COMMENT

ALL FOR ONE AND ONE FOR ALL—THE CASE FOR INVALIDATING COLLECTIVE ACTION ARBITRATION WAIVERS UNDER SECTION 7 OF THE NLRA*

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I. INTRODUCTION

This Comment addresses a split among the circuits[1] regarding whether employees have a substantive right under Section 7 of the National Labor Relations Act[2] ("NLRA" or "the Act")[3] to bring claims collectively in the face of mandatory

1. The split pits Jacob Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1155 (7th Cir. 2016) against Cellular Sales of Mo., LLC v. NLRB, 824 F.3d 772, 776 (8th Cir. 2016). The Ninth Circuit joins the Seventh Circuit while the Fifth Circuit joins the Eighth Circuit. *See, e.g.*, Morris v. Ernst & Young, LLP, 834 F.3d 975, 984 (9th Cir. 2016); D.R. Horton, Inc., v. NLRB, 737 F.3d 344, 362 (5th Cir. 2013); Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1021 (5th Cir. 2015).

2. 29 U.S.C. §§ 151, *et seq*. (2012).

3. It is worth noting that the NLRA covers only employees of private employers in

arbitration.[4] When an employee is forced to sign an arbitration agreement waiving any kind of collective action against the employer as a precondition to employment,[5] the agreement is generally known as a collective action waiver.[6] After a few months on the job, however, the employee may find him or herself misclassified as a wage worker and seek to bring a grievance claim against the company, which then immediately moves to arbitrate pursuant to the terms of the employment contract. Ordinarily, such a provision would not be an issue. Courts have consistently invoked the Federal Arbitration Act[7] ("FAA") as a strong policy presumption in favor of arbitration and would have little hesitation upholding the mandatory arbitration provision.[8] However, the plot thickens when the aggrieved employee is not the only one affected. What can the employee do when he or she finds out that Janice from accounting,[9] along with *25 million* other workers in similarly-situated positions,[10] are systematically being deprived of fair compensation?

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interstate commerce and excludes employees of railroads and airlines, as well as agricultural employees, domestic service workers, supervisors, managers, and independent contractors. *See* 29 U.S.C. § 152(2) (defining "employer"); *id*. § 152(3) (defining "employee").

4. At the time of writing, all three cases have been consolidated and set for oral arguments on Oct. 2, 2017. The government, which initially supported the National Labor Relations Board, sided with the employers after a change in presidential administrations. *See* Amy Howe, *Argument Analysis: An Epic Day for Employers in Arbitration Cases?*, SCOTUSBLOG (Oct. 2, 2017, 2:50 PM), http://www.scotusblog.com/2017/10/argument-analysis-epic-day-employers-arbitration-case/ [https://perma.cc/VD8C-JQ58].

5. This practice is common. *See* Maria J. Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1740–41 (2006) (noting that, in response to the liberal federal policy towards arbitration, it is common for U.S. businesses to begin imposing arbitration clauses in contracts, mail inserts, licenses, and other business transactions).

6. *Id.* at 1746; *see also* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011), discussed *infra* in Part II, for the Court's treatment of class-action waivers in a pure consumer contract.

7. 9 U.S.C. §§ 1, *et seq*. (2012). The relevant FAA language reads "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, of an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or inequity for the revocation of any contract." *Id.* § 2.

8. *See* CompuCredit Corp. v. Greenwood, 56 U.S. 95, 98 (2012) (citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

9. Maverickblah, *Janice in Accounting Compilation—Last Week Tonight with John Oliver*, YOUTUBE (Nov. 9, 2015), https://www.youtube.com/watch?v=k8HpQZUF2OY.

10. To highlight the magnitude of this issue, approximately 55% of nonunion private employees, or 60 million workers, have contracts that are covered by mandatory arbitration agreements. Of those, approximately 25 million employees have noncollective clauses in their arbitration agreements. Transcript of Oral Argument at 54-55, Epic Sys. Corp. v. Lewis, 137 S. Ct. 908 (2017) (No. 16-285). In oral arguments, Justice Breyer noted that this debate could "undermin[e] and chang[e] radically" the labor laws that are the "entire heart

Up until recently, the employee's most logical recourse would be to argue that arbitration agreements are manifestly "unfair" given the frequency with which businesses employ arbitration agreements to dictate important aspects of dispute resolution that parties had not properly bargained for *ex-ante*.[11] However, such unconscionability arguments have not been widely successful.[12] Superseding any concerns of unconscionability, courts are increasingly cognizant of the risk that plaintiffs in a collective suit could exploit the class action procedures to extort massive settlements on otherwise unmeritorious claims.[13] Courts have thus resorted to a variety of methods to invalidate unconscionability challenges in an effort to shield corporations and employers from such liability.[14] As a consequence, few plaintiffs dare to invoke collective rights in mandatory, bilateral arbitration agreements.[15]

Considering the Latin motto *concordia res parvae crescent*[16] may lead to wondering if the doctrine of unconscionability is the only way to challenge class action waivers. In recent years, commentators have noted that arbitration clauses forcing employees to bring forth bilateral arbitration suits highlight a number of legal and policy concerns.[17] For one, the right to aggregate a petition for better working conditions has long been

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of the New Deal." *Id.* at 8–9.

11. Ample amounts of case law and scholarship address whether such collective action waivers are *unconscionable*. *Compare* Adkins v. Labor Ready, Inc., 303 F.3d 496, 502–03 (4th Cir. 2002) (applying West Virginia state law to find that a broad arbitration clause that waived applicant's right to bring a class action did not render that clause unenforceable or unconscionable), *with* Siordia v. City Circuit City Stores, Inc., No. 03-56459, 2005 U.S. App. LEXIS 10925, at *5 (9th Cir. June 9, 2005) (applying California law to find that a prohibition of class-action lawsuits in arbitration agreements is unconscionable and unenforceable); *see also* Glover, *supra* note 5, at 1741 (noting that businesses use arbitration clauses to dictate various characteristics of the arbitration process).

12. *See* Glover, *supra* note 5, at 1751–52 (noting that the majority of circuit courts have upheld the validity of class action waivers against claims that they are unconscionable).

13. *See id.* at 1746.

14. *See* discussion *infra* Parts II–III.

15. One article that addresses the topic at hand is Michael D. Schwartz, *A Substantive Right to Class Proceedings: The False Conflict Between the FAA and NLRA*, 81 FORDHAM L. REV. 2945, 2959–60 (2012). This Comment, however, goes beyond the legal conflicts between the NLRA and the FAA.

16. The phrase generally translates to "unity makes strength." *See, e.g.*, WIKIPEDIA, *Unity Makes Strength*, https://en.wikipedia.org/wiki/Unity_makes_strength [https://perma.cc/3C3M-V3AM] (last visited Jan. 4, 2018).

17. Katherine V.W. Stone & Alexander J.S. Colvin, ECON. POL'Y INST., THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS 18–22 (Dec. 7, 2015), http://www.epi.org/publication/the-arbitration-epidemic/ [https://perma.cc/Z6QJ-8HH8].

codified under Section 7 of the NLRA.[18] Prohibiting the ability to bring collective actions appears to abrogate that right. Second, from a practical standpoint, one must consider the possibility that such waivers, when combined with the potentially high costs of individual litigation for low awards, could effectively preclude meritorious claims from being raised or brought against nefarious employers at all. Similarly, on a broader policy level, it is easy to see how such a result could facilitate and encourage employers to systematically violate labor rights with little accountability.

This Comment will address all three issues, starting with the inescapable legal tension between two behemoth statutes. At its core, this Comment confronts Section 7 of the NLRA and Section 2 of the FAA, which seem, upon first impression, inherently at odds with one another.[19] However, this Comment will develop the argument that upon closer examination, the two statutes can and should in fact co-exist. Circuit courts holding otherwise relied on an erroneous reading of both statutes as well as Supreme Court precedents interpreting them.

This Comment will proceed in six parts. Part I is this introduction. Part II will critically examine the circuit split by looking at Supreme Court precedents supporting collective action waivers to better isolate the judicial and policy issues at play. Part III of this Comment will critically analyze Supreme Court precedents and argue that the Fifth and Eighth Circuits erroneously foreclosed this issue from debate. In fact, the class action waiver cases on which the circuits relied and the collective action waivers presently at issue are distinguishable, and few courts have properly analyzed the interplay between the two statutes and the substantive rights granted by them. In Part IV, this Comment will look at the legislative history of the NLRA as well as past National Labor Relations Board ("NLRB") decisions to support an expansive reading of Section 7's statutory protection to include collective arbitration as a protected substantive right under its "concerted activity" language. In so doing, the Comment will also confront the issue of preemption to show that the NLRA does not necessarily conflict with the FAA mandate. In Part V, this Comment will highlight the detrimental effects that collective action waivers impose on employees and will caution that a failure to allow employees to speak with one voice will likely ensure that

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18. Section 7 of the NLRA reads, in relevant part, that "[e]mployees shall have the right to self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (2012).

19. In fact, it is precisely through such apparent inconsistency that courts have traditionally upheld class action waivers. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011), discussed *infra* Part II.

no employee can speak out at all because of the prohibitive cost of individual arbitration and the ever-present threat of retaliation. On a broader policy level, silencing individual employees will implicitly encourage systematic violations of employment rights that, when aggregated, represent a significant workforce concern. Part VI of this Comment will propose that the Supreme Court should adhere to the Seventh Circuit's interpretation—the correct interpretation—in realizing that Section 7 is a substantive right under the NLRA. This Comment will conclude by reassuring those on the other side of the fence that an invalidation of collective action waivers will neither lead to the demise of arbitration nor encourage plaintiffs' exploitation of companies through malicious use of class action mechanisms.

II. A COURT DIVIDED—CAN EMPLOYEES SUE TOGETHER IN ARBITRATION?

A. Cellular Sales*: John Bauer and His Fight for Overtime Pay*

Cellular Sales is a cellular retail store that, as of 2013, operated over 21 stores in Missouri and Kansas and employed over 106 sales representatives.[20] In November 2010, John Bauer began working for Cellular Sales as an "independent contractor."[21] During an employee meeting, Bauer was converted to employee status and was given a compensation schedule containing an arbitration clause that served as a precondition to continued employment.[22] The arbitration clause stipulated in relevant parts that "[a]ll claims, disputes, or controversies arising out of, or in relation to this document or Employee's employment with Company shall be decided by arbitration . . . . Employee hereby agrees to arbitrate any such claims, disputes, or controversies only in an individual capacity and not as a plaintiff or class member in any *purported class, collective action, or representative proceeding* . . . ."[23] The agreement also bound employees to a commission-based compensation structure.[24] After approximately two years of employment, John Bauer noticed that the commission-based payment structure resulted in compensation even lower than

20. Cellular Sales of Mo., LLC, 362 N.L.R.B. No. 27, *17 (2015), 2015 NLRB LEXIS 165.

21. *Id.*

22. *Id.*

23. *Id.* at *15–16 (emphasis added).

