supported by substantial evidence on the record as a whole.’”) (citations omitted); *Owen v Bristol Care, Inc.*, 702 F.3d 1050, 1054 (8<sup>th</sup> Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297-98, n.8 (2d Cir. 2013).

<sup>281</sup> *See, e.g.*, *D.R. Horton*, 737 F.3d at 356; *Owen*, 702 F.3d at 1054; *Sutherland*, 726 F.3d at 297-98, n.8 (noting that the Board’s decision interpreted “federal statutes unrelated to the NLRA”).

<sup>282</sup> *D.R. Horton*, 737 F.3d at 356 (noting no deferral to Board’s remedial preferences where such “potentially trench upon federal statutes and policies unrelated to NLRA”) (citing *Hoffman Plastics Compound, Inc. v. NLRB*, 535 U.S. 137, 144 (2002)).

capricious, or manifestly contrary to the statute.<sup>283</sup> To the extent that the Board's decision in *D.R. Horton* sets policy beyond mere construction of the statute, so long as the Board's choice is reasonable, it is controlling, and a reviewing court should uphold it even if its own interpretation would differ.<sup>284</sup> As courts continue to consider Section 7 challenges to agreements requiring individual arbitration, they should give *Chevron* deference to the Board's decision in *D.R. Horton*.

The Board made it clear that Section 7 requires collective access to the courts or arbitration. Several courts have suggested that these rights are preserved by access to administrative agencies.<sup>285</sup> This construction of Section 7 is a distinct departure from how the Board interpreted Section 7 in *D.R. Horton*, an interpretation that involves only the scope of the NLRA, and thus one that is entitled to substantial deference by the courts.

## CONCLUSION

With the exception of the Fifth Circuit's decision, a decision that was not unanimous and failed to address the importance of the central tenet of Section 7 of the NLRA, the courts have yet to squarely address the implications of the Board's decision in *D.R. Horton*. Decisions thus far have focused solely on interpretations of the right to collective action under FLSA rather than the NLRA. Although FLSA makes specific reference to class actions, the courts have interpreted this right as permitting, but not requiring a nonwaivable right to collective action. In contrast, under the NLRA, the Section 7 right to engage in collective action may not be waived unless done so collectively. Thus, employees must be mindful to raise Section 7 rights if they hope to defeat arbitration agreements that require individual arbitration.

Unless the NLRB or the United States Supreme Court overrules or vacates *D.R. Horton*, the decision will remain binding on the regional offices of the NLRB and its ALJs. According to the decision, employers will not be able to require covered individual employees to waive their rights to bring class or collective actions in both arbitral and judicial forums. Furthermore, arbitration agreements that allow employees to opt out of a mandatory class action waiver will not save an otherwise problematic provision because they unfairly require employees to take action to preserve their rights. The *D.R. Horton* decision leaves unchanged the rule that a properly recognized or certified union could waive the right to collective action in collective bargaining negotiations.

The Board's decision in *D.R. Horton* did not arise in a vacuum. It flowed naturally from decades of decisions upholding the importance of employees' Section 7 rights to engage in protected concerted activities in both union and nonunion environments. More than ten years ago, and long before the Board's *D.R. Horton* decision, labor law scholar Professor Ann Hodges wrote that "compulsory arbitration agreements that deny employees the right to bring class actions, joint claims, and claims for broad injunctive relief force employees to waive their Section 7 rights to obtain employment."<sup>286</sup> It is clear that even then, the increasing prevalence of employer-imposed mandatory arbitration agreements on individuals as a condition of employment was creating a cause for alarm amongst those who value and

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<sup>283</sup> See *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

<sup>284</sup> See *id.* at 865, 866; see also TWOMEY, *supra* note 97 at 31 (discussing *Chevron* framework for review of administrative agency's application of its own enabling statute).

<sup>285</sup> See *Owen*, 702 F.3d at 1050; *Torres v. United Healthcare Systems*, 902 F. Supp. 2d 368 (E.D.N.Y. 2013). See discussion *supra* at text accompanying notes 164-171.

<sup>286</sup> Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled With Section 7 Rights?*, 38 WAKE FOREST L. REV. 173, 237 (2003).

seek to preserve the substantive Section 7 right to engage in concerted activities. As the Supreme Court has recognized, the NLRB is the agency that must adapt the NLRA to changing industrial circumstances.<sup>287</sup> In *D.R. Horton*, the Board has done just that. It is clear that the NLRB has a strong argument that Section 7 rights *are* the very heart of the NLRA and that the FAA’s policy in favor of arbitration is on equal footing with employment laws, so the FAA may not supersede these important employee rights to engage in protected concerted activity.<sup>288</sup>

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<sup>287</sup> NLRB v. J. Weingarten, 420 U.S. 251, 265-66 (1975).

<sup>288</sup> See Sullivan & Glynn, *supra* note 2, at 1015-18 (approving of *D.R. Horton*’s reasoning and exploring reasons why FAA must “give way” to NLRA); Stone, *supra* note 13, at 174-76 (outlining why Section 7 of NLRA is a substantive right).