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The National Labor Relations Act ("NRLA") was born out of the industrial strife of the Great Depression and provides for employee collective rights in order to prevent the potentially devastating economic consequences of an unstable working environment. The rights provided by the NLRA generally encompass the right to employee collective activity, including collective legal activity and unionizing, which seeks to better working conditions. These substantive rights cannot be waived through any employment agreement, but the Supreme Court has never decided the precise issue of whether pursuing a class action is a substantive right under the NLRA as a protected employee collective activity. The enforceability of class action waivers in employment arbitration agreements has become a hot topic over the past few years since the National Labor Relations Board ("Board"), which administers the NLRA, and the courts have largely split on whether the right to pursue a class action is a substantive right under the NLRA, as opposed to a mere procedural right that can be waived through agreement. This is an especially important issue to low-wage workers because if class action waivers are upheld in arbitration agreements, many low-wage workers, if not all, will be foreclosed from bringing claims regarding employer violations. This preclusion is primarily due to the fact that litigation costs often do not justify workers bringing these relatively low value claims on an individual basis. This Note examines how class actions comport with the substantive purpose of the NLRA and discusses the recent decisions of the Board and the courts regarding class action waivers in employment arbitration agreements. This Note will also offer a few potential resolutions.

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INTRODUCTION

Congress passed the National Labor Relations Act ("NLRA" or "Act") in 1935 as a means of alleviating the industrial strife of the Great Depression.[1] Corporate monopolies and employer exploitation caused poor wages and working conditions, which eventually led to employee unrest.[2] At a time when the country was experiencing economic instability and the worst outbreak of strikes in decades, Congress sought to address the industrial strife by leveling the playing field between employee and employer.[3] Thus, the NLRA attempts to divert labor distress away from disruptive forms of employee activities, such as strikes, by giving employees more bargaining power through collective bargaining rights.[4] Accordingly, § 7 of the NLRA ("§ 7") guarantees employees the right to "form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or

1. *See* Jonathan Fox Harris, *Worker Unity and the Law: A Comparative Analysis of the National Labor Relations Act and the Fair Labor Standards Act, and the Hope for the NLRA's Future*, 13 N.Y.C. L. REV. 107, 107 (2009).

2. *See* Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921 (1993).

3. *See* Laura J. Cooper, *Letting the Puppets Speak: Employee Voice in the Legislative History of the Wagner Act*, 94 MARQ. L. REV. 837, 841 (2011).

4. 29 U.S.C. § 151 (2016).

protection" ("§ 7 rights").[5] The Act prohibits employers from interfering with an employee's exercise of her § 7 rights.[6]

Under § 7, the right to "form, join, or assist labor organizations" clearly protects union organizing and employee affiliation with unions.[7] Effectively, an employer cannot act in a way that would discourage employees from attempting to form a union, from participating in a union, or from associating with a union.[8] Since the enactment of the NLRA, unions have been the primary means through which workers exercise their § 7 rights, and indeed the NLRA "envisions unions' fundamental mission to be improving wages and other working conditions and standing with and supporting workers."[9] Unions are the most recognizable tool employees have to collectively advocate for fair working conditions, including wages, and union activity is explicitly protected by § 7.[10] Without unions, employees lack a clear institution through which they can collectively bargain for fair working conditions.[11] Thus, some scholars believe that the decline of unions and other labor organizations over the past few decades explains the increase in hourly wage inequality.[12]

The decline in unions has led to a focus on the ambiguous meaning of the § 7 catchall—"concerted activity for the purpose of . . . mutual aid or protection"[13]—as workers are forced to find other protected § 7 means to address their workplace grievances. In response to the need to clarify the § 7 catchall, the U.S. Supreme Court has recognized employees' § 7 right "to improve working conditions through resort to administrative and judicial forums . . . ."[14] The Supreme Court explained,

> Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context. It recognized this fact by choosing, as the language of [§ 7] makes clear, to protect concerted

5. *Id.* § 157.

6. *Id.* § 158(a)(1).

7. Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 241 (2005).

8. *See* Michael P. Spellman & Jeffrey D. Slanker, *Social Media, At-Will Employment, and Internal Investigations: The Ever-Expanding Reach of the National Labor Relations Board to Union and Non-Union Workplaces*, 32 TRIAL ADVOC. Q. 36, 38 (2013).

9. Dannin, *supra* note 7, at 230.

10. *Id.* at 241.

11. *See* Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 517 (2011).

12. *See generally* Abraham L. Gitlow, *Ebb and Flow in America's Trade Unions: The Present Prospect*, 63 LAB. L.J. 123 (2012) (focusing on the history and development of the trade union movement in the United States following World War II); CCH HUMAN RESOURCE COMPLIANCE LIBRARY, UNIONS: IMPACT OF UNION DECLINE ON WAGE INEQUALITY ¶ 94,427 (2015), 2012 WL 5470150.

13. 29 U.S.C. § 157 (2016).

14. Eastex, Inc. v. NLRB, 437 U.S. 556, 566 (1978).

> activities for the somewhat broader purpose of "mutual aid or protection."[15]

Thus, the Supreme Court found that the § 7 catchall generally included collective legal action when such action was for the purpose of improving working conditions.

While the Supreme Court has suggested that § 7 protects legal collective activity generally, the Court has not spoken on the precise issue of whether pursuing a class action is a protected § 7 activity. The issue of whether class actions are a protected § 7 activity has become significant in the employment context because of the recent increase in class action waivers contained in employment arbitration agreements.[16] Importantly, the Supreme Court has found that substantive employment rights cannot be waived in an arbitration agreement. As a result, whether [pursuit of a] class action is a *substantive* right under the NLRA, as opposed to a mere procedural right as indicated by the Federal Rules of Civil Procedure, can have a considerable impact on employee rights.[17] When an employee enters into an arbitration agreement with an employer, she is agreeing to arbitrate any legal claims covered by the agreement, rather than filing a lawsuit in court.[18] The parties to an arbitration agreement can tailor many of the terms of the agreement, including what legal claims will be arbitrated.[19] These agreements are often mandatory in the sense that the employee must consent to the arbitration agreement as a condition of employment.[20] When an arbitration agreement contains a provision that prohibits employees from arbitrating their claims as a class, as defined by Federal Rule of Civil Procedure 23,[21] courts tend to refer to these types of provisions as a class action waiver.[22] Some provisions also prohibit collective action. The significant difference between a class action and a collective action is that in a collective action, individuals must affirmatively give their consent before becoming a part of the class and being bound by any court judgment in favor of the collective.[23] In a class action, all similarly situated employees are

15. *Id.* at 565.

16. Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1125–26.

17. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

18. *See* Yongdan Li, *Applying the Doctrine of Unconscionability to Employment Arbitration Agreements, with Emphasis on Class Action/Arbitration Waivers*, 31 WHITTIER L. REV. 665, 665 (2010).

19. Hall St. Assocs., LLC v. Mattel, Inc., 128 S. Ct. 1396, 1404 (2008); *see also* American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013) (finding that 9 U.S.C. § 2 reflects the principle that arbitration is a matter of contract and that courts must enforce the terms the parties themselves have agreed on).

20. Li, *supra* note 18, at 665.

21. FED. R. CIV. P. 23.

22. Li, *supra* note 18, at 700–01.

23. 1 MCLAUGHLIN ON CLASS ACTIONS § 2:16 (11th ed. 2014), Westlaw (database updated Nov. 2014).

automatically a part of the class.[24] This Note will focus mainly on class actions and class action waivers because the courts and the National Labor Relations Board ("Board") has mainly focused on class actions in determining whether these waivers are valid in arbitration agreements.

The Board is the federal agency that investigates and resolves complaints under the NLRA.[25] Per this authority, the Board has found that pursuing a class action is a substantive right under § 7.[26] Since substantive rights cannot be waived through agreement according to Supreme Court jurisprudence, § 7 rights cannot be waived through arbitration agreements.[27] In coming to this conclusion, the Board relied on the unique nature of the NLRA in providing substantive *collective* rights, as opposed to the *individual* rights established by other employment statutes.[28] The courts, on the other hand, have largely held that pursuing a class action is a procedural right because it is codified in the Federal Rules of Civil Procedure, and that arbitration agreements with class action waivers must be upheld under the Federal Arbitration Act ("FAA"), which establishes that arbitration agreements are generally enforceable.[29]

The issue of class action waivers in employment arbitration agreements has yet to be decided by the Supreme Court. Any decisions by the Supreme Court on the issue will be binding on the NLRB and the courts.[30] Until then, the Board and the courts are free to diverge from one another on the issue, leaving the collective rights of employees in a state of uncertainty.[31] The stakes are particularly high for low-wage workers, who often have legitimate claims with low, individual value.[32] Employees, and particularly low-wage workers, struggle to bring claims on their own because of litigation costs, lack of financial resources, and fear of retaliation from employers.[33] Thus, courts have recognized the importance of class actions as a sound option for these employees.[34] This is most clear in the context of wage and hour litigation where claims are usually of low value.[35]

In response to a surge in employee class actions, employers have increasingly adopted arbitration agreements containing class and

24. *Id.*

25. *Who We Are*, NLRB, https://www.nlrb.gov/who-we-are (last visited Apr. 10, 2016).