24. *Id.* at *17.

minimum wage.[25] In addition, Bauer noted that Cellular failed to pay him and all other sales representatives, overtime pay for hours worked in excess of 40 per work-week, as required by federal law.[26] Because Bauer was not the only person affected by this alleged labor violation, Bauer filed a class action lawsuit in federal court on behalf of himself and all Cellular Sales representatives around the country.[27] In response, Cellular Sales immediately moved to enforce the arbitration agreement—including the class action-waiver contained therein—against Bauer by requiring Bauer and other aggrieved employees to bring forth claims on an individual basis.[28] Bauer refused and immediately took issue with the arbitration clause itself.[29] While his lawsuit against Cellular Sales was pending, Bauer also filed an unfair labor practice charge with the Board claiming that the arbitration clause violated his federal right to engage in protected concerted activity under Section 7 and Section 8(a)(1) of the NLRA.[30] An administrative law judge agreed with Bauer's arguments, and the NLRB then affirmed the Administrative Law Judge's ruling.[31]

While Bauer's initial labor lawsuit ultimately settled out of court,[32] the battle over Bauer's right to engage in concerted activity was just getting started. The clash with the NLRB's interpretation of its own statute and that of Cellular Sales reached the Eighth Circuit,[33] where the employers brought the big guns to the fight. In support of Cellular's arguments were two Fifth Circuit precedents already denying the right to collectively arbitrate under a set of very similar circumstances.[34] Thus, this analysis must begin with the Fifth Circuit.

B. Examining the Fifth Circuit Precedent—D.R. Horton *& Progeny*

The Fifth Circuit precedent presents analogous facts. In the first case, *D.R. Horton v. NLRB*, plaintiff Cuda had worked at

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25. Kevin J. Skelly, *NLRB Attempts to Stop Employers from Enforcing Arbitration Agreements in Court*, 22 NO. 1 N.J. EMP. L. LETTER 6, *1 (Nov. 2013).

26. *Id.*

27. *Cellular Sales*, 2015 NLRB LEXIS 165, at *16

28. Cellular Sales of Mo. v. NLRB, 824 F.3d 772, 774 (8th Cir. 2016).

29. *Id.*

30. *Id.* at 775.

31. *Id.*

32. *Id.*

33. *Id.* at 772.

34. *See* D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 362 (5th Cir. 2013); Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1018 (5th Cir. 2015). *Murphy Oil* largely relied on *D.R. Horton* and the analysis is similar. *Id.*

Horton as a home building superintendent.[35] Much like Bauer, Cuda was forced to sign, as a precondition to employment, a "Mutual Arbitration Agreement" that waived all rights to pursue a class or collective claim in an arbitral or judicial forum.[36] Faced with the plain statutory requirements of Sections 7 and 8(a)(1) of the NLRA, the *Horton* court appeared to circumnavigate the statute by holding that class action was not a "substantive right" under Section 7 and instead classifying the right as purely procedural.[37] This must be so, the *Horton* court reasoned, because the FAA is clear in stating that any arbitration agreements must be enforced according to their terms[38] unless otherwise exempted by the FAA's savings clause.[39] While the savings clause may allow the court to declare arbitration agreements invalid if such clauses were deemed illegal, the *Horton* court believed that collective arbitration was so inconsistent with the aims of the FAA that no such rescue was needed.[40]

C. Narrowing Down the Disagreements Between the Circuits

Relying largely on the Fifth Circuit's reasoning that collective arbitration clauses run contrary to the aims of the FAA, the *Cellular Sales* court declared Bauer's contract valid and enforceable.[41] In doing so, the Eighth Circuit squarely pitted itself against both the Seventh and Ninth Circuits[42] whose precedent case law disagreed on virtually every basis of the *Horton* decision. Further narrowing down the split, the Eighth and the Fifth Circuits' interpretations of the employees' right to collective action are distinguishable on two key points. First, while they acknowledge the existence of Section 7, they disagree on whether the right to collective action is a substantive right.[43] For the Fifth

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35. *D.R. Horton*, 737 F.3d at 349.

36. *Id.* at 348–49.

37. *See id.* at 357 (noting that "[t]he use of class action procedures, though, is not a substantive right" because "[t]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims" (quoting Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 332 (1980))).

38. *See* CompuCredit Corp. v. Greenwood, 565 U.S. 95, 98 (2012). This follows the FAA's mandate of establishing a "liberal federal policy favoring arbitration agreements." Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

39. *See* AT&T Mobility v. Concepcion, 563 U.S. 333, 339 (2011) (discussing Section 2 of the FAA, otherwise known as the "savings clause"). The savings clause renders any clause otherwise subject to arbitration invalid "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2012).

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

41. Cellular Sales of Mo. v. NLRB, 824 F.3d 772, 776 (8th Cir. 2016).

42. *See, e.g.*, Lewis v. Epic Sys., 823 F.3d 1147, 1155 (7th Cir. 2016); Morris v. Ernst & Young, LLP, 834 F.3d 975, 987–89 (9th Cir. 2016).

43. *Cellular Sales*, 824 F.3d at 775–76.

Circuit, collective action seems to be a purely procedural mechanism never subject to Section 7's protection of substantive rights.[44] Second and perhaps more importantly, they believe that the duality of precedents that are the FAA and the Supreme Court's decision in *AT&T v. Concepcion* has clearly spoken on the issue of collective arbitration, and such debate is thus foreclosed from consideration. Part II will begin by examining the Supreme Court's jurisprudence on collective action waivers.

III. IMMACULATE *CONCEPCION*[45]—DOES THE COURT'S HOLDING IN *CONCEPCION* AND OTHER RELATED CASES FORECLOSE THIS DEBATE?

Proponents of disallowing employees to bring forth collective arbitration suits point to the Court's decision in *Concepcion* as evidence that the FAA reigns supreme whenever arbitration clauses are implicated.[46] The logic here is simple. *Concepcion* appears to indicate that class action waivers[47] are prohibited except under two narrow provisions:[48] 1) when an arbitration clause falls under the FAA's "savings clause;" and 2) when the FAA is precluded by another statute's contrary congressional demand.[49] While the FAA clearly enunciates a pro-arbitration national policy,[50] courts eager to dismiss collective arbitration actions seem all too quick to apply this policy as a blanket over *all* collective actions. The following analysis demonstrates why *Concepcion* may be ill-suited to address the issue of collective action in a labor employment setting.[51]

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

45. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

46. *See id.* at 340 (noting that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: the conflicting rule is displaced by the FAA").

47. Here, class action waivers and collective action waivers are used interchangeably as contemplated by the Court. However, they are not the same. Collective action waivers are narrower in scope. For a relevant discussion, see *infra* Part III.

48. *See D.R. Horton*, 737 F.3d at 358 (outlining two exceptions to the requirement under the FAA that arbitration agreements must be enforced according to their terms). For a discussion of *D.R. Horton*, see *supra* notes 34–44 and accompanying text.

49. *See D.R. Horton*, 737 F.3d at 358; *see also supra* note 6 and accompanying text.

50. *See* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)*; see also supra* note 8.

51. It is worth noting the questions presented in *Concepcion* were brought up twice before the case was finally heard. *See* Laster v. T-Mobile USA, Inc., 407 F. Supp. 2d 1181, 1186 (2005); Franco v. Athens Disposal Co., Inc., 171 Cal. App. 4th 1277, 1287, 1290 (2009). Both petitions—including a previous petition arising out of the very litigation involving the Concepcions—were denied certiorari. *See* T-Mobile USA, Inc. v. Laster, 553 U.S. 1064 (2008); Athens Disposal Co. v. Franco, 558 U.S. 1136, 1136 (2010).

A. Examining California's Discover Bank *Rule: Is It Unconscionable to Arbitrate?*

To understand *Concepcion*, one must first grasp the issue that *Concepcion* sought to address. The *Concepcion* ruling is a direct response to California's *Discover Bank* rule.[52] Under the disputed California law, courts could refuse to enforce any contract that had been "unconscionable at the time it was made" or could "limit the application of any unconscionable clause."[53] The Concepcions bought an AT&T service that came with what they thought was a free phone.[54] They were not charged for the phone, but they were instead charged $30.22 in sales tax based on the phone's retail value.[55] When the Concepcions objected, they were directed to the service agreement they had signed.[56] The service contract provided for the arbitration claims to be brought in an "individual capacity" and not as a "class member in any purported class or representative proceedings."[57] The Concepcions protested that charging sales tax when AT&T plainly advertised free phones conflicted with the fine print of the contract.[58] In addition, consumers were helpless to protest this grievance because no lawyer would find sufficient monetary incentive to bring suit. The only remedy was to bring a collective class action suit. Therefore, the Concepcions pointed to a California statute prohibiting class action waivers in arbitration agreements—the so-called "*Discover Bank*" Rule—to argue that AT&T's service contract was unconscionable.[59] The court in *Discover Bank* agreed with the

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52. Discover Bank v. Superior Ct., 113 P.3d 1100, 1100–01 (2005), *disapproved of on other grounds in* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

53. *See Concepcion*, 563 U.S. at 340 (quoting Cal. Civ. Code Ann. § 1670.5(a) (West 1985)).

54. *Id.* at 337.

55. *Id.*

56. *Id.*

57. *Id.* It is worth noting that the Court decided *Concepcion* based on terms of a revised contract that was decidedly very favorable to the claimants in arbitration. For instance, under the terms of the *revised* AT&T service, either party may bring claim in small claims court in lieu of arbitration or that the arbitrator may award punitive damages. The agreement further denies AT&T any ability to seek reimbursement of its attorneys' fees as well as require AT&T to pay a minimum recovery fee and *twice* the amount of claimant's attorneys' fee should the claimant prevail. *See id.* at 337; *see also* Laster v. AT&T Mobility, 584 F.3d 849, 853 (2009) (noting that in December 2006 and just prior to the litigation, AT&T revised the arbitration agreement to add a new premium payment clause that is highly favorable to arbitration).