26. D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012 WL 36274, at *1 (Jan. 3, 2012).

27. *Id.* at *12; *see also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

28. Murphy Oil U.S.A., Inc., 361 N.L.R.B. No. 72, 2014 WL 54654, at *12 (Oct. 28, 2014).

29. 9 U.S.C.A. § 2 (West 2014).

30. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1003 (2005) (Stevens, J., concurring).

31. *Id.*

32. Ruan, *supra* note 16, at 1107–08 (explaining that a worker is classified as low wage when she earns on average $27,000 or less per year while working at least thirty hours a week).

33. *Id.* at 1118–20.

34. *Id.* at 1115.

35. *Id.* at 1116.

collective action waivers.[36] Part I of this Note outlines how low-wage workers are particularly affected by these arbitration provisions with class action waivers, especially in the wage and hour context. This Part further explains how class actions help carry out Congress' goals under the NLRA by preventing industrial strife through a level playing field between employers and low-wage workers. Part II examines recent court decisions dealing with the issue of class action waivers in employment arbitration agreements and argues that these decisions have set a dangerous precedent by restricting an employee's § 7 rights in two ways. First, these decisions unjustifiably narrow the definition of "concerted activity for the purpose of . . . mutual aid or protection" under the Act by determining that pursuit of class actions is not a substantive right under the NLRA, setting the stage for further limitations on § 7 rights. Second, these decisions indicate that the FAA can render an employee's § 7 rights meaningless because these decisions have indicated that substantive § 7 rights can be waived through arbitration agreements. In Part III, this Note will present proposals address the problems that recent court decisions have relied on in upholding class action waivers in the employment context. First, the Supreme Court, should it decide this issue in the future, should find that the right to *pursue* class actions is a substantive right under § 7. Such a holding is consistent with the substantive nature of the NLRA and will preclude the narrowing of § 7 rights, while avoiding conflict with the FAA. Alternatively, a narrow amendment to the FAA explicitly prohibiting waiver in an agreement of the right to class actions should be considered in order to ensure that low-wage workers will be legally protected against workplace exploitation. Without these fixes, class action waivers will leave low-wage workers largely unprotected against employer exploitation, as they will effectively be precluded from seeking legal redress for many employer violations.

I. Impact of Class Action Waivers on Low-Wage Workers

This Note will first show that employer violations against low-wage workers are widespread and that class actions have helped many of these workers reclaim their employment rights. Furthermore, the Note will demonstrate that class actions help support the purpose of the NLRA by examining how class action waivers financially bar low-wage workers from addressing employer violations and promote other, more disruptive means of redress.

36. Joane Deschenaux, *Appeals Court Rejects NLRB Conclusion That Class-Action Waivers Violate Labor Law*, Soc'y for Hum. Resource Mgmt. (Dec. 4, 2013), http://www.shrm.org/legalissues/federalresources/pages/appeals-court-rejects-nlrb-class-action-waivers-decision.aspx.

Recent studies have shown that the employment rights of low-wage workers are frequently violated. For example, a 2013 Bay Area study of 500 low-wage workers showed that almost all of the workers had been denied a rest or meal break at one time during their working life.[37] More than a third of them had been denied sick leave and about half of the workers had work-related illnesses or injuries.[38] A majority of the workers had experienced verbal abuse or degrading treatment at some point, with more than a quarter of women reporting experiences of sexual harassment in the workplace.[39] This illustration is consistent with "an emerging body of evidence suggest[ing] that the systematic violation of employment and labor laws is common in a number of low-wage industries."[40] Common violations include retaliation for worker complaints, unsafe working conditions, and avoidance of worker's compensation.[41]

Evidence indicates that wage and hour violations tend to be the most prevalent rights violations amongst employers of low-wage workers.[42] The Fair Labor Standards Act ("FLSA") remains the primary protection for workers against wage theft.[43] The FLSA establishes, among other employee rights, a right to overtime pay for work exceeding forty hours in a week.[44] Claims by workers that their employers failed to pay them correctly have quadrupled over the last decade, and the majority of wage and hour litigation claims are filed under the FLSA.[45] Thus, the recent studies on wage theft, coupled with the increase in FLSA litigation, indicate that wage theft is an epidemic among low-wage workers.

Studies show that wage theft is not restricted to a few companies or industries. In 2009, a survey of 4387 low-wage workers across a variety of industries working for large and small companies within three major U.S. cities found that seventy-six percent of full-time workers faced unpaid or underpaid overtime and twenty-six percent reported being paid less than minimum wage.[46] It also found an overall wage theft of fifteen percent of the earnings of all of the workers surveyed.[47] In 2010, a San Francisco-

37. Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1085 n.66 (2014).

38. *Id.*

39. *Id.*

40. Annette Bernhardt et al., *Employers Gone Rogue: Explaining Industry Variation in Violations of Workplace Laws*, 66 INDUS. & LAB. REL. REV. 808, 809 (2013).

41. *Id.*

42. Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 VAND. L. REV. 727, 735–36 (2010); *see also* Rosemary Sage Jones, *The FLSA Wage and Hour Epidemic*, 69 ADVOCATE 70 (2014).

43. 29 U.S.C.A. § 201 (West 2016).

44. *Id.* § 207.

45. Ruan, *supra* note 42, at 735; *see also* Jones, *supra* note 42.

46. Ruan, *supra* note 16, at 1110.

47. *Id.*

based survey found that fifty percent of Chinatown workers earn less than minimum wage.[48] In New York City in 2012, thirty percent of 436 retail workers interviewed reported that they worked more than forty hours a week without being paid overtime.[49] With these statistics, it is evident that wage and hour violation is a systemic problem that likely cannot be addressed by those few individuals that have the financial resources to bring claims on their own. Thus, class action is an important tool for combatting widespread employee exploitation since it allows individual employees to pool their resources for one case.

Recent lawsuits show that class actions have been the only way through which workers have been able to significantly address wage violations occurring across industries. Workers in construction, garment factories, nursing homes, agriculture, poultry processing, and restaurants have all suffered extensive and systemic wage theft, and studies indicate that "billions of dollars in wages are being illegally stolen from millions of workers each and every year."[50] The vast number of recent wage theft claims brought by low-wage workers from these industries shows that they are particularly affected by wage theft compared to other workers. For example, "Wal-Mart . . . paid $352 million dollars to settle sixty-three unpaid wages lawsuits in forty-two states . . . ."[51] Another FLSA collective action regarding misappropriation of servers' tips and a failure to pay overtime at a restaurant chain "settled for $800,000 after sixty-five servers opted in to the lawsuit in a case."[52] Similarly, employees of a car wash won a lawsuit alleging that their employer paid them less than minimum wage, did not give them adequate breaks, and even paid some workers only in tips.[53]

These cases and surveys show that wage theft is a particularly serious problem affecting low-wage workers, and that class actions have been, and should continue to be, the primary tool workers use to alleviate this problem.

A. Class Action Waivers and the Purpose of the NLRA

Class action waivers undermine the purpose of the NLRA in two ways. First, class action waivers leave low-wage workers with almost no bargaining power. The collective rights established by the NLRA gave employees more bargaining power through protected means of addressing workplace grievances. Class actions serve this purpose by protecting employees from employer exploitation. Class action waivers force

48. *Id.*
49. *Id.*
50. Ruan, *supra* note 42, at 737 (quoting Kim Bobo, Wage Theft in America 6 (2009)).
51. Ruan, *supra* note 16, at 1109–10.
52. *Id.*
53. *Id.* at 1110.

workers to address workplace grievances individually and without the shield of anonymity, thus allowing employers to exploit these vulnerabilities. Second, with decreasing access to union protection and the high costs of litigation, the next most likely alternative is disruptive collective action, which the NLRA specifically aims to prevent.

The minimal bargaining power of unskilled, low-wage workers across industries reflects their vulnerability in the face of wage theft and other opportunities for employers to exploit them. Other common examples of exploitation include:

> [C]ashiers at retail chains that are misclassified as "assistant managers" and lose thousands in unpaid overtime; restaurant workers who have their tips "reallocated" to owners and management; truck drivers who have their hours shaved; car wash workers paid below minimum wage; temporary staffing agency workers who lose premium overtime pay through creative time keeping.[54]

These examples show that there are some common vulnerabilities shared among low-wage workers in different industries. Thus, the protection of class actions can address the exploitation of employees in a variety of occupations.