58. *See* Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 76, 85–92 (2004) (generally discussing the challenges facing consumers who wish to bring individual action in a small-claim setting).

59. *See* Discover Bank v. Superior Ct., 36 Cal. 4th 148, 162–63 (2005) (holding that when a class action waiver was found in a consumer contract of adhesion, the waiver

Concepcions and held that the FAA does not preclude the state court from refusing to enforce an arbitration clause based on unconscionability doctrines.[60]

B. The Concepcion *Court:* Discover Bank *Rule Interfered with Arbitration.*

The Supreme Court, in a six-to-three decision, overruled the *Discover Bank* rule. The decision continued the Court's trend toward enforcing arbitration clauses, including those banning class action proceedings in arbitration.[61] Relying on the revised AT&T contract that included the premium payout clause,[62] the Court showed very little hesitation in finding that the *Discover Bank* rule was contrary to the FAA's mandate.[63] It noted that the *Discover Bank* rule had the effect of discouraging arbitration as a whole, even though in practice it only applied to consumer contracts if the unconscionability doctrine rendered them revocable.[64] However, that was never the Concepcions' argument. If anything, they requested an interpretation of *Discover Bank* as merely an *application* of the unconscionability doctrine and not a *prohibition* on all collective-action waivers.[65] Yet, the Court framed the *Discover Bank* rule as a rule against class-wide arbitration and in so doing inadvertently manufactured a conflict with the FAA where none may have originally existed. The Court further noted that the FAA was enacted under a "liberal federal policy favoring arbitration,"[66] ensuring that the only way that

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became unenforceable).

60. The California Supreme Court is not the only court to reach this conclusion. Prior to the Court's decision in *Concepcion*, the courts of last resort in at least nine states have reached the conclusion that the FAA does not preclude courts from striking down particular class action bans under generally applicable state contract laws. *See, e.g.*, Feeney v. Dell, Inc. 908 N.E.2d 753, 762–68 (Mass. 2009); Fiser v. Dell Computer Corp., 188 P.3d 1215, 1222 (N.M. 2008); Tillman v. Com. Credit Loans, Inc., 655 S.E.2d 362, 373 (N.C. 2008); Scott v. Cingular Wireless, 161 P.3d 1000, 1008–09 (Wash. 2007); Kinkel v. Cingular Wireless, 857 N.E.2d 250, 260–63 (Ill. 2006).

61. *See, e.g.*, DirecTV v. Imburgia, 136 S. Ct. 463, 471 (2015); Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2308–09, 2312 (2013). Note that both involved consumer contracts.

62. *See supra* note 53.

63. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 340 (2011) ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: the conflicting rule is displaced by the FAA.").

64. *Id.* at 346 (noting that "[a]lthough the rule does not require class-wide arbitration, it allows any party to a consumer contract to demand it *ex-post*").

65. *See id.* at 340. (Concepcions arguing that *Discover Bank* does not focus on collective-action waivers as "the rule would still be applicable to all dispute-resolution contracts, since California prohibits waivers of class litigation as well").

66. *Id.* at 339 (citing Moses H. Cone, Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

Discover Bank could survive was if it could be rescued under the FAA's "savings clause." Of course, no rescue came.[67] The Court concluded that while FAA's Section 2 "savings clause" preserves general contract defenses, it cannot be construed to invalidate the entire existence of a state statute that "interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[68]

C. The Concepcion *Mandate: Invalidating Class Arbitration as Contrary to FAA*

Having decided that the *Discover Bank* Rule interferes with arbitration, the Supreme Court felt it necessary to expound upon why class action arbitration, as a whole, cannot survive in the face of the FAA.[69] This exercise was carried out despite the Concepcions' insistence that class-action arbitration was not pled as the merit of their argument but merely as a relief to their claims of unconscionability.[70] Nevertheless, the Court discussed the unfavorability of class action arbitration. First, the Court noted that Congress, when passing the FAA, did not envision class arbitration.[71] This was the Court's position despite the FAA's failure to mention either the *allowance* or the *prohibition* of class arbitrations.[72] Second, the Court noted that class arbitration "makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[73] To substantiate this point, the Court compares the procedural limits of class-wide arbitration to *individualized* arbitration.[74] This is not an apt comparison. The Court seems to suggest that class arbitrations are slower compared to arbitrations conducted individually. For such logic to stand, the Court must compare the efficiency of class arbitration to that inherent to bilateral arbitrations, *but only when they are brought in the aggregate*. Until and unless such comparison is standardized, comparing class

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67. *Concepcion*, 563 U.S. at 343.

68. *Id.* at 343–44.

69. *See id.* at 347 (The Court jumped at the opportunity to address the issue of class-wide arbitration because "we have had little occasion to examine class-wide arbitration").

70. *Id.* at 337–38.

71. *Id.* at 349 ("We find it unlikely that in passing the FAA Congress meant to leave [the procedural formalities of classwide arbitration] to an arbitrator. Indeed class arbitration was not even envisioned by Congress when it passed the FAA in 1925.").

72. 9 U.S.C. § 1, *et seq*. (2012).

73. *Concepcion*, 563 U.S. at 348–49. The court noted that as of September 2009, the American Arbitration Association ("AAA") had 121 active arbitrations, with none being resolved as of 2011. *Id.*

74. *Id.* (comparing the average consumer arbitration time between January and August 2007 to the average class arbitration time between 2009 and 2011).

action suits to individual arbitrations is akin to comparing apples to oranges. Take this example: one study showed that class action size could involve over 190 million estimated class members.[75] It is hardly conceivable, as the Court suggests, that 190 million individualized processes will take up less time and resources than a class action—regardless of whether such action is filed in the courts or in the arbitration forums.

Third, the Court pointed out that class arbitration's procedural formality and its increased risk are poorly suited to the higher stakes of class litigation.[76] The Court notes with emphasis that in arbitration proceedings, 9 U.S.C. § 10 allows a court to vacate an arbitral award only where the award "was procured by corruption, fraud, or undue means" and similar other egregious conduct.[77] Yet, the deference with which the court reviews an arbitral award cannot be a reason why class arbitration should be outlawed. Not only is the standard of review a creature of Congress's own intention when it promulgated the FAA, but more importantly, the standard of review applies with equal force to bilateral as well as class arbitration. The Court, on one hand, seems to advocate that the FAA should facilitate and encourage widespread arbitration, yet on the other hand, the Court appears to balk at the idea that too many people are arbitrating at the same time.[78]

Lastly, the Court's lack of discussion regarding the inability for consumers to seek redress is indicative of why *Concepcion* is an inadequate precedent for issues of collective action arbitration. The Concepcions sued primarily on the assertion that class action claims provide the most effective—if not the only—mechanism by which small-dollar claims can be redressed in a systematic manner.[79] The Court attempts to obfuscate this issue by pointing to the revised arbitration clause and claiming that the

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75. *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) 16 (Mar. 2015), http://src.bna.com/cqq [https://perma.cc/84Q3-PHHC] (estimating that class membership for a total of 422 federal consumer financial class settlements across five years of study was 350 million, including one class action that involved an estimated 190 million class members).

76. *Concepcion*, 563 U.S. at 349–50.

77. *Id.* at 350.

78. *Id.* at 349–50.

79. A major impediment to plaintiffs planning to initiate collective claims is the modesty of the award; for the Concepcions, very few lawyers would take on a case in which the relief sought was a mere $30.22. *See id.* at 365 (J. Breyer, dissenting). This is not exclusive to consumer contracts. In a wage-and-hour employment claim, the unavailability of attorneys' fees as well as the meager individualized wage awards would likewise make it significantly less likely that attorneys would pursue claims on an individual basis. *See* discussion in *supra* Part V.B.

Concepcions "were *better off* under their arbitration agreement with AT&T than they would have been as participants in the class action."[80] This is partly misleading. The fact that the Concepcions may have benefitted from this particularized set of agreement terms prepared specifically for litigation is, of course, no guarantee that terms in future will be equally as favorable. In fact, the Concepcions explicitly protested in their brief that the revised agreement is a poor vehicle to address the issue of class arbitration specifically because, at the time of the Concepcions' first suit in March 2006, the arbitration agreement *did not in fact* allow for many of the provisions on which the Court ultimately relied in its holding.[81] Therefore, the Court's analysis with respect to the terms of the contract should be appropriately directed to the issue of unconscionability and should not be generally applied to the overall issue of class arbitrability.

D. If Concepcion *Is a Poor Vehicle to Address Collective Arbitration, Are There Any Cases That Address It?*

Proponents of collective action waivers will argue that, even by adopting a narrow interpretation of *Concepcion*, previous Supreme Court cases have squarely held that class action claims must cede way to arbitration clauses under the FAA.[82] For instance, *CompuCredit v. Greenwood* suggests that a class action claim under the Credit Repair Organization Act ("CROA") must be arbitrated—despite thousands of credit card applicants aggrieved by the same injury—under the FAA.[83] While the *CompuCredit* Court indeed held that the respondents' claim must be arbitrated under the FAA, its decision is based on a presumption that the issue turned on a dispute over the choice of judicial forum in the arbitration clause,[84] and its holding implies that such choice of judicial forum is a procedural rather than substantive right.[85]

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80. *Concepcion*, 563 U.S. at 352.

81. Brief for Respondents at 24–25, AT& T Mobility LLC v. Concepcion, 563. U.S. 333 (2011) (No. 09-893) (arguing that because of the revised contract, the case presents a poor vehicle to explore the question presented because it presents an antecedent question of state contract law that could preclude the Court from reaching the question the way that AT&T has framed it).

82. *See, e.g.*, CompuCredit v. Greenwood, 565 U.S. 95, 95 (2012); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 20 (1991).

83. *See CompuCredit*, 565 U.S. at 104. Consumers argue that the Credit Repair Organization Act's "right to sue" language "clearly involves the right to bring an action in a court of law." *Id.* at 99. CompuCredit instead requests to compel arbitration as stipulated in the arbitration clause. *Id.* at 97.

84. *See id.* at 99 (noting that the dispute revolves around the statutory language that "clearly involves the right to bring an action in a *court of law*") (emphasis added).