There are a number of factors that leave low-wage workers with little bargaining power, particularly in the wage theft context. In addition to the financial barrier to individual wage and hour litigation, lack of knowledge and fear of retaliation are also concerns for low-wage workers. Low-wage workers, who are often low-skilled workers and at-will employees, are less likely to challenge workplace violations in times of high unemployment because many employers consider them easily replaceable.[55] Unchallenged violations are especially prevalent in industries where the low-wage workers are immigrants with limited English proficiency, have minimal familiarity with their legal rights, or are fearful and lack motivation based on their immigrant status.[56] Furthermore, many low-wage workers remain unaware that their employers have violated their legal rights until they are informed of the violations.[57] Thus, many low-wage workers will be discouraged from claiming wage and hour violations on an individual basis because they fear or anticipate retaliation from the employer who can terminate or discipline employees at will or who can expose their immigration status. Class and collective actions can help address these vulnerabilities.

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54. *Id.* at 1109.

55. CCH HUMAN RESOURCE COMPLIANCE LIBRARY, EMPLOYEE RELATIONS: CAUSES OF TURNOVER ¶ 46,417, 2012 WL 5934978; Yungsuhn Park, *The Immigrant Workers Union: Challenges Facing Low-Wage Immigrant Workers in Los Angeles*, 12 ASIAN L.J. 67, 98–99 (2005).

56. *See* Llezlie Green Coleman, *Procedural Hurdles and Thwarted Efficiency: Immigration Relief in Wage and Hour Collective Actions*, 16 HARV. LATINO L. REV. 1, 7–8 (2013).

57. Ruan, *supra* note 16, at 1121.

There are two separate procedures through which workers can collectively file claims, depending on whether their claims fall under the FLSA. Section 216(b) of the FLSA, which deals specifically with wage and hour violations, provides that an action to recover for violations of the FLSA "may be maintained against any employer . . . by any one or more employees for and on behalf of himself or themselves and other employees similarly situated."[58] While the FLSA authorizes collective legal action specifically for wage and hour claims, Federal Rule of Civil Procedure 23 governs class actions generally.[59] Class actions, therefore, can be used for a broader range of employment claims.

Collective actions and class actions have many similar protections for low-wage workers against employer exploitation, as will be discussed in this Part, but there is one significant difference that makes Rule 23 class actions superior to collective actions for low-wage workers. Under Rule 23, putative class members must opt out in order to be removed from each case, meaning that all employees that fit the requirements of the class are automatically members of the class until they affirmatively decline this inclusion.[60] Rule 23 thus alleviates the fear of employer retaliation for bringing a claim because it only requires a few named plaintiffs, usually those who initiate the claim, to represent the class as the plaintiffs in the case.[61] In comparison, under § 216(b), workers, once notified of the claim and how to join it, must opt in by filing a written consent, thus providing little protection against fear of retaliation because the employer can readily identify the individual and her association with the claim as listed on the face of the claim.[62] Both rules, however, require notice of the suit to similarly situated employees.[63] Notice provides workers with information regarding their wage rights and the potential violations of these rights, and also encourages them to seek legal counsel.[64] Thus, many workers who are vulnerable to employer exploitation because they are unaware of their rights or violations thereof have increased protection through FLSA collective actions and through Rule 23 class actions. All it takes is one victim aware of the employer violations to bring a lawsuit on behalf of those low-wage workers similarly wronged.[65] Because class actions address many of the vulnerabilities of low-wage workers in the employment context through the opt-out mechanism, it serves an important purpose of the NLRA by

58. 29 U.S.C.A. § 216(b) (West 2016).
59. FED. R. CIV. P. 23.
60. FED. R. CIV. P. 23(c)(2)(A).
61. FED. R. CIV. P. 23.
62. 29 U.S.C.A. § 216(b) (West 2016).
63. *Id.*; FED. R. CIV. P. 23(c)(2).
64. Ruan, *supra* note 16, at 1121–22.
65. Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 722 (2012).

helping to equalize the bargaining power between employer and employee.

Another obstacle for low-wage workers is the financial barrier to wage and hour litigation. As noted above, a worker is classified as low-wage when she earns on average $27,000 or less per year while working at least thirty hours per week, and lost wages are often important to these individual workers in order to meet the cost of living.[66] However, attorneys usually do not take on individual wage and hour cases because the costs and resources of litigation are unjustified by the relatively minimal amount of damages, and low-wage workers generally cannot afford to pay for expensive litigation costs out of pocket.[67] Effectively, this means that if low-wage workers are always required to bring their wage and hour claims on an individual basis, the vast majority will not have their claims heard and will not receive the wages withheld from them. In comparison, the ability to aggregate claims through class actions eliminates the financial barrier and ultimately allows low-wage workers to litigate their wage and hour claims.

Beyond equalizing bargaining power, the NLRA also seeks to safeguard commerce from disruptions such as strikes and picketing.[68] A primary purpose of the NLRA is to channel industrial strife into orderly collective bargaining, and class action waivers undermine this purpose because bargaining power and industrial strife are correlative: "[T]he policy justification of conferring bargaining power on employees is to prevent strikes and industrial unrest that may in turn decrease wages and purchasing power, which ultimately may disrupt the market for goods in interstate commerce."[69] Thus, Congress has found that equality of bargaining power through collective rights is necessary to prevent aggravation of economic depression and instability and to ensure the free flow of interstate commerce.[70]

The Board has said that "[b]locking this channel [of class actions] would only push employees toward other, more disruptive forms of concerted activity."[71] As discussed above in Part I.B, class actions help to equalize the bargaining power between low-wage workers and their employers. In light of the decline in unions, which evidence shows has

66. *See* Ruan, *supra* note 16, at 1107–08.

67. *Id.* at 1118–19.

68. 22 ILL. PRACTICE, THE LAW OF MEDICAL PRACTICE IN ILLINOIS § 37:2 (3d ed. 2015), Westlaw (database updated Feb. 2015); Seth Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 VA. L. REV. 685, 686 (1985).

69. Michael C. Duff, *What* Brady v. N.F.L. *Teaches About the Devolution of Labor Law*, 52 WASHBURN L.J. 429, 470 (2013).

70. COMPARISON OF S. 2926 AND S. 1958, at 15 (Comm. Print 1935), *reprinted in* 1 NAT'L LABOR RELATIONS BD., S. COMM. ON EDUC. AND LABOR, 74TH CONG., LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1338 (1985).

71. Murphy Oil U.S.A., Inc., 361 N.L.R.B. No. 72, 2014 WL 54654, at *10 (Oct. 28, 2014).

already led to an increase in wage inequality,[72] and an increase in class action waivers in arbitration agreements,[73] low-wage workers will continue to have low bargaining power and be vulnerable to depressed wages. Without access to an orderly forum to address their grievances, any current employee unrest will likely divert to more disruptive forms of collective activity—such as strikes—subverting the goal of the NLRA to "eliminate the causes of certain substantial obstructions to the free flow of commerce."[74]

Ultimately, class action waivers will leave many workers vulnerable to exploitation because of their low bargaining power, directly undermining a primary purpose of the NLRA to equalize bargaining power. The inequality in bargaining power then promotes the use of disruptive forms of employee collective activity, as employees seeking to combat workplace violations have limited tools of redress beyond class actions. Thus, if class action waivers are found to be valid in employment arbitration agreements, the goals of the NLRA could become futile.

II. The Current Tug-of-War over Class Action Waivers in Employment Arbitration Agreements

This Part addresses the divergence between the courts and the Board on the issue of enforceability of class action waivers in employment arbitration agreements and examines the key arguments of each in rendering conflicting opinions. While neither the Board nor the courts are bound by the decisions of the other, each tends to address the arguments of the other since § 7 rights claims often go through the hands of both.

The process of addressing employer violations often begins when an employee files a claim against the employer in state or federal court.[75] However, if there is an arbitration agreement with a class action waiver, the ability of low-wage workers to proceed with these claims depends largely on whether a court will enforce the class action waiver and force individual arbitration.[76] In comparison to the claims of individual employment rights violations brought in courts, an employee who believes her employer has infringed on her § 7 rights has the option of filing an unfair labor practices claim with the Board, which has exclusive jurisdiction over such claims.[77] Employees have thus filed unfair labor practice claims on the basis that class action waivers infringe upon their

72. *See* Western & Rosenfeld, *supra* note 11, at 513.

73. Ruan, *supra* note 16, at 1125–26.

74. 29 U.S.C. § 151 (2016).

75. Jones, *supra* note 42, at 74.

76. *See infra* Part II.B.

77. Laura L. Mall, *Practical Implications of Murphy Oil on Employee Waivers: An Ecological Disaster or a Dissenter's Pipeline to Freedom?*, 89 Fla. Bus. J. 38, 38 (2015).