85. *Id.* at 102 (holding that "parties remain free to specify" their choice of judicial

Because of this, one must distinguish the core substantive right of the CROA, which the *CompuCredit* Court did not address from a provision whose procedure facilitated the vindication of that right.[86] In addition, there remain several key distinctions between *CompuCredit* and the issue presented here. First, the CROA, unlike the NLRA, is silent on the issue of arbitrability, which effectively allowed the FAA to take precedence without any conflict.[87] Second, even though the CROA advised consumers of a general right to sue, it did not specify the judicial forum in which that right may be exercised. In that respect, the Court is correct, and it must be free to interpret the language in a manner that engenders the right to sue as a substantive right but leaves the right to use a particular forum as a purely procedural one, absent a statutory mandate to the contrary. As the Ninth Circuit accurately puts it, "the issue is not whether any particular forum, including arbitration, is available but rather which substantive rights must be available within the chosen forum."[88] To put it more concisely, procedural rights may be waived as long as substantive rights—the basic guarantees of a federal statute—are not contracted away.[89]

IV. *CONCEPCION* NOTWITHSTANDING, DOES THE NLRA NEVERTHELESS PROVIDE EMPLOYEES WITH SUBSTANTIVE RIGHTS?

A. Before Concepcion*—Does the History of the NLRA Envision Substantive Rights?*

While the Supreme Court has made clear that Section 7 of the NLRA's "mutual aid or protection" clause protects an employee's right to improve working conditions through administrative and judicial forums,[90] any discussion regarding Section 7 must begin with the circumstances surrounding its enactment.[91] This section will argue that the NLRA has always envisioned that the scope of

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forum as long as their substantive rights, or "*the guarantee of the legal power to impose liability*" is preserved) (emphasis in original).

86. Morris v. Ernst & Young, LLP, 834 F.3d 975, 986 (9th Cir. 2016).

87. *CompuCredit*, 565 U.S. at 104.

88. *Morris*, 834 F.3d at 987.

89. *Id.*

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

91. While some authors have attempted to distinguish Section 7's "mutual aid or protection" with its "concerted activity" language, the history of the NLRA suggests that neither loses its meaning when employees seek redress outside of the traditional means of collective bargaining or grievance settlement. *See, e.g.*, *Eastex*, 437 U.S. at 565; Rita G. Smith & Richard A. Parr II, Note*, Protection of Individual Action as "Concerted Activity" Under the National Labor Relations Act*, 68 CORNELL L. REV. 369, 373 (1983).

protection—as well as the workers under such protection—was meant to be expansive.[92]

In the beginning of the Twentieth Century and at common law in general, many states have historically regarded group protests concerning wages and working conditions as unlawful conspiracies.[93] Such disdain for collective action was first reconsidered through the enactment of the Clayton Act of 1914, which carved out exceptions for certain labor activities from the purview of the Sherman Antitrust Act that outlawed conspiracy.[94] In 1928, a subcommittee of the Senate Judiciary Committee requested five members—including future Justice Felix Frankfurter—to draft a bill that focused upon substantive law to insulate from legal prohibition certain activities undertaken "in concert" arising out of a labor dispute.[95] The bill underwent several drafts as the draftsmen disagreed on the best practical approach to secure the bill's passing.[96] For instance, Witte, one of the draftsmen, questioned whether that the courts would sustain any drastic change in substantive law and therefore urged presenting the bill as an exclusive procedural reform.[97] The result was a compromise "that attended largely to procedural reform while adopting a declaration of policy that spoke to *substantive* ends."[98] The policy statement was ultimately adopted with minor changes into Section 2 of the Norris-LaGuardia Act of 1932.[99] The Norris-LaGuardia Act declared it to be a public policy of the United States that workers shall "be free from the interference, restraint, or coercion . . . in self organization or in other concerted activities for the purpose of collective bargaining or other mutual

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92. *See Smith &* Parr, *supra* note 91, at 374 (noting that "[c]ourts have construed 'mutual aid or protection' so broadly [to include] . . . almost any activity that somehow affects the well-being of the employees as a group").

93. Robert A. Gorman & Matthew W. Finkin, *The Individual and the Requirement of "Concert" under the National Labor Relations Act*, 130 U. PA. L. REV. 286, 331 (1981).

94. *Id.* at 331; 15 U.S.C. § 17 (2012).

95. Gorman & Finkin, *supra* note 93, at 333; Bill entitled "Revision of an Act Concerning Labor Organizations, § 4" (Apr. 9, 1923) (attached to Frankfurter's letter of transmittal of April 24, 1928) (on file with the University of Pennsylvania Law Review).

96. Gorman & Finkin, s*upra* note 93, at 333–34.

97. *Id.* at 334; Letter from Edwin Witte to Francis Sayre (May 26, 1929); Letter from Edwin Witte to Senator Blaine (Nov. 3, 1928). In contrast, Sayre argued for a purely substantive change. Francis Sayre, "Suggestions and Criticisms of Mr. Francis Sayre With Regard to Proposed Tentative Draft of Bill Limiting the Use of Injunctions" (May 17, 1928).

98. Gorman & Finkin, *supra* note 93, at 334 (emphasis added).

99. *Id.* 29 U.S.C. § 102 (2012). The Norris-LaGuardia Act of 1932, 29 U.S.C. § 101 *et seq.* (2012) generally bars enforcement of contracts that prevent employees from engaging in concerted activities for mutual aid or protection. Section 102 declares it a public policy of the United States that individual workers shall be free from interference from pursuit of collective action. 29 U.S.C. § 102 (2012).

aid or protection."[100] This language first expressed a recognition by Congress to improve the "right of wage earners to organize and to act jointly in questions affecting wages, conditions of labor, and the welfare of labor generally . . . ."[101]

It would seem plainly evident that the language of the Norris-LaGuardia Act renders unenforceable any employment agreements waiving the right to act in concert with fellow employees for legal rights.[102] Few could argue that such rights were meant to be procedural,[103] as neither Section 2 nor Section 3 specifically proscribes any judicial mechanism by which such rights may be vindicated.[104] To the contrary, the Norris-LaGuardia Act was enacted to outlaw management practices requiring what was known as a "yellow-dog" contract.[105] In eradicating those "yellow-dog" contracts, Congress intended to do more than just prohibit agreements that prevented employees from joining unions; it "applie[d] to all contracts that restricted employees from concerted pursuit of workplace rights."[106]

At the time of the NLRA's passage, the 74th Congress knew well that labor causes were often advanced through means other than collective bargaining and grievance settlements, and Congress, therefore, chose to model NLRA Section 7's language

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100. 29 U.S.C. § 102 (2012); s*ee also* S. Rep. No. 573, 74th Cong., 1st Sess., 9 (1935); H. R. Rep. No. 1147, 74th Cong., 1st Sess., 15 (1935).

101. Eastex, Inc. v. NLRB, 437 U.S. 556, 566 n.14 (1978); *see also* S. Rep. No. 163, 72d Cong., 1st Sess., 9 (1932).

102. Brief of Labor Law Professors as *Amici Curiae* at 3, Epic Sys. Corp. v. Lewis, 137 S. Ct. 908 (2017) (No. 16-285) [hereinafter *Labor Law Professors*]; *see also* Eastex, 437 U.S. at 565–66.

103. While opponents of this view argue that the federal labor acts did not confer substantive rights, few have unpacked the historical underpinnings of the acts' passage. *See Labor Law Professors*, *supra* note 102, at 5 (noting that the Employers and their *amici* briefs almost completely ignored the Norris-LaGuardia Act in their analysis).

104. While section 4 of the Norris-LaGuardia Act "deprives federal courts of jurisdiction to enjoin participation, 'whether singly or in concert,' in a set of enumerated actions to advance workplace rights," the lynchpin of this legislation resides in Section 2, which plainly establishes a public policy against interference with worker's collective rights. *Labor Law Professors*, *supra* note 102, at 10; *see also* 29 U.S.C. §§ 102, 104 (2012).

105. *See Labor Law Professors*, *supra* note 102, at 12–13. *See also* H.R. Rep. No. 72-669, at 6 (1932) ("Section 3 is designed to outlaw the so-called yellow-dog contract."). *See generally* Joel I. Seidman, *The Yellow Dog Contract*, 46 QUARTERLY J. ECON. 348, 348 (Feb. 1932).

106. *See Labor Law Professors*, *supra* note 102, at 13. In fact, the term "yellow-dog" contracts was first applied to leases of housing in mining towns that prohibited anyone other than miner's immediate family from having access to the mining houses. *Id. See* Seidman *supra* note 105, at 31. Congress was also aware of the expansive scope of the Norris-LaGuardia Act from the very beginning. A Senate report made clear that not all yellow-dog contracts were the same, but in all of them, the "employee waives his right of free association . . . in connection with his wages, the hours of labor, and other conditions of employment." *Labor Law Professors*, *supra* note 102, at 14.

after the wording found in Section 2 of the Norris-LaGuardia Act.[107] To be sure, the NLRA was not the only legislation on which Congress relied to draft the Norris-LaGuardia Act. Similar language evincing Congress' intent can be found in Section 7(a)(1) of the National Industrial Recovery Act of 1933,[108] Section 1 of the NLRA,[109] and Section 2(a) of the Labor-Management Reporting and Disclosure Act of 1959.[110] These pieces of legislation were passed for a reason. The statement of public policy implicit within their enactments was a direct response to—and represents a conscious repudiation of—the *Lochner*-era judiciary's single-minded promotion of contractual freedom in which wage and hour violations were widespread, but individual instances of redress involved such a small amount that aggregation of claims became the only practical solution.[111] It is precisely under those circumstances that the courts thereafter equated activity for mutual aid or protection with activity "to improve terms and conditions of employment or otherwise improve [the] lot" of employees.[112] According to one author, the real implication behind the Act "was not that action which should be protected when engaged in by a group should be left unprotected when engaged in by the individual, but that lawful individual action should not become unlawful when engaged in collectively."[113] It would thus seem clear that the line of New Deal legislation including the NLRA protected against the same forms of conduct that its predecessors had declared free against government intrusions while upholding the scope of protection that the law would give to concerted activities.[114]

In addition to a strong legislative intent, such an expansion of rights has historically been advocated by the Board and confirmed by courts. For instance, NLRB decisions have long applied the "Interboro doctrine" under which "concerted activity" was recognized to include rights grounded in collective-bargaining agreements.[115] Courts have since recognized that the task of defining the scope of Section 7 is "for the Board to perform in the first instance as it considers the wide variety of cases that come

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107. Eastex, Inc. v. NLRB, 437 U.S. 556, 565 n.14 (1978); 29 U.S.C. § 102 (2012).

108. *Eastex*, 437 U.S. at 565 n.14; H.R. Rep. No.67-5755, at 195 (1933).

109. 437 U.S. at 565 n.14; 29 U.S.C. §151 (2012).

110. 437 U.S. at 565 n.14; 29 U.S.C. § 401(a) (2012).

111. *Labor Law Professors*, *supra* note 102, at 16; *see also* S. Rep. No. 72-163, at 15; Lochner v. New York, 198 U.S. 45, 57 (1905).

112. Gorman & Finkin, *supra* note 93, at 289 n.10.

113. *Id.* at 336.

114. *See id.* at 338.

115. *See* Interboro Contractors, Inc., 157 N.L.R.B. 1295, 1298 (1966).

before it."[116] In most cases, "a reasonable construction by the Board is entitled to considerable deference."[117] Thus, just as the Supreme Court found reasonable the Board's adaptation of "concerted activity"[118] to embrace the activities of employees who have joined together to achieve common goals, a lower court should take care to defer to the Board's finding of a substantive right under Section 7.[119]

B. Is Employee's Complaint "Concerted" if He Is the Only One Complaining?

One of the hallmarks of arbitration is its highly individualized nature. In the case of any one plaintiff, one can plausibly make the argument that a court should dismiss his plea for substantive Section 7 protection without a heightened burden showing that others have suffered the same injury. Courts and commentators have largely agreed that Section 7's "concerted activity" language applies whenever two or more employees act together in a group.[120] However, there is some evidence that section 7's protection is not all-encompassing. As courts and commentators have noted, the "prevailing principle of law—endorsed by both the courts of appeals and the NLRB—is that section 7 does not protect "personal gripes" by individual employees.[121] As expected, the Board will often find a claim to be an unprotected "personal gripe" when employees are found to have been motivated by personal animosity or malice.[122] Despite this, the Board has traditionally held that "concerted" activity may include protection of the views of many, even if an individual employee "acts alone" in speaking to management without the explicit knowledge of the other employees whom he purports to represent.[123]

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116. NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 829 (1984).

117. *Id.* (citing NLRB v. Iron Workers, 434 U.S. 335, 350 (1978)).

118. The Board's position with respect to encouraging the pursuit of collective actions by workers has been expansive and consistent. *See, e.g.*, *Labor Law Professors*, *supra* note 102, at 16 (citing NLRB v. Alt. Ent., Inc., 858 F.3d 393, 402–03 (6th Cir. 2017) ("[c]oncerted activity" includes pursuit of employment claims "in all forums, arbitral and judicial."); Brady v. NFL, 644 F.3d 661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under § 7 of the National Labor Relations Act."); Mohave Elec. Coop., Inc. v. NLRB, 206 F.3d 1183, 1188–90 (D.C. Cir. 2000) ("mutual aid or protection" clause protects collective action in litigation).

119. *See* D.R. Horton, Inc v. NLRB, 737 F.3d 344, 357–58 (5th Cir. 2013) (discussing the Board's findings).

120. Smith & Parr, *supra* note 91, at 370 n.7.

121. Gorman & Finkin, *supra* note 93, at 290.

122. *Id.* at 291.

123. *Id.*

Irrespective of one's definition of "concerted group activity" or "concerted individual activity," most agree that the view of what it means to be "concerted"—at least in the eyes of the Board—has been expansive.[124] As such, a class arbitration suit, as contemplated by Bauer or the Concepcions, could easily come within the ambits of the existing interpretation of concerted activity.[125] In fact, in the 1970s the Board explicitly recognized in *Alleluia Cushion Co.*, 221 N.L.R.B. 999, 1000 (1975) that individual complaints to enforce *statutory rights* were concerted and therefore always protected under the statute under the presumption that: 1) other employees indirectly benefited from the complaint; and 2) therefore consented to the protest.[126] Courts and some authors have long argued that such a meaning comports with the primary purpose of the NLRA since Section 7 rights are protected "not for their own sake but as an instrument of the national labor policy."[127] As such, few authorities could find a legally digestible distinction between a single employee advocating for collective arbitration rights from a group of employees clamoring for the same.

C. To What Extent Are Section 7 Rights Purely Procedural?

Even as class actions confer equitable remedies of the group to bear on businesses who engage in the systematic violation of employee rights, many have argued that the right to choose the forum under which redress is sought is largely a procedural right.[128] If such rights are purely procedural, the argument goes, arbitration agreements must be given full force under the FAA.[129] However, disregarding the historical evidence that Section 7 rights were meant to promote a *substantive* national policy rather than to serve as a mere vehicle for its implementation,[130] it is still

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124. *See id.*

125. Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 WAKE FOREST L. REV. 173, 204 (2003).

126. Alleluia Cushion Co., 221 N.L.R.B. 999, 1000 (1975).

127. Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 62 (1975).

128. *See, e.g.*, Hodges, *supra* note 125, at 180–191, n.23, n.73, n.108 and accompanying text.

129. *Cf.* AT&T Mobility v. Concepcion, 563 U.S. 333, 349 (2011) (noting that the Court "find[s] it unlikely that in passing the FAA Congress meant to leave the disposition of these *procedural* requirements to an arbitrator") (emphasis added). This argument was reinforced by petitioners' attorney Paul Clement during oral arguments during which he claimed that at most, the NLRA provided employees with the ability to get to "the threshold of the courthouse." Once there, the employees must nevertheless be subject to the rules of the forum—the mandatory arbitration clauses in this case. Transcript of Oral Argument at 5–6, Epic Sys. Corp. v. Lewis, 137 S. Ct. 908 (2017) (No. 16-285).

130. *See supra* notes 90–119, Part IV.A.

difficult to imagine how Section 7's "concerted activity" phrase, even if interpreted to be procedural, operates in resonance with both the provisions of the NLRA and with collective action mechanisms in other federal employment statutes.

First, the NLRA itself has long held that it is unlawful to condition employment on the waiver of employees' Section 7 rights.[131] This is true even when: 1) an employee is partially responsible for instigating an agreement to waive the right to engage in concerted activity;[132] 2) the matter involves reinstatement after termination;[133] and when 3) employers require employees to bring complaints to their employer before bringing charge or seeking redress.[134] From the NLRB's holdings, it is clear that Section 7 rights are nonwaivable precisely because they are substantive and statutory in nature. Given the wide scope of Section 7's protection, an employee may safely assume that all of Section 7's protections must be substantive and not merely procedural. However, the *Horton* and *Cellular Sales* courts summarily reject such a reading, instead clinging to the view that Section 7's "concerted activity" language is substantive but only insofar as to except it when it appears in the context of collective arbitration. In other words, employees would have a wide range of substantive rights under Section 7 to band together, form labor unions, share information about work conditions, and collectively bargain for better working conditions, but once employees collectively arbitrate, their rights immediately turn procedural in nature.[135] Such an interpretation relies on a fictional distinction, which is based in neither the history of the NLRA nor in the language of the statute. It is also inconsistent with the realities of the workplace. If an employee is substantively protected under Section 7 to raise complaints collectively against the employer,[136]

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131. *See* Hodges, *supra* note 125, at 201 (citing Teamster Local Union No. 171 v. NLRB, 863 F.2d 946, 953 (D.C. Cir. 1988) (enforcing NLRB's decision that it was unlawful to condition reinstatement on the waiver of the right to strike in the future)); Am. Cyanamid Co. v. NLRB, 592 F.2d 356, 364 (7th Cir. 1979) (enforcing NLRB's decision that it is unlawful to condition on waiver of right to file unfair labor practice charges to challenge termination); Great Lakes Chem. Corp., 298 N.L.R.B. 615, 624 (1990) (finding violation of Sections 8(a)(4) and (1) where employer conditioned employment on signing of a waiver of the legal right to bring action in event of layoff or termination).

132. John C. Mandel Sec. Bureau, Inc., 202 N.L.R.B. 117, 119 (1973).

133. Am. Cyanamid Co. v. NLRB, 592 F.2d 356, 363–64 (7th Cir. 1979).

134. Kinder-Care Learning Ctrs., Inc., 299 N.L.R.B. 1171, 1171 (1990).

135. *See* D.R. Horton, Inc v. NLRB, 737 F.3d 344, 356–57 (5th Cir. 2013) (noting that "[t]he use of class action procedures, though, is not a substantive right" because "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims").

136. Section 7 protects a range of concerted employee activities, and regularly protects employee's right to pursue work-related legal claims. *See, e.g.*, Brady v. NFL, 644 F.3d 661,

one questions why the statutory protection should change if the same employee merely chooses an alternative forum of expression for their grievances.

Second, even if courts adopt the view that class action suits are strictly governed by Federal Civil Procedure Rule 23's procedural nature, it is challenging to reconcile the scopes of protection across various federal labor and employment statutes—or even within the NLRA itself. As the Ninth Circuit astutely noted, the rights—*all of the rights*—established in Section 7 are substantive insofar as they are the central, fundamental protections of the Act.[137] In the court's words, the entire Section 7 must be substantive because "[n]o other provisions of the Act create these sorts of rights. Without Section 7, the Act's entire structure and policy flounder."[138] In addition, viewing Section 7 as a strictly procedural mechanism muddles the Act's other enforcement sections. For instance, Section 8 specifically refers to the "exercise of the rights guaranteed in section 157,"[139] while Section 160 provides powers of the Board to prevent interference with rights in Section 7.[140] Such directives would be inconsistent if Section 7 bespoke purely of a procedural mechanism.

Furthermore, viewing Section 7 this way would breed incoherence among other federal laws. For instance, class action suits are readily available under most federal employment law statutes.[141] To most employees, class action enables the litigation of multiple claims and promotes economy and efficiency by reducing the need to adjudicate issues repeatedly.[142] For these reasons, the Fair Labor Standards Act ("FLSA"), along with the Environmental Protection Act ("EPA"), Age Discrimination in Employment Act ("ADEA"), and Family and Medical Leave Act ("FMLA") have adopted their own collective action provisions which are generally "viewed as providing . . . substantive right[s] to proceed collectively."[143] Viewed in this fashion, the Fifth and

673 (8th Cir. 2011) (Section 7 governing a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment); Mohave Elec. Coop., Inc. v. NLRB, 206 F.3d 1183, 1189 (D.C. Cir. 2000) (Section 7 protecting the filing of civil actions by a group of employees).