§ 7 rights. Board decisions may be appealed to a court of appeals, but neither the Board nor the courts are bound by the decisions of the other on the issue of unfair labor practice claims, including the claim that class action waivers violate § 7.[78] However, the courts of appeals are required to defer to the Board's interpretation of § 7 if such interpretation has a reasonable basis in law.[79] The court of appeals and the Board are bound by the decisions of the Supreme Court, should the Supreme Court ever decide the issue.[80]

The enforceability of class action waivers is increasingly significant because evidence indicates that arbitration agreements in employment contracts are on the rise and have been for several years: "[T]he number of employees covered by employment arbitration plans administered by the American Arbitration Association increased from 3 million employees in 1997 to 6 million in 2001."[81] In 2008, it was estimated that about fifteen percent to twenty-five percent of employers nationally had adopted mandatory arbitration procedures.[82] Thus, a significant number of low-wage workers must adhere to the provisions of employment arbitration agreements, and the use of class action waivers in these arbitration agreements is already fairly common.[83] This increase in arbitration agreements in employment contracts threatens the ability of many low-wage workers to have their wage, hour, and other low-value claims heard if class action waivers in these agreements are held to be enforceable.

The enforceability of class action waivers in arbitration agreements is still uncertain because while some courts have found them unenforceable, most courts have upheld such provisions in employment arbitration agreements. The few courts that have found class action waivers in arbitration agreements unenforceable have done so on the basis of unconscionability or public policy, because such a provision operates solely to the advantage of the employer.[84] However, the majority of courts deciding this precise issue have found that class action waivers are valid in employment arbitration agreements, primarily for

78. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1003 (2005) (Stevens, J., concurring).

79. 12 EMP'T COORDINATOR LABOR RELATIONS § 52:45, DEFERENCE GIVEN TO NLRB'S INTERPRETATIONS OF LAW, Westlaw (database updated Mar. 2016).

80. Ross E. Davies, *Remedial Nonacquiescence*, 89 IOWA L. REV. 65, 90 (2003).

81. Stacey L. Pine, *Employment Arbitration Agreements and the Future of Class-Action Waivers*, 4 AM. U. LAB. & EMP. L.F. 1, 11 (2014).

82. Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 411 (2007).

83. Christopher T. Vrountas, *Class Action Waivers and Arbitration Agreements Are Enforceable, for Now*, SES LEGAL EDUC. BLOG (June 2, 2014), http://www.sterlingeducation.com/the-sterling-blog/bid/101658/Class-Action-Waivers-and-Arbitration-Agreements-Are-Enforceable-For-Now.

84. Skirchak v. Dynamics Research Corp., 508 F.3d 49, 59 (1st Cir. 2007); Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1176 (9th Cir. 2003); Gentry v. Super. Ct., 42 Cal. 4th 443, 452 (2007).

two reasons: (1) a class action is not a substantive right under the NLRA, rather it is a procedural right and thus can be waived; and (2) the FAA dictates that an arbitration agreement must be enforced to its terms, even in an employment context where the employer has significantly more bargaining power.[85] The Board, on the other hand, has consistently struck down class action waivers in arbitration agreements as violations of employees' § 7 rights.[86] This Note argues that the Board is correct because the courts' decisions have provided little basis for narrowing employees' § 7 rights by excluding class actions from these rights. Furthermore, because the Board has reasonably interpreted § 7 to include the right to pursue a class action, the courts should defer to this interpretation.

A. Interpretation of the Section 7 Catchall

The Board and the Supreme Court have often interpreted the § 7 catchall broadly in order to ensure that employees can maintain bargaining power through collective activity in various workplaces.[87] The right to engage in "concerted activities . . . for the purpose of mutual aid or other protection" under § 7 thus acts as a catchall for collective activity.[88] The Board and the courts have analyzed the catchall as containing two separate elements: (1) concerted activity; and (2) mutual aid or protection.[89] Both elements must be established in order for the employee activity to constitute a protected § 7 activity.[90] This Part will examine the wide boundaries established by the Supreme Court for both elements.

The Supreme Court has established a broad reading of "concerted activity" under § 7, explaining that "[t]here is no indication that Congress intended to limit this protection to situations in which an employee's activity and that of [] fellow employees combine with one another in any

85. D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 360 (5th Cir. 2013); Sutherland v. Ernst & Young LLP, 726 F.3d 290, 297 n.8 (2d Cir. 2013); Richards v. Ernst & Young, LLP, 744 F.3d 1072, 1075 (9th Cir. 2013); Jasso v. Money Mart Express, Inc., 879 F. Supp. 2d 1038 (N.D. Cal. 2012); Morvant v. P.F. Chang's China Bistro, Inc., 870 F. Supp. 2d 831 (N.D. Cal. 2012); Delock v. Securitas Sec. Servs. USA, Inc., No. 4:11-cv-520-DPM, 2012 WL 3150391 (E.D. Ark. Aug. 1, 2012); Nelsen v. Legacy Partners Residential, 144 Cal. Rptr. 3d 198 (Ct. App. 2012); Iskanian v. CLS Transp. L.A., LLC, 142 Cal. Rptr. 3d 372 (Ct. App. 2012), *appeal docketed*, 147 Cal. Rptr. 3d 324 (Cal. Sept. 19, 2012).

86. Brinker Int'l Payroll Co., 27-CA-110765, 2014 WL 2547547 (N.L.R.B. June 4, 2014); Flyte Tyme Worldwide, 04-CA-115437, 2014 WL 2507633 (N.L.R.B. June 3, 2014); Fairfield Imports, LLC, 20-CA-035259, 2014 WL 2507632 (N.L.R.B. June 3, 2014); Labor Ready Sw., Inc., 31-CA-072914, 2014 WL 1692778 (N.L.R.B. Apr. 29, 2014).

87. Eastex, Inc. v. NLRB, 437 U.S. 556, 567 (1978).

88. *Id.* at 558.

89. *See id.*

90. *See id.* at 564–66; *see also* Michael D. Schwartz, *A Substantive Right to Class Proceedings: The False Conflict Between the FAA and NLRA*, 81 Fordham L. Rev. 2945, 2963 (2013).

particular way."[91] An individual employee can undertake "concerted activity" when she acts as a representative for at least one other employee or when she intends to induce group activity.[92] Protected § 7 concerted activity has included employees acting alone to vindicate rights statutorily provided to all employees and an individual bringing a group complaint to the attention of management.[93]

The definition of "mutual aid or protection" is similarly broad. The Supreme Court has found that an employee acts for mutual aid or protection when she seeks to improve the terms and conditions of employment.[94] This includes action taken to improve working conditions "in administrative and judicial forums," such as when employees initiate appeals to legislators or agencies and file judicial actions.[95] Employees who join in a lawsuit together against their employer are engaging in protected § 7 activity when the lawsuit seeks to address employer actions that have been detrimental to their working conditions.[96] The Court has found that the broad language of "mutual aid or protection" indicated that Congress intended to protect a wide variety of employee concerted activities because it knew that labor disputes were not always best resolved in the immediate employment context.[97] The Court has held that arbitrarily limiting the employee actions that constitute protected § 7 rights would "frustrate the policy of the [NLRA] to protect the right of workers to act together to better their working conditions."[98] Section 7 thus protects different forms of collective action—including collective legal action—which tend to advance and protect employee rights and federal labor policy.

B. Class Actions as a Substantive Section 7 Right

This Part addresses Supreme Court precedent and Board decisions to argue that pursuit of a class action is a substantive § 7 right. In *D.R. Horton, Inc.*, the Board first addressed the issue of whether a class action prohibition in an arbitration agreement violated § 7.[99] This case involved a typical employment arbitration agreement that prohibited employees from pursuing class actions and that required employees to sign the

91. NLRB v. City Disposal Sys., 465 U.S. 822, 835 (1984).

92. *Id.* at 831.

93. Alleluia Cushion Co., 221 N.L.R.B. 999, 1000 (1975); Meyers II, 281 N.L.R.B. 882, 887 (1986).

94. *Eastex*, 437 U.S. at 565.

95. *Id.* at 566; Michael D. Schwartz, Note, *A Substantive Right to Class Proceedings: The False Conflict Between the FAA and NLRA*, 81 Fordham L. Rev. 2945, 2965 (2013).

96. *See* Health Enters. of Am., Inc., 282 N.L.R.B. 214 (1986); Trinity Trucking & Materials Corp., 221 N.L.R.B. 364 (1975).

97. *Eastex*, 437 U.S. at 565.

98. *Id.* at 567 (quoting NLRB v. Wash. Aluminum Co., 370 U.S. 9, 14 (1962)).

99. D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012 WL 36274, at *1 (Jan. 3, 2012).

agreement as a condition of employment.[100] As in many cases where an employer infringes on an employee's § 7 rights, the employee in this case filed an unfair labor practice claim with the Board when his employer refused to submit to class arbitration.[101] For the first time, the Board applied § 7 to class actions and interpreted it as including the right to pursue class action.[102] This Part examines the Board's interpretation and argues that the interpretation of class action as a substantive § 7 right is reasonable and should thus be deferred to by the courts.

In finding that pursuing a class action is a substantive § 7 right, the Board relied heavily on precedent that strongly favors including collective legal action as a protected concerted activity under § 7.[103] The Board relied on Supreme Court precedent that substantive rights cannot be contractually waived in holding that the class action waiver violated § 7.[104] Because of this precedent, the right to pursue a class action cannot be waived in an arbitration agreement if it is a § 7 right and because an arbitration agreement is a contract. Beyond this precedent, there is ample support for the Board's conclusion that pursuing class actions is a substantive right under § 7 given the wide boundaries of the § 7 catchall, as discussed in Part II.A.

Employees' pursuit of a class action is a collective activity that fits well within the § 7 catchall as defined by the courts and the Board.[105] The named plaintiffs in class actions act in a representative capacity, a scenario that the Supreme Court deemed "concerted activity" under § 7.[106] Class actions also satisfy the "mutual aid or protection" element when employees in a class action bring suit for an employer's systemic violations under state and federal employment statutes.[107] Perhaps most importantly, pursuing a class action is a collective activity that works to advance federal labor policy as defined by the NLRA. The NLRA promotes the right of employees to engage in collective activity in order to combat the inequalities that are often present in the employer-employee relationship.[108] In the Board's most recent decision regarding class action waivers in employment arbitration contracts, *Murphy Oil*,

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at *10.

104. *Id.* at *12.

105. *See* cases cited *supra* note 84.

106. NLRB v. City Disposal Sys., 465 U.S. 822, 831 (1984) (finding that an employee is engaged in concerted activity when "the employee acts as a representative of at least one other employee").

107. Schwartz, *supra* note 95, at 2966 ("The Board had previously held that a suit filed by multiple employees is a form of concerted activity, and so it concluded that the same classification should apply to claims brought on a classwide basis. This is true even if the suit is initiated unilaterally, on behalf of other employees.").

108. 29 U.S.C. § 151 (2016).

the Board found that there was no basis for excluding collective legal action, specifically class action, because class action, as a substantive right, reinforces the primary policy considerations underlying the NLRA.[109] The Board relied on this right in reaching its decision in *D.R. Horton*, and courts have reaffirmed this right in many cases that remain good law today.[110]

In comparison, some courts that have addressed the issue of class action waivers in employment contracts have disagreed with the Board on the issue of whether class action is a substantive right or a procedural right.[111] These courts have ignored the established judicial precedent defining what a substantive right is by ignoring the nature of the substantive rights under the NLRA. For example, in declining to follow the Board's decision in *D.R. Horton*, the Fifth Circuit—the only federal circuit court to have addressed this issue of class action as a substantive right thus far—found that class action is not a § 7 right.[112] In particular, the Fifth Circuit relied on Supreme Court precedent that found there is no substantive right to class action under the Age Discrimination Employment Act and the FLSA.[113] This Subpart argues that the Fifth Circuit and other courts have erroneously relied on cases that dealt with collective legal action brought under other employment statutes, such as the FLSA, as precedent supporting the notion that collective legal action is not a substantive right.[114] In Board decisions after *D.R. Horton*, the Board explained that while the underlying legal claims involved the FLSA, it was the NLRA that was the source of the relevant, substantive right to pursue those claims concertedly.[115] In comparison, other employment statutes create only individual rights, and under these statutes, class action is merely a procedure through which these claims can be brought. The NLRA is unique in that it creates substantive collective rights. Thus, these courts have failed to address the unique nature of the NLRA, which is important in determining whether class action is a substantive right under the NLRA that cannot be waived through agreement.

Regarding whether a right is substantive or procedural, the Supreme Court provides: "[t]he most helpful way . . . of defining a substantive

109. Murphy Oil U.S.A., Inc., 361 N.L.R.B. No. 72, 2014 WL 54654, at *8 (Oct. 28, 2014) ("Indeed, concerted legal activity would seem, if anything, to be a *favored* form of concerted activity under the Act because it would have the least potential for economic disruption, the harm that Congress sought to prevent in enacting the NLRA, as Section 1 of the Act explains.").

110. Peter Danysh, *Employing the Right Test: The Importance of Restricting* AT&T v. Concepcion *to Consumer Adhesion Contracts*, 50 HOUS. L. REV. 1433, 1465–66 (2013).

111. D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 357 (5th Cir. 2013).

112. *Id.*

113. *Id.*

114. *Id.*

115. Murphy Oil USA, Inc., 361 N.L.R.B. No. 72, 2014 WL 5465454, at *12 (Oct. 28, 2014).

rule . . . is as a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process."[116] For example, collective action under FLSA § 216(b) is not a substantive right, but it is a mechanism through which employees can better ensure fairness and efficiency in the litigation of wage and hour claims. The purpose of the collective action mechanism of § 216(b) is to give plaintiffs the advantage of lower individual costs through the pooling of resources. In general, such collective action mechanisms also promote judicial efficiency by allowing for "resolution in one proceeding of common issues of law and fact."[117] The substantive rights of the FLSA, on the other hand, focus on individual rights: "in passing the FLSA, Congress did not state support for collective action; rather, its intention was to force employers to compensate workers for individual violations in wage and hour provisions to ensure workers earned enough to reinvest in the economy and boost the nation out of the Great Depression."[118] Thus, in the context of the FLSA, collective legal action does not serve the statute's substantive purpose of establishing employees' right to fair wages, but rather serves the purpose of streamlining litigation of these claims.

Similarly, the Age Discrimination in Employment Act ("ADEA") establishes individual rights and largely follows FLSA § 216(b) by incorporating the procedures of that provision into its own authorization for collective legal action.[119] The substantive purpose of the ADEA is to fight age discrimination in the workforce through individual rights to bring age discrimination claims against employers.[120] Like the FLSA, class and collective actions are mechanisms under the ADEA to ensure fairness and efficiency in bringing these claims: "The ADEA and the FLSA provide individuals with a cause of action, including access to a judicial forum and class action mechanisms, as a means to vindicate their other statutory rights regarding age discrimination and wages."[121] The ADEA and FLSA are representative of employment statutes that establish individual rights and are distinct from the substantive nature of the NLRA, which establishes collective rights.

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116. Marek v. Chesny, 473 U.S. 1, 36–37 n.53 (1985) (citing John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 725 (1974)).

117. Kristin M. Stastny, *Eleventh Circuit Treatment of Certification of Collective Actions Under the Fair Labor Standards Act: A Remedial Statute Without a Remedy?*, 62 U. MIAMI L. REV. 1191, 1203 (2008).

118. Fox Harris, *supra* note 1, at 107–08.

119. 29 U.S.C. § 626(b) (2016).

120. Colleen Gale Treml, Zombro v. Baltimore City Police Department*: Pushing Plaintiffs down the ADEA Path in Age Discrimination Suits*, 68 N.C. L. REV. 995, 995 (1990).

121. Note, *Deference and the Federal Arbitration Act: The NLRB's Determination of Substantive Statutory Rights*, 128 HARV. L. REV. 907, 927 (2015).

The courts that declined to follow *D.R. Horton* in finding that pursuing class actions is not a substantive right under the NLRA have failed to address the unique nature of the NLRA, and instead have incorrectly relied on the employment statutes that establish individual rights. In *D.R. Horton*, the court explained, "the right allegedly violated by [D.R. Horton's arbitration agreement] is 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."[122] The purpose of collective action under the NLRA, including collective legal action, is to equalize bargaining power between employees and employers and to ensure industrial stability.[123] As discussed above in Part I, class actions serve this purpose, in addition to efficiency and fairness purposes. Because class actions have nonprocedural purposes under the NLRA, pursuing a class action is a substantive § 7 right. While § 7 does not create a right to be certified as a class under Rule 23, it creates a substantive right to pursue class action procedures as a protected "concerted activity" when done for the mutual aid and benefit of other employees, which includes pursuing claims under other employment statutes.[124] Thus, the Fifth Circuit did not persuasively explain why pursuing class actions is not a substantive right when it fits under the broad definition of "concerted activities . . . for other mutual aid and protection."[125] Upholding the Fifth Circuit's reasoning, instead of the Board's decisions to invalidate class action waivers, would therefore unjustifiably restrict § 7 activity.

C. The Federal Arbitration Act as Applied to Employment Arbitration Agreements with Class Action Waivers

This Subpart focuses on the courts' application of the Federal Arbitration Act ("FAA") to class action waivers in employment arbitration agreements. Many courts have used the liberal federal policy and Supreme Court precedent encouraging the use of arbitration to justify upholding class action waivers in employment arbitration agreements, while ignoring the strong federal policy of protecting employee rights underlying the NLRA. Such decisions can have dangerous implications for employee rights because these courts are prioritizing the goals of the FAA over the goals of the NLRA.

The FAA essentially establishes that an arbitration agreement and all of its terms are generally enforceable.[126] There are only two exceptions to this rule: The first is the "savings clause" exception, which states that

122. D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012 WL 36274, at *10 (Jan. 3, 2012).

123. *Id.*

124. *Id.* ("Rule 23 may be a procedural rule, but the Section 7 right to act concertedly by invoking Rule 23, Section 216(b), or other legal procedures is not.").

125. 29 U.S.C. § 157 (2016).