137. Morris v. Ernst & Young, LLP, 834 F.3d 975, 985 (9th Cir. 2016).

138. *Id.* at 986.

139. 28 U.S.C. § 158 (2012).

140. 29 U.S.C. § 160 (2012).

141. Hodges, *supra* note 125, at 201.

142. *Id.* at 204.

143. *See, e.g.*, *id.* at 215–16; Sam Smith & Christine Jalbert, *Certification—216(b) Collective Actions v. Rule 23 Class Actions & Enterprise Coverage Under the FLSA*, AM. BAR ASS'N 1–2, 14–15, 20 (Nov. 2, 2011).

Eighth Circuits' interpretation of the NLRA would lead to inconsistent protection.

> [E]mployees could lawfully be deprived of the right to [bring forth lawsuits] under [statutes such as] Title VII, the [American Disabilities Act ("ADA")], and [the Employee Retirement Income Security Act of 1974 ("ERISA")] because class actions exist solely by virtue of a procedural rule, but not under the FLSA, EPA . . . and the FMLA where there [exists] a statutory right to class action.[144]

This inconsistency is further magnified when considering the small monetary value of these claims. Deprivation of some claims to proceed collectively while allowing others to be aggregated accomplishes neither the objectives of a class action—which is to afford judicial access to plaintiffs with small claims that would be otherwise uneconomical[145]—nor the expediency objectives of individual arbitration.

D. Where There Is Smoke but No Fire: Is Section 7 Inherently Inconsistent with The Federal Arbitration Act?

There is much fear that Section 7's allowance of collective arbitration would run afoul of the FAA's national policy in favor of upholding arbitration agreements.[146] As with the *Concepcion* Court, much of the inquiry has been focused on whether a clause that prohibits collective arbitration falls within the FAA's Section 2 savings clause.[147] This is a mistake. By first engaging in an inquiry into the FAA's savings clause, one readily concedes—when one shouldn't—that the two statutes are irreconcilably conflictive. Federal laws often involve substantive rights that cannot be abrogated by another federal statute.[148] In fact, established canons

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144. Hodges, *supra* note 125, at 215–16.

145. *Id.* at 204, 215–17.

146. *See* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983) (noting that the Act embodies "a liberal federal policy favoring arbitration agreements"). In fact, much of the *Concepcion* holding was devoted to this issue. In the Court's opinion, Justice Scalia states: "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 341 (2011). Furthermore, the position adopted by the government in support of the employers is clear. Attorney Clement, at oral arguments for *Epic Sys. Corp. v. Lewis*, emphasized that the Courts' precedent provides a "well-trod path" to resolving the case. The FAA mandates "that arbitration agreements should be enforced unless . . . contrary command from Congress"—which the government alleged was "not present here." *See* Howe, *supra* note 4.

147. 9 U.S.C. § 2 (2012); *see also* D.R. Horton, Inc v. NLRB, 737 F.3d 344, 357–62 (5th Cir. 2013) (discussing the conflict between the FAA and the NLRA).

148. *See* Vimar Seguros Reasequoros S.A. v. M/V Sky Reefer, 515 U.S. 528, 533 (1995) (holding that "when two statutes are capable of co-existence . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as

of statutory construction dictate that statutes, to the extent possible, should be interpreted in a harmonized manner.[149] Courts, as the Seventh Circuit noted, are "not supposed to go out *looking* for trouble."[150] Nor is there any actual conflict between two statutes. As the Seventh Circuit found, "the NLRA is in fact pro-arbitration." "[I]t expressly allows unions and employers to arbitrate [through 29 U.S.C. Section 171(b)], and to negotiate collective bargaining agreements that require [arbitration of] individual employment disputes."[151] The only way to manufacture a conflict between the two statutes is to view Section 7 as strictly mandating class arbitration. Of course, neither Section 7 nor Section 8 requires this result.[152] If anything, they say nothing about class arbitration as their broad focus is to prevent employers from restraining workers' rights to engage in collective actions.[153]

Viewed through the frameworks above, one must conclude that Section 7 rights can be neither procedural nor an affront to the aims and goals of the FAA. It cannot be procedural because the right violated is, as one commentator puts it, "the substantive Section 7 right to concerted activity which is *being effectuated* through the class action device."[154] Even if it is conceded that class action is a procedural vehicle, this conclusion must not bar employees from reaching their destination by simply eliminating the vehicle to get there. The legislative history of the Act and the statutory framework in which it finds itself lend support to the assertion that Section 7 has never been a direct threat to arbitration.[155]

V. HIDDEN ABUSE: WHO IS REALLY HURT BY COLLECTIVE ACTION ARBITRATION WAIVERS?

Let us employ the hypothetical of a single mother, recently finding herself without employment and desperate to find work again. She has made it through two rounds of interviews. Faced with the last hurdle of signing a standard arbitration clause before

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effective." (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

149. TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)).

150. Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1158 (7th Cir. 2016).

151. *Id.* (citing 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 257–58 (2009)).

152. *Id.* at 1159.

153. *Id.* at 1158–59.

154. Hodges, *supra* note 125, at 216 (emphasis added).

155. *Labor Law Professors*, *supra* note 102, at 21. In fact, "Section 8 of the Norris-LaGuardia Act facilitates 'voluntary arbitration' of labor disputes." *Id.* at 22 (citing 29 U.S.C. § 108 (2012)).

being allowed to work, the mother is only too happy to oblige.[156] In theory, these individuals and others like them may have an opportunity to bargain over the terms of their contract. More often than not, however, these choices are merely illusory.[157] If and when disputes arise, many employers have recognized that requiring individual litigation not only serves the company's interest in stifling internal grumbling, but it also provides the added benefit of increasing transaction costs forcing plaintiffs "to accept lower settlements or even drop their claims altogether."[158] The following sections explore how employers have taken advantage of existing precedents to undermine the bargaining dynamics in the work place and caution that collective action waivers, if unregulated, pose a significant and real threat to the American workforce.

A. Setting a Precedent Allowing Waivers of Collective Action Will Not Promote Arbitration but Will Instead Stifle It.

In recent years, some companies have increasingly utilized arbitration agreements to eliminate the potential for collective actions. Companies are especially encouraged by the landmark Supreme Court decision *Circuit City Stores, Inc. v. Adams*[159] declaring arbitration provisions in employment contracts enforceable under the FAA.[160] "[The] problem has only worsened for workers since *Concepcion* and *American Express Co. v. Italian Colors Restaurant,* . . . which further emboldened employers to insist on [collective]-action waivers."[161] A sampling of the Department of Labor Online Collective Bargaining Agreement File indicates that many collective bargaining agreements include arbitration provisions as a mechanism for dispute resolution.[162] A

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156. Brief of Maryland and Other States as *Amici Curiae* at 6, Epic Sys. Corp. v. Lewis, 137 S. Ct. 908 (2017) (No. 16-285) [hereinafter *Maryland and Other States*].

157. *Id.* at 6–7.

158. *See, e.g.*, Sternlight & Jensen, *supra* note 58, at 76; Marc S. Galanter, *The Quality of Settlements*, 1988 J. DISP. RESOL. 55, 70–72 (arguing that one party can encourage a settlement that would not otherwise have been desirable by imposing high transaction costs on the other).

159. Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

160. Hodges, *supra* note 125, at 173–74.

161. *Maryland and Other States*, *supra* note 156, at 28.

162. Collective Bargaining Agreements File: Online Listing of Private and Public Sector Agreements, U.S. DEP'T OF LAB. (last modified Nov. 17, 2017), https://www.dol.gov/OLMS/regs/compliance/cba/index.htm [https://perma.cc/WGL9-PT99]. Some collective bargaining agreements sampled include: AGREEMENT BETWEEN DAN RIVER INC. DANVILLE, VIRGINIA AND LOCAL 400 UNITED FOOD & COMMERCIAL WORKERS UNION 4, 15–16, 22 (June 12, 2005), https://www.dol.gov/OLMS/regs/compliance/cba/box/private/d/Dan%20River%20Inc%20K602.pdf [https://perma.cc/9RL3-B37H]; AGREEMENT BETWEEN KEYSTONE CONTRACTORS ASSOCIATION AND LABORERS' DISTRICT COUNCIL OF WESTERN

recent survey "by a consulting firm that represents employers found that the percentage of companies using class action waivers . . . skyrocketed from 16% in 2012 to almost 43%" just two years later.[163] It may have been reasonable to expect that an increase in mandatory arbitration provisions would result in an increase in filed arbitration claims, but that has not been the case. "Around the same time, from January to December 2013, there was [a *decrease*] of 65% in the number of employees who filed arbitration claims."[164] In fact, only one out of every 12,000 employees covered by a mandatory arbitration clause files an arbitration claim in a given year.[165] The gap, while perhaps surprising, is not a coincidence. Backed by the judiciary, employers know full well that few individual employees will be in a position to bring forth claims.[166] What began as a national liberal policy towards arbitration has been corkscrewed by employers into a concerning trend towards the opposite direction. The practical reality of the workplace cautions that concerted action waivers "erase rather than . . . enhance the capacity to pursue rights."[167]

B. The High Cost of Individual Litigation Makes Bilateral Arbitration Unfeasible.

Some employers have largely capitalized on such trends to raise the costs of individual employees bringing suit by "select[ing] the rules under which arbitration [shall] proceed."[168] In mandating individual arbitration, businesses rely on coercive arbitration agreements—usually in the form of a precondition to employment—to avoid class action lawsuits and other collective

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PENNSYLVANIA AFL-CIO 12–13 (2002–2005) https://www.dol.gov/OLMS/regs/compliance/cba/pdf/cbrp0997.pdf [https://perma.cc/7LGQ-N57U]; COLLECTIVE BARGAINING AGREEMENT BETWEEN BOEING—CORINTH, CO AND INTERNATIONAL ASSOCIATION OF MACHINIST AND AEROSPACE WORKERS 30 (2001) https://www.dol.gov/olms/regs/compliance/cba/pdf/cbrp0285.pdf [https://perma.cc/BLY9-2C27].