126. 9 U.S.C.A. § 2 (West 2016).

an arbitration agreement is not enforceable "upon such grounds as exist at law or in equity for the revocation of any contract."[127] The second exception is satisfied when there is another statute that conflicts and has a clear congressional command that overrides the FAA.[128] The Supreme Court has read the savings clause exception narrowly, finding that arbitration agreements will be enforced even when there is a contrary state law.[129] With regard to the second exception, the Supreme Court has held that the party opposing arbitration must demonstrate a congressional intent to override the FAA in the text, legislative history, or purpose of the conflicting statute.[130] Overall, the Supreme Court has established "a liberal federal policy favoring arbitration" and has traditionally struck down any policy or law that tends to disfavor arbitration.[131]

The Supreme Court's first decision regarding the enforceability of class action waivers in arbitration agreements reinforced this liberal federal policy favoring arbitration.[132] However, this case involved class action waivers in a consumer context, rather than an employment context. Since the NLRA does not apply to the consumer context, it does not provide support for class action as an unwaivable substantive right in the consumer context. In this case, the original plaintiffs, the Concepcions, entered into a contract with AT&T for the sale and servicing of cellphones.[133] The contract included a provision that required all claims be brought in arbitration, and the arbitration provision further barred all class and collective actions.[134] After the Concepcions filed a lawsuit against AT&T for breach of contract, they argued that the arbitration provision was unconscionable because of the class action waiver.[135]

Relying on the California Supreme Court's decision in *Discover Bank v. Superior Court*, the California Supreme Court and the U.S. Court of Appeals for the Ninth Circuit agreed with the Concepcions, and found that the arbitration agreement was unconscionable because "AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions."[136] Effectively, California's *Discover Bank* rule classified most collective arbitration waivers in

127. *Id.*; AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011); D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 358 (5th Cir. 2013).

128. 9 U.S.C.A. § 2 (West 2016); *AT&T Mobility*, 131 S. Ct. at 1746; *D.R. Horton*, 737 F.3d at 358.

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

130. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987).

131. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013); CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 669 (2012); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985).

132. *See generally AT&T Mobility LLC*, 131 S. Ct. 1740.

133. *Id.* at 1744.

134. *Id.*

135. *Id.* at 1744–45.

136. *Id.* at 1745.

consumer contracts as unconscionable.[137] The U.S. Supreme Court reversed, finding that the FAA preempted the California rule establishing that unconscionable contracts are void.[138] In reaching this conclusion, the Court relied upon case law establishing that the primary purpose of the FAA is to encourage arbitration by enforcing arbitration agreements to their terms.[139] Thus, if a state law frustrates this purpose, the FAA preempts the law. The Court also found that the number of parties involved and the added procedural requirements placed on the arbitrator relative to class certification would further frustrate arbitration by eliminating its advantages, which include informality, speed, and lower cost.[140] Therefore, the Court found the arbitration agreement and its class action waiver enforceable because the FAA preempted any state law that tended to disfavor arbitration.[141]

Three months after *AT&T Mobility*, the Board decided *D.R. Horton*, which was the first Board decision to address class action waivers in the employment context. Once the Board determined that the arbitration agreement violated the NLRA because class action was a substantive right, as discussed in Part II.A, the Board next considered whether the FAA and the NLRA conflicted on this precise issue.[142] As the only binding precedent for the Board, the Supreme Court has established that if there is a conflict between the two statutes, agencies, such as the Board, are supposed to do their best to accommodate conflicting federal statutes.[143] The Board, relying on this precedent, found that there was no conflict because the class action "waiver interferes with substantive statutory rights under the NLRA, and the intent of the FAA [under Supreme Court precedent] was to leave substantive rights undisturbed."[144] Thus, because the FAA does not allow the waiver of substantive rights, it does not conflict with the NLRA if pursuing a class action is a substantive right. Even if there was a conflict, the Board found that invalidating class action waivers in the employment context would represent an appropriate accommodation of the two statutes because the strong federal policy protecting employees' rights, as established through federal statutes like the NLRA, satisfied the FAA's savings clause exception.[145] In coming to this conclusion, the Board found that the strong federal policy protecting employees' right to engage in protected

137. *Id.*
138. *Id.* at 1753.
139. *Id.* at 1750–51.
140. *Id.*
141. *Id.* at 1753.
142. D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012 WL 36274, at *8 (Jan. 3, 2012).
143. *Id.*; Ralph K. Winter, Jr., *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 72–73.
144. *D.R. Horton, Inc.*, 357 N.L.R.B. at *11.
145. *Id.*

concerted action would do little to undermine the FAA and its policy to encourage the use of arbitration.[146] The employer's incentive to use arbitration for cost and time savings would not be undermined by finding class action waivers unenforceable in an employment context because employment class actions typically involve only twenty employees.[147] The efficiency and manageability advantages of arbitration would therefore remain intact with the typical class action employment arbitration, and thus the purpose of the FAA to encourage arbitration would not be undermined.[148] Thus, in accommodating the two statutes, the Board properly considered the purposes of both statutes.

This Note argues that, while the Board has accommodated the two statutes with a relatively balanced approach, many of the state and federal courts have given too much weight to the goals of the FAA. A majority of courts to date have refused to follow *D.R. Horton*, finding instead that class action waivers in arbitration agreements are enforceable under the FAA, regardless of context.[149] Four federal circuit courts of appeals have addressed the issue of arbitration agreements with class action waivers in employment contracts.[150] Three of the four federal circuit courts, however, provided only conclusory statements or little explanation in support of the decisions to disregard *D.R. Horton*. For example, the U.S. Court of Appeals for the Eighth Circuit, when declining to follow *D.R. Horton* in a case involving FLSA claims, stated that no deference is owed to the Board's reasoning because it has no experience in interpreting the FAA.[151] It further supported its conclusion by finding no contrary congressional command in the FLSA overriding the FAA, but did not explain why the text of the FLSA did not constitute a contrary congressional command.[152] In declining to follow *D.R. Horton*, the U.S. Court of Appeals for the Second Circuit merely stated that it owed no deference to the reasoning of the Board.[153] The U.S. Court of Appeals for the Ninth Circuit declined to even address *D.R. Horton* because the party opposing enforcement of the arbitration agreement failed to raise the argument until after the parties had briefed.[154] The

146. *Id.* at *12–13.

147. *Id.* at *11–12.

148. *Id.* at *12.

149. *See, e.g.*, Jasso v. Money Mart Express, Inc., 879 F. Supp. 2d 1038, 1048–49 (N.D. Cal. 2012); Morvant v. P.F. Chang's China Bistro, Inc., 870 F. Supp. 2d 831, 838–41 (N.D. Cal. 2012); DeLock v. Securitas Sec. Servs. USA, Inc., 883 F. Supp. 2d 784, 789–91 (E.D. Ark. 2012).

150. Owen v. Bristol Care, Inc., 702 F.3d 1050, 1054 (8th Cir. 2013); Sutherland v. Ernst & Young LLP, 726 F.3d 290, 297 n.8 (2d Cir. 2013); Richards v. Ernst & Young, LLP, 744 F.3d 1072, 1075 (9th Cir. 2013); D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 360 (5th Cir. 2013).

151. *Owen*, 702 F.3d at 1054.

152. *Id.* at 1055.

153. *Sutherland*, 726 F.3d at 297 n.8.

154. *Richards*, 744 F.3d at 1075.

conclusory reasoning of these circuit courts indicate a potentially dangerous trend in overriding the Board's authority to define § 7 rights through the use of arbitration agreements.

The Fifth Circuit provided more explanation for its determination that the Board's interpretation of the NLRA in *D.R. Horton* conflicted with the FAA.[155] The court considered whether the interpretation fit under either of the two exceptions to the general FAA rule that an arbitration agreement must be enforced to its terms.[156] The court found that the Board had not satisfied the savings clause exception because class arbitration would discourage employers from pursuing arbitration given the added costs, time, and formality with having multiple plaintiffs, thereby frustrating the policy of the FAA.[157] The court held that the second exception was also not satisfied by the NLRA because the party opposing arbitration bears the burden of proving a congressional command and that all doubts must be resolved in favor of arbitration because federal policy favors arbitration.[158] The court held that the general language of the NLRA was insufficient to constitute a contrary congressional command.[159] In particular, the court found that the lack of more specific words related to the issue, such as "arbitration" or "class action," undermined the assertion that the NLRA contained a clear contrary congressional command. Therefore, the court found that the arbitration agreement must be enforced to its terms, including the class action waiver.[160]

In contrast, the Board came to different conclusions than that of the Fifth Circuit regarding the accommodation of the two statutes. The Board analyzed the flaws in the Fifth Circuit's reasoning in its most recent decision regarding class action waivers in employment arbitration agreements, *Murphy Oil*.[161] First, the Board found that invalidating arbitration agreements with class action waivers would not undermine the FAA because the NLRA does not legally conflict with the FAA, given the Supreme Court precedent establishing that the FAA does not allow the waiver of substantive rights.[162] Accordingly, the Board found that class action waivers in an employment arbitration agreement fall under the savings clause exception of the FAA because these agreements restrict employees' ability to partake in nondisruptive collective activity for the purpose of bettering the workplace, and precedent clearly finds