163. *See Maryland and Other States*, *supra* note 156, at 28 (citing THE 2015 CARLTON FIELDS JORDEN BURT CLASS ACTION SURVEY: BEST PRACTICES IN REDUCING COSTS AND MANAGING RISK IN CLASS ACTION LITIGATION 26, http://classactionsurvey.com/2015-survey/ [https://perma.cc/5SMA-ALCJ]).

164. *Maryland and Other States*, *supra* note 156 at 28 (citing David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DEPAUL L. REV. 457, 469 (2016)).

165. Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1330 (2015).

166. *Id.* at 1345.

167. Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2893 (2015).

168. *See* Hodges, *supra* note 125, at 173.

actions.[169] Through such methods, businesses are sometimes able to impose at least half of the cost of arbitration on the employee,[170] and employees forced to arbitrate individually often lose the ability to seek certain forms of injunctive relief available to class action participants.[171] Many argue that the effect of such rulings virtually eliminate the ability of employees to bring forth small claims, as well as the claims of lower wage employees who are either discouraged by, or simply unable to, afford the costs of individual arbitration.[172] Consider the example of Edixon Franco who filed a class action complaint against Athens Disposal Company, Inc. on behalf of other similarly-situated employees where he alleged nonpayment of overtime wages as well as failure to provide meal periods.[173] Franco further alleged other state labor law violations including failure to keep records of work hours and failing to provide rest periods.[174] Upon consultation with three different attorneys, Franco found that based on his hourly wage, he would be entitled to damages that totaled approximately $7,750 if he prevailed.[175] One of the consulted attorneys admitted that "it would be extremely difficult for the class member employees to obtain representation for their cases because of the relatively small amounts [of] damages each employee suffers if they are required to *litigate each of their cases separately*."[176] He added that very few potential clients have worked for the employer for a substantial period of time, and thus "most assuredly many members . . . will have . . . correspondingly lower damages."[177] Another attorney revealed that he was "extremely selective about picking [his] cases; [trying] to help those that are (a) the most clearly in need and (b) that might have a chance to prevail."[178]

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169. *Id.*

170. *Id.* at 174. Contrast this with *Concepcion*, discussed *supra* Part III.A, in which the arbitration agreement in a consumer contract shifted the cost of arbitration solely onto the business.

171. *See* Hodges, *supra* note 125, at 174.

172. *See id.* at 174–75.

173. *See* Franco v. Arakelian Enters., Inc., 211 Cal. App. 4th 314, 325–26 (Cal. Ct. App., 2012).

174. *Id.* at 326.

175. *Id.* at 328. Most employees, particularly low-wage workers for whom the labor laws should apply with great force, simply cannot afford the time and expense it would take to prosecute these low value claims. *See* 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, 1118–19 (2012).

176. *Franco*, 211 Cal. App. 4th at 328 (emphasis in original). This is not atypical. Most attorneys are unwilling to take individual arbitration cases because a plaintiff's chances of winning are lower than in court, and damage awards are lower as well. *See* Stone & Colvin, *supra* note 17, at 21–22.

177. *Franco*, 211 Cal. App. 4th at 329.

178. *Id.* at 330.

Therefore, it makes little sense to take on a case if he has to "*litigate it on an individual basis* because of the moderate damages and because *these cases are labor intensive*. Additionally, it makes no sense to bring these cases individually because *the employer can simply pay the small damages and not be forced to correct its unlawful behavior*."[179]

For similar reasons, employers often fear class action lawsuits as well. Employment-based class action suits have increased progressively since the passage of the 1991 Civil Rights Act and under federal FLSA and ERISA statutes.[180] Class actions are often expensive and time-consuming endeavors, punctuated by costly discovery involving a wide array of expensive investigation and analysis by attorneys and experts even at the initial pre-certification stage.[181] In one such instance, the plaintiffs were able to fight against a mandatory arbitration agreement only after conducting extensive discovery and presenting a mountain of factual evidence at trial.[182] In that particular litigation, the plaintiffs' attorneys spent more than 2,000 hours on the pretrial, trial, and post-trial portions of the case and incurred over $400,000 in costs.[183] To be sure, defendants are not exempt from this costly endeavor either. In fact, defendants often expend equally large sums in their defense.[184]

As a result of these costly impositions, substantial pressures exist for companies unwilling to bear such pernicious risks to settle claims before resorting to litigation or arbitration.[185] Businesses are acutely aware that class actions often attract negative attention and raise consumer suspicions regarding the manner in which they have been conducting business.[186] Such actions may carry consequences that may irreparably harm the company's reputation and stock value.[187] Thus, businesses have very strong incentives to avoid collective actions such as class

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179. *Id.* (emphasis in original).

180. *See* Hodges, *supra* note 125, at 205–06 (citing William L. Kandel, *An Appellate Boost for Employment Discrimination Class Actions*, 25 EMP. REL. L. J. 79, 92 n.1 (2000) (noting an increase in new class action filings from 1992 to 1998 and a large portion of recent EEOC lawsuits have been class action suits)).

181. *See* Hodges, *supra* note 125, at 205–06.

182. Sternlight & Jensen *supra* note 58, at 76 (referencing Ting v. AT&T, 182 F. Supp. 2d 902 (N.D. Cal. 2002)).

183. Sternlight & Jensen *supra* note 58 at 100.

184. *Id.*

185. *See* Hodges, *supra* note 125, at 206–07.

186. Elisabeth Best, *In Class-Action Lawsuits, You're Only Suing Yourself*, PACIFIC STANDARD MAGAZINE (May 20, 2010), https://psmag.com/in-class-action-lawsuits-you-re-only-suing-yourself-9696eabeeccc#.o4hi90z74 [https://perma.cc/25R5-4RWQ].

187. *See* Hodges, *supra* note 125, at 207.

action lawsuits—not only because of the costs but also because class actions could potentially amplify workers' discontent across the company. Viewed through this perspective, it is easy to see why bilateral arbitrations are preferred by businesses. Class actions shed light on individual arbitrations whose private mechanisms all but ensure that companies remain distanced from concerns of employees and remain unpressured by the public to modify their behavior.

C. Failing to Invalidate Class Action Waivers Props the Door Open to Wage Theft

Injustice to the individual workers notwithstanding, collective action waivers have often been nefariously employed to perpetuate the current epidemic of wage theft that plagues the modern workforce. This carries devastating effects with special force on the country's low wage workers. For instance, 76% of low-wage employees surveyed who worked over forty hours in a week reported being underpaid or not paid at all for overtime.[188] On a broader level, this may represent a theft of over $50 billion every year by violating employers.[189] The courts' reluctance to accurately recognize the magnitude of such loss is only compounded by the fact that many employees may not even know that their wages are being skimmed unless and until other colleagues file suit in similar actions.[190] The ability given to a particular employee to be apprised of similar treatment serves a vital function in the stabilization of workplace dynamic between employees and employers by reigning in employers who find themselves drifting too far from the shores of compliance.

D. Permitting Collective Action Waivers Does Little to Engender Systemic Change.

As noted above, a plaintiff who is denied collective action faces several hurdles in seeking vindication. Not only is he subjected to the high costs of individual arbitration—costs which are sometimes borne exclusively by the individual employee plaintiff—but his compensation upon prevailing is often of little

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188. *See* Ruan, *supra* note 175, at 1110 (2012) (citing ANNETTE BERNHARDT ET. AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 2, 20 (2009)).

189. *See* BRADY MEIXELL & ROSS EISENBREY, ECON. POL'Y INST., AN EPIDEMIC OF WAGE THEFT IS COSTING WORKERS HUNDREDS OF MILLIONS OF DOLLARS A YEAR 2 (Sept. 11, 2014), http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds [https://perma.cc/V73Q-8MET].

190. *See* Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 496 (1992).

utility to address the systemic abuse at hand. First, the courts cannot expect to rely on the federal and state governments to enforce every labor law violation. In fact, most state and federal employment laws were designed primarily to be privately enforced by employees.[191] States and federal regulators simply do not have the necessary resources to make up for a reduction in private enforcement. The Department of Labor, for instance, receives over 20,000 complaints per year and can scarcely investigate all of them.[192] The same is true for state regulatory agencies, which are often understaffed and underfunded.[193] As a consequence, the gap in violations and corresponding enforcements not only presents a clear incentive for habitual violators to continue their practices, but it could also potentially disadvantage responsible employers who are forced to compete with unscrupulous competitors.[194] In fact, one cannot fault law-abiding employers for even feeling the slightest itch to start breaking the law, given that the costs of complying with the law are greater than the costs of ignoring it.[195]

In some situations, a systemic change may not only be the desired way to effectuate a change in behavior but the *only* way to do so. A typical consumer contract illustrates this point well. AT&T in 2000 alone was named as a defendant in no less than 59 consumer suits.[196] The majority of these suits are not individual billing disputes, but rather "claims of intentional misconduct . . . and problems relating to identity theft and claims that involve practices or problems that pertain to all or a group of consumers."[197] Had they been individual gripes, AT&T can choose to satisfy a customer by making billing adjustments, but the company will rarely make systematic changes unless its actions are found to be in violation of federal law.[198] The same consideration exists in the workplace. A re-adjustment of the number of hours worked may settle an individual employee's overtime pay grievances at the company's headquarters in New York. But unless all of the employees maintain a constant channel of communication across the company's offices in Des Moines,

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191. *Maryland and Other States*, *supra* note 156, at 29–31. With respect to the FLSA, for instance, Congress purposefully "established a regulatory scheme that was largely dependent on enforcement by private litigation." J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1150 (2012).

192. *Maryland and Other States*, *supra* note 156, at 30.

193. *Id.* at 31.

194. *Id.* at 34.

195. *Id.*

196. Ting v. AT&T, 182 F. Supp. 2d 902, 915 (N.D. Cal. 2002).

197. *Id.* These misconducts parallel those found to be at issue in employment contracts.

198. *Id.* at 915.

Washington D.C., and Austin, it is unlikely that the company will stop undercounting overtime hours on the basis of one employee complaint. Therefore, it is easy to see that the lack of a collective voice facilitates systematic abuse by encouraging employers to *respond* to illegal acts rather than to *prevent* them from occurring in the first place.