155. *D.R. Horton, Inc.*, 737 F.3d at 362.
156. *Id.* at 358.
157. *Id.* at 359.
158. *Id.* at 360.
159. *Id.*
160. *Id.* at 362.
161. Murphy Oil USA, Inc., 361 N.L.R.B. No. 72, 2014 WL 5465454, at *9 (Oct. 28, 2014).
162. *Id.*

such agreements unlawful.[163] The Board found that the second exception, the requirement of a contrary congressional command, was also met because the NLRA's broad language clearly authorizes concerted legal activity, which is supported by Supreme Court precedent.[164]

Alternatively, the Board pointed out that if the two statutes do conflict, agencies are supposed to try and accommodate conflicting federal statutes instead of relying on the preemption doctrine.[165] The Board's finding on this point is consistent with Supreme Court precedent.[166] The Board found that the federal circuit courts, specifically the Fifth Circuit, did not properly accommodate the two statutes because they gave too much weight to the FAA and its policies.[167] In particular, the courts merely relied on *AT&T Mobility* and the liberal federal policy favoring the FAA and arbitration in finding that the NLRA is required to yield to the FAA.[168] However, the Board held that *AT&T Mobility* does not apply here because the case involved accommodation of two federal statutes, not preemption of state law, which was the issue in *AT&T Mobility*. Furthermore, the Board pointed out that the Supreme Court has made clear that every federal statute has limits,[169] so a liberal federal policy does not mean the FAA is limitless. Because the courts did not provide justification beyond the liberal policy favoring arbitration for finding that the FAA trumped the NLRA in this case, "the majority never persuasively . . . 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."[170] The Board seemed to imply that the lack of explanation indicated an improper presumption of the courts that the FAA held more importance than the NLRA. Such a presumption supports the argument that these decisions have dangerous implications for § 7 rights since the goal of the FAA, that of encouraging arbitration, may be given more weight in an accommodation than the goal of the NLRA to provide for collective employee rights.

Furthermore, the issue in question, collective legal action, implicates the NLRA more than it does the FAA because "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."[171] Thus, the Board indicated that the

163. *Id.*; Nat'l Licorice Co. v. NLRB, 309 U.S. 350, 364 (1940).

164. *Murphy Oil USA, Inc.*, 361 N.L.R.B. at *9.

165. Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942).

166. D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012 WL 36274, at *8 (Jan. 3, 2012).

167. *Murphy Oil USA, Inc.*, 361 N.L.R.B. at *12.

168. *Id.*

169. Rodriguez v. United States, 480 U.S. 522, 525–26 (1987) (finding that "no legislation pursues its purposes at all costs").

170. Herrington v. Waterstone Mortg. Corp., 993 F. Supp. 2d 940, 946 (W.D. Wis. 2014).

171. *Id.*

policies of the NLRA should have received more weight in the accommodation of the two statutes because of its explicit policy to provide collective rights is directly affected.

Additionally, the Board found that the Fifth Circuit gave too much weight to the FAA because invalidating arbitration agreements with class action waivers would not "frustrate" the primary purpose of the FAA to encourage arbitration.[172] Employers still have incentive to pursue arbitration if class action waivers are invalidated. With arbitration, employers can avoid juries and the unpredictability of trial. Employers can also use "expert arbitrators less likely than juries to favor employees, . . . limited discovery, and . . . the 'repeat player' dynamics created by the reality that employers, but not so often employees, will return to the arbitral forum in future workplace disputes."[173] Thus, the invalidation of class action waivers would not significantly frustrate the purpose of the FAA to promote the use of arbitration because employers are likely to still favor arbitration over litigation. Additionally, as discussed in Part I, upholding class action waivers would severely frustrate the purpose of the NLRA. As a true accommodation weighs the impact of the issue on the competing goals of the conflicting statutes, the Fifth Circuit's decision does not reflect a proper accommodation of the NLRA and the FAA since the impact on the FAA is minimal in comparison to the impact on the NLRA.

Furthermore, the Fifth Circuit's application of the FAA to the NLRA should not be followed because it presents an opportunity for employers to challenge the Board's interpretation of potential § 7 employee collective activities that have yet to be established as a § 7 right through Supreme Court precedent. The Fifth Circuit's decision found that the Board's interpretation of class action as a § 7 activity conflicts with the FAA because it discourages the use of arbitration, and that any such discouragement dictates enforcement of arbitration agreements to its terms.[174] Given that class action waivers severely frustrate the NLRA's policies, the Fifth Circuit indicated that the goal of the FAA, to enforce arbitration agreements to its terms, prevails over the goal of the NLRA, to protect collective activity and prevent industrial strife. Thus, under the Fifth Circuit's analysis, the Board's interpretation of an employee collective activity will be given little or no weight in an accommodation of the two statutes when such an activity might discourage arbitration. Only the well-established § 7 rights, such as collective bargaining and union organizing, are presumably safe from this conflict, since substantive rights cannot be waived. But whenever there is an issue over

172. *Rodriguez*, 480 U.S. at 525–26.

173. Henry H. Drummonds, *Avoiding the "Plague" of Class Action/Representative Action Wage and Hour Suits*, 65 LABOR L.J. 76, 76 (2014).

174. D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 359–60 (5th Cir. 2013).

whether a collective activity is a § 7 right, the Fifth Circuit's reasoning opens the door to further challenges to the authority of the Board in interpreting § 7 rights through the application of the FAA.

Perhaps even more dangerous than the Fifth Circuit's reasoning behind its holding that class action is not a § 7 right is the finding by some courts that even when pursuing a class action is a § 7 right, it can be waived in an arbitration agreement. Several courts have found that even when class action is considered a substantive right under § 7, class action waivers in arbitration agreements should still be upheld.[175] These courts applied similar reasoning to the Fifth Circuit in concluding that the FAA prevails over the NLRA. The courts first found that there was a conflict between the FAA and the NLRA because compelling class actions conflicts with the FAA's purpose to enforce arbitration agreements to the terms,[176] and the courts also found that none of the FAA exceptions applied.[177] Ultimately, these courts found that even if class action was a protected § 7 right, it can be waived in an arbitration agreement.

The decisions of these courts have even more dangerous implications for § 7 rights than that of the reasoning of the Fifth Circuit's decision in *D.R. Horton.* Under this line of case law, pursuing class actions is clearly a substantive § 7 right that can be waived when it is in an arbitration agreement, regardless of context, thus allowing employers to require waiver of this right in mandatory arbitration agreements. However, waiving § 7 rights goes against Supreme Court precedent, which establishes that substantive rights cannot be waived through agreement and undermines the NLRA. Furthermore, there is no precedent indicating that different § 7 rights should be analyzed under different standards. The implication that necessarily follows from the above cases, therefore, is that all § 7 rights can be waived in an arbitration agreement. Otherwise, a new and arbitrary category of § 7 rights has been implicitly created—those rights that can be waived, as compared to those that cannot be waived. But, courts have never made

175. *See* Jasso v. Money Mart Express, Inc., 879 F. Supp. 2d 1038 (N.D. Cal. 2012); Morvant v. P.F. Chang's China Bistro, Inc., 870 F. Supp. 2d 831 (N.D. Cal. 2012); DeLock v. Securitas Sec. Servs. USA, Inc., 883 F. Supp. 2d 784 (E.D. Ark. 2012); Nelsen v. Legacy Partners Residential, 144 Cal. Rptr. 3d 198 (Ct. App. 2012); Iskanian v. CLS Transp. L.A., LLC, 142 Cal. Rptr. 3d 372 (Ct. App. 2012).

176. *See DeLock*, 883 F. Supp. 2d at 787; *Jasso*, 879 F. Supp. 2d at 1048; *Morvant*, 870 F. Supp. 2d at 842 (N.D. Cal. 2012); *Iskanian*, 142 Cal. Rptr. 3d at 380.

177. *See DeLock*, 883 F. Supp. 2d at 789 (The text of the NLRA "contains no command that is contrary to enforcing the FAA's mandate"); *Jasso*, 879 F. Supp. 2d at 1049; *Morvant*, 870 F. Supp. 2d at 845 ("Because Congress did not expressly provide that it was overriding any provision in the FAA when it enacted the NLRA ... the Court cannot read such a provision into [the NLRA]."); *Nelsen*, 144 Cal. Rptr. 3d at 214 ("[T]here is no language in the NLRA ... demonstrating that Congress intended the employee concerted action rights therein to override the mandate of the FAA." (internal quotation marks omitted)); *Iskanian*, 142 Cal. Rptr. 3d at 382 ("The *D.R. Horton* decision identified no 'congressional command' in the NLRA prohibiting enforcement of an arbitration agreement pursuant to its terms.").

inquiries into the relative values of different § 7 rights, and such inquiries would add unnecessary complexity to the goal of the NLRA to ensure that employees have collective rights generally. If these arbitration agreements are upheld on the mere assertion that the FAA's policy should be applied liberally, the NLRA would become a futility because employers will be incentivized to create arbitration agreements that waive collective rights, even those beyond class actions, and courts can continue to apply the FAA liberally in upholding these waivers.