Some may argue that several successful individual suits may provide just enough incentive for a normative shift in the company's behavior to change its overall policy.[199] However, there is no indication this will be the case. In most instances, it will always be more worthwhile—not to mention cheaper—to pay off a few individuals rather than implement company-wide business change.[200] Furthermore, this analysis doesn't change even when individual claims are arbitrated rather than litigated. Unlike public litigation, which can lead to widespread publicity, the arbitration process is shrouded in privacy.[201] Few employees—much less the general public—will even be aware that such a process exists or is currently underway.[202] Even if arbitration were to be made public, a successful arbitration is beneficial only to the extent that it provides individualized relief to the complainant. As one commentator notes, "it is highly unlikely that the arbitrator could order the kind of declaratory or injunctive relief that would put a stop to a widespread illegal practice."[203]

E. Individualized Arbitration Concentrates the Risk of Retaliation on the Employee.

Win or lose, an employee still has much to fear after deciding to bring the fight to the employer. An important consideration in any employee's decision to bring suit against his employer is the ever-present risk of retaliation. Arbitration, though it remains a less contentious form of dispute resolution, is no different. An employee who sues his employer individually rather than collectively is nevertheless at a greater risk of retaliation.[204] One

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199. *See* Sternlight & Jensen, *supra* note 58, at 90.

200. *Id.*

201. *Id.* at 90–91.

202. *Id.* In fact, many claims are nearly impossible for an individual worker to substantiate without the help without the help of other claimants because they depend on proving "corporate policies, patterns, and practices" which can only be shown by evidence of systematic violations. *See* Ruan, *supra* note 175, at 1123.

203. *See* Sternlight & Jensen, *supra* note 58, at 90.

204. *See* Franco v. Arakelian Enters., Inc., 211 Cal. App. 4th 314, 354 (Cal. Ct. App., 2012) (noting that "[F]ederal courts have widely recognized that fear of retaliation for individual suits against an employer is a justification for class certification in the arena of employment litigation . . . ." *citing* Gentry v. Superior Court, 42 Cal. 4th 433, 460 (Cal. 2007)); *Maryland and Other States*, *supra* note 156, at 24–25 (noting that according to

such example from the Division of Labor Standards Enforcement in California proves illustrative. An examination of post-2003 DLSE reports shows that there were 646 retaliation cases making up 61% of all complaints in 2004.[205] This percentage remains largely constant from 2005 through the present. Retaliation complaints have by far been the largest category of complaints received.[206] This suggests that retaliation is not merely a workplace fiction; it presents a veritable challenge to employees contemplating individual action.

In contrast, collective action arbitration mitigates much of this issue. The key distinction is that individual arbitration singles out the individual for retaliation while collective arbitration does the exact opposite. This means whatever retaliatory risk that remains in the latter case is either dissipated through the untenable action of retaliating against *all of the employees* who joined in the collective action, or in the worst-case scenario, the risk is equally spread across all employees so no one individual bears the brunt of the abuse. Therefore, collective action by its very nature seeks to decrease the risks of retaliatory action.

VI. SOLUTION AND CONCLUSION

As Section 7 of the NLRA makes clear, collective action represents one of the most efficient and valuable tools for employees to self-organize in the workplace. In the early days of the labor movement, employers had the upper hand in restraining workers' attempts to band together for better working conditions. The passage of the NLRA was a watershed moment and evinced a clear congressional intent to equalize the bargaining power between employees and employers. One such power resides in the broad language of Section 7's protection. While the shapes and methods through which Section 7 protections are carried out have indeed changed over the decades, the systematic discrimination and labor abuses that employees face in the workplace have not. Whereas a consumer or lay citizen might look to the courthouse for redress, an employee is unfortunately foreclosed from doing so

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California Labor Commission, fear is the number one reason why workers do not complain about wage theft).

205. *See Franco*, 211 Cal. App. 4th at 357 (noting that California DLSE reports from 2004–2011 show that around sixty percent of all complaints were retaliatory in nature). *See, e.g.*, ST. OF CA. DEP'T OF INDUST. LAB. REL., 2004 RETALIATION COMPLAINT REPORT (2004), http://www.dir.ca.gov/dlse/RCILegReport2004.pdf [https://perma.cc/6Q3A-TDHR]; ST. OF CA. DEP'T OF INDUST. LAB. REL., 2011 RETALIATION COMPLAINT REPORT (2011), http://www.dir.ca.gov/dlse/RCILegReport2011.pdf [https://perma.cc/5NZQ-V8P4].

206. ST. OF CA. DEP'T OF INDUST. LAB. REL., 2014 RETALIATION COMPLAINT REPORT (2014), http://www.dir.ca.gov/dlse/RCILegReport2014.pdf [https://perma.cc/GY3T-HKX7].

once he signs—as he is so often required to do—an arbitration clause just to be able to work.[207] The commonality of such contractual provisions means that the scales of power have tipped once again in favor of employers. Barring an extensive overhaul of contract law and doctrines of unfair bargaining, courts must reconsider their interpretation of the NLRA in a way that is consistent with the Act's legislative purpose.

This Comment suggests two straightforward solutions to this issue. First, the Supreme Court should stand on the side of the Seventh and Ninth Circuit to invalidate arbitration provisions that require as a precondition to employment a waiver of collective action.[208] Looking at the intentions of the Act, as well as current case law that seeks to interpret this crucial legislation, the Court should recognize that NRLA incorporated Section 7 as wholly substantive rights which in no way impair any procedural vehicle. Commentators who argue that allowing Section 7 to conflict with the FAA would effectively abrogate the requirements of Federal Rules of Civil Procedure Rule 23 mischaracterize the issue—and not to mention, overstate a conflict that does not exist. Those who worry about the parade of horrible raining down on the future of arbitration, as originally contemplated in *Concepcion*, should be assuaged by the fact that collective action does not always equal class actions.[209] Courts have never, and are not being asked, to certify all collective initiatives as class actions. Given the high costs of class action litigation, courts have every right to be wary of the consequences of certifying hundreds, if not thousands, of litigants in a forum that is decidedly not their own. Instead, a joinder claim in an arbitration proceeding involving a small number of employees with related claims will not be any more formal or any less efficient than a bilateral arbitration. It would also not require the same type of special procedural formality as in a class action.[210] Viewed this way, there is little risk that joinder of claims will somehow alter the landscape of arbitration as we know it.

Second, to the extent that collective actions may eventually constitute a class action proceeding, none of the requirements of a

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207. *See* Cellular Sales of Mo., LLC, 362 N.L.R.B. No. 27, *18, 2015 NLRB LEXIS 165 (2015).

208. Jacob Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1161 (7th Cir. 2016); Morris v. Ernst & Young, LLP, 834 F.3d 975, 979 (9th Cir. 2016).

209. In fact, in the context of a FLSA claim, collective actions are "fundamentally different" from class actions. *Maryland and Other States*, *supra* note 156, at 19–20 (quoting Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1529 (2013)). For instance, unlike with class actions, an employee must affirmatively opt into an FLSA collective action. 29 U.S.C. § 216 (b) (2012).

210. *Maryland and Other States*, *supra* note 156, at 20.

class action suit are sacrificed just because an action is deemed collective. For instance, class action claims may only be upheld when the aggregated claims on their face meet the requirements of numerosity, commonality, typicality and adequate representation under Rule 23.[211] This Comment adds to the analysis by proposing a balancing test that adjudicators may consider in consolidating collective or class action claims in the context of arbitral forums. On one hand, the courts and arbitrators should take note whether employers have demonstrated conduct that evincibly frustrates the very purpose of employee's collective action. For instance, a history of systemic abuse by threatening employees with retaliation each time the employee inquires about a missing paycheck, or a pattern of deprivation of overtime wages in amounts barely below the threshold needed to take collective action is strong evidence that class action should be encouraged. On the other hand, courts and arbitrators should give equal attention to the preservation of the hallmarks of arbitration such as informality and expediency, especially when employers make a good faith effort in conducting bilateral arbitrations as fairly as possible. Practicality is key. A strong showing of the inherent unfeasibility of adjudicating a hodge-podge of grievance claims that lack the most basic element of commonality should be sufficient to overcome any pleas for aggregation. Thus, to be sure, this approach does not mean that every claim will be meritorious on its face; it suggests that such claims are not invalidated merely because they are collective in nature. Therefore, this Comment does not seek to relax the procedural requirements of class action, but only seeks to make them more responsive to the workplace.

As an alternative, policymakers at both federal and state levels could choose to narrow the scope of the protection in a variety of ways, such as by prohibiting companies from using arbitration clauses to preclude class actions only.[212] Using this method maintains some flexibility to mold the outer reaches of Section 7's protections without invalidating collective action waivers as a whole.[213] For instance, Congress has shown a significant interest in this debate by introducing the Arbitration Fairness Act of 2017, which would address the ills of collective action waivers by requiring that agreements to arbitrate be made after disputes have arisen.[214] Furthermore, even if Congress

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211. *See* Glover, *supra* note 5, at 1768.

212. *See* Sternlight & Jensen, *supra* note 58, at 101.

213. *See id.* at 102. Recall class action is narrower than the term collective action.

214. Press Release, Representative Hank Johnson, Sen. Al Franken and Rep. Hank Johnson Lead Fight to End Unfair Forced Arbitration Agreements (Mar. 7, 2017), https://hankjohnson.house.gov/media-center/press-releases/sen-al-franken-and-rep-hank-

deems a general prohibition on collective action too broad, it could leave it to the states to further fashion a limitation prohibiting collective action waivers in arbitration agreements insofar as they only address wage claims.[215] While the outer contours of such legislative action may be subject to debate, two things will be clear. First, both arbitration and collective action rights have been—and will continue to remain—crucial elements of the U.S. legal system.[216] Second, the strength of a legislative-based solution lies in its flexibility to adapt to concerns of a localized workplace without inviting the judiciary to paint with broad strokes over theories of statutory interpretation that implicate substantive rights. Such legislative actions will undoubtedly raise more debate about the ubiquity of arbitration in our work and lives, but even arbitration advocates can appreciate that the fight for collective action is a battle which employees at all levels must continue to wage. As a nation founded on the shoulders of liberty and unity, it is imperative that employees remain vigilant and stand together to ensure that their substantive rights are not abridged in pursuit of better working conditions.

Jay Zhang

johnson-lead-fight-end-unfair-forced [https://perma.cc/3SNA-A5NC].

215. *See* Sternlight & Jensen, *supra* note 58, at 102.

216. *Id.*