The reasoning of these courts strongly supports the FAA at the expense of the NLRA. Such prioritizing could potentially allow employers to restrict employee collective rights through the use of arbitration agreements. The reasoning of the Board represents a true accommodation of the two statutes because the accommodation has minimal impact on the goals of both statutes.

III. Recommendations

Given the divergence between the courts and the Board on the enforceability of class action waivers in employment arbitration agreements, this Part explores two possible avenues that could bind the courts and the Board to the unenforceability of these waivers. First, if the Supreme Court were to issue a decision, the courts and the Board would be bound by such an interpretation. In order to best protect the rights of workers, the Supreme Court should follow the reasoning of the Board.[178] Alternatively, or in addition to, a Supreme Court precedent binding the Board and the courts, Congress could take action to ensure employers will not infringe the rights of low-wage workers.

A. The Supreme Court Should Defer to the Board's Interpretation of Class Actions as a Section 7 Activity.

Should the Supreme Court decide the issue of the enforceability of class action waivers in employment arbitration agreements, the Court should defer to the Board's interpretation of class action as a § 7 right. Such deference would be reasonable because of the Board's expertise in implementing the NLRA and because such an interpretation avoids conflict with the FAA through the Supreme Court's requirement that substantive rights cannot be waived through agreement. The Board's latest decision in *Murphy Oil* regarding class action waivers in employment arbitration agreements reaffirmed its decision in *D.R. Horton*. In *Murphy Oil*, however, the Board addressed the arguments of the courts that have overturned *D.R. Horton*, primarily the Fifth Circuit's, and analyzed the legal issue in the context of federal labor policy in general. The Board

178. *See supra* note 177.

found that class action waivers are always invalid in employment contracts.[179]

Thus, the Supreme Court should follow the *Murphy Oil* Board in holding that pursuing class actions is a substantive right under the NLRA. Such a holding would preclude the narrowing of § 7 rights while avoiding conflict with the FAA because of the principle that substantive rights cannot be waived through agreement. In doing so, the Supreme Court should defer to the Board's interpretation of class action as a substantive § 7 right. The Board has the "special function of applying the general provisions of the Act to the complexities of industrial life."[180] Like other administrative agencies, the Board is entitled to judicial deference when it interprets an ambiguous provision of a statute that it administers.[181] A provision is ambiguous when Congress has not spoken on the precise issue.[182] Because Congress delegated the issue of defining and accommodating § 7 rights to the Board, a court should not substitute its own judgment for a reasonable interpretation given by the Board.[183] As discussed in Part II.A, class actions fit well within the boundaries of established precedent defining § 7 rights. Furthermore, class actions clearly uphold the purpose of the NLRA. Thus, the pursuit of class actions as a substantive right under § 7 is a reasonable construction of the NLRA and courts should not substitute their own judgment over this issue.

Deferring to this interpretation will not conflict with the FAA or undermine its purpose, and it will not blur the line between substantive and procedural rights. First, Board deference on this precise issue does not present the concerns some courts had over deferring to the Board's interpretation of the conflict between the NLRA and the FAA.[184] Deferring to the Board only on the issue of class action as a substantive § 7 right does not require any interpretation of the FAA and its policies, and thus, the deference is limited to that area in which the Board has expertise—the NLRA. Second, deferring to the Board on this issue and finding that pursuing a class action is a substantive right leads to the conclusion that there is no conflict with the FAA for the same reasons that the Board found no conflict: since pursuing a class action is a substantive right under the NLRA, Supreme Court precedent dictates that it cannot be waived through agreement. Because the intent of the

179. Murphy Oil USA, Inc., 361 N.L.R.B. No. 72, 2014 WL 5465454, at *6–7 (Oct. 28, 2014).

180. NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963).

181. *See, e.g.*, NLRB v. United Food & Commercial Workers, 484 U.S. 112, 123 (1987); *cf.* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

182. *Chevron U.S.A. Inc.*, 467 U.S. at 842.

183. *Id.* at 844.

184. Owen v. Bristol Care, Inc., 702 F.3d 1050, 1054 (8th Cir. 2013) (holding that no deference was owed to the Board because it has no expertise in interpreting the FAA); Sutherland v. Ernst & Young LLP, 726 F.3d 290, 297 n.8 (2d Cir. 2013).

FAA was to leave statutory rights alone, § 7 rights cannot be waived through arbitration agreements. Thus, there is no conflict between the NLRA and the FAA. Finally, pursuing class actions is the substantive right under the NLRA, not the right to class action certification: "Rule 23 may be a procedural rule, but the § 7 right to act concertedly by invoking Rule 23, § 216(b), or other legal procedures is not."[185] The right to invoke class action procedures should not create any confusion between the procedural and substantive rights of workers. Ultimately, Supreme Court deference to the Board on the first issue of substantive rights under § 7 is consistent with deference principles and will avoid the problems discussed in Part II.

B. Statutory Fix Could Ensure That Class Action Remains a Protected Employee Activity.

Given the Supreme Court's liberal policy toward the FAA, it is reasonable to predict that *D.R. Horton* and *Murphy Oil* will not survive and class action waivers will be upheld in employment arbitration agreements. In any case, Congress should consider a statutory fix to ensure that employees will be able to fully exercise their substantive rights under all employment statutes, thus preserving federal labor policy. This could involve either amending the FAA or the NLRA.

The NLRA could be amended in a way that is consistent with the FAA. In order to avoid conflicting with the FAA and the Supreme Court's liberal policy favoring arbitration, Congress could add an explicit command in the NLRA prohibiting class action waivers in employment contracts. Such a command would satisfy the second exception to the FAA's general enforceability rule, a contrary congressional command. While the second exception to the FAA does not necessarily require an explicit command, the courts' generally broad application of the FAA may lead to unfavorable interpretations of commands that are anything less than explicit. For example, the Fifth Circuit, in its decision to not follow *D.R. Horton*, found the language of the NLRA too general to constitute a clear contrary congressional command. The Fifth Circuit specifically pointed out that the NLRA does not mention "arbitration," or "class action."[186] In order to ensure that courts will find a contrary congressional command, Congress should include in the NLRA an explicit provision designating class action as a protected concerted activity and a provision that states that all protected concerted activities cannot be waived in any arbitration agreement.

185. D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012 WL 36274, at *10 (Jan. 3, 2012).) (internal citations omitted).

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

A potential problem with inserting such an explicit contrary congressional command in the NLRA is that it could incentivize those courts that strongly favor the FAA to find other collective activities outside of class action—such as social media posts aiming to encourage group action—as unprotected under § 7. Also, narrowing the provision to only discuss arbitration waivers of class actions would not account for changing circumstances. The workplace is constantly evolving and as new forms of collective activity arise, a narrow NLRA amendment would offer no protection from the scrutiny of the courts when arbitration agreements attempt to waive these activities. Under typical statutory construction tools, an enumeration of class actions could actually support a court's conclusion that Congress did not intend a particular collective activity be a protected § 7 activity.

Amending the FAA might avoid some of the problems discussed above. An amendment of the FAA should be narrowly tailored to prohibit class action waivers in the employment context when doing so would preclude an employee, as defined by the NLRA, from accessing the court or arbitral system to participate in a class action as defined by Rule 23. Such an amendment does not prohibit or necessarily discourage employers from using arbitration. All of the other advantages of arbitration are still largely intact, as discussed in Part II.B. The amendment would also be consistent with the current FAA statute because the FAA does not allow the waiver of substantive rights. In any case, the narrow scope of the amendment would do little to frustrate the purpose of the FAA, as class action waivers would not invalidate arbitration agreements in a wide variety of contexts.

CONCLUSION

Given employees' minimal bargaining power in the employee-employer relationship, many employment-related statutes necessarily protect low-wage workers from exploitation, from the FLSA, which guarantees overtime pay and a minimum wage, to the Occupational Safety and Health Act, which maintains health and safety standards in workplaces.[187] The NLRA not only ensures that workers have access to collective means of ensuring these protections, but it is also meant to protect industries and the economy by diverting workers away from disruptive forms of collective activity. Without the ability to bring their claims as a class, many low-wage workers will be unprotected by the laws and employers will be incentivized to exploit them. These workers will be forced to seek redress through other means, including potentially disruptive actions. This could lead to widespread industrial strife, considering that many workplace violations, particularly wage theft, are

187. 29 C.F.R. § 1910.1 (2016).

prevalent across industries. Thus, federal labor policy and the purpose of the NLRA dictate that pursuing class actions is a protected concerted activity, and the NLRA's substantive rights should not yield to the FAA because federal labor policy would be severely frustrated by class action waivers.

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