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THE FUTURE OF CLASS ACTION WAIVERS IN EMPLOYMENT AGREEMENTS: *LEWIS* CREATES
A FRAMEWORK FOR THE UNITED STATES SUPREME COURT

By
Meghan M. Gonyea*

I. INTRODUCTION

In 2011, the United States Supreme Court in *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011) (“*Concepcion*”) validated adhesive arbitration agreements.¹ *Concepcion* held that California’s *Discover Bank* rule, which attempted to ban class action waivers in most consumer contracts, was preempted by the Federal Arbitration Act (“FAA”).² While the U.S. Supreme Court explicitly upheld class action waivers in the consumer context, this decision left considerable room for the lower courts to interpret class action waivers found in employment agreements.³

The National Labor Relations Board (“Board”), empowered by the National Labor Relations Act⁴ (“NLRA”), decided *D.R. Horton Inc. and Michael Cuda*, 357 N.L.R.B. 2277 (2012)⁵ (“*Michael Cuda*”), and found that employers who banned class action claims in both arbitral and judicial forums violated the NLRA because class actions were “concerted activity,” and thus protected by the statute.⁶ This victory for employees was short-lived, after the Fifth Circuit refused to enforce *Michael Cuda* on appeal, because the Board’s decision “did not give proper weight to the Federal Arbitration Act.”⁷ Only a couple of years later, the Seventh Circuit decided *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016),⁸ creating a split in authority among the circuit courts that will now be resolved by the U.S. Supreme Court in the October 2017 Term.⁹

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¹ See generally *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

² See *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (Cal. 2005).

³ See generally *Concepcion* 563 U.S. at 352.

⁴ National Labor Relations Act, 29 U.S.C. §§ 151-169 (2012).

⁵ See *D.R. Horton, Inc. and Michael Cuda*, 357 N.L.R.B. 2277 (2012).

⁶ See *Michael Cuda*, 357 N.L.R.B. at 2288 (discussing “concerted activity” as “employees’ ability to join together to pursue workplace grievances, including through litigation.”).

⁷ *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 357 (5th Cir. 2013).

⁸ See *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016).

⁹ *Epic Systems Corp. v. Lewis*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/epic-systems-corp-v-lewis/>.

In *Lewis*, the Seventh Circuit became the first circuit to support the Board's interpretation that the NLRA precludes class action waivers.¹⁰ The Seventh Circuit reconciled the NLRA and FAA, finding no conflict between the two federal statutes because the NLRA and FAA "work[ed] hand in glove."¹¹ The Seventh Circuit's decision will soon undergo review by the U.S. Supreme Court to resolve the relationship between the NLRA and the FAA, and further, to settle the validity of class action waivers in employment agreements.¹²

This article will first provide background information regarding class action waivers in both the consumer and employment context. Next, this article will discuss the NLRA and how the Board attempted to interpret the federal statute as precluding class arbitration waivers. This discussion will then provide an overview of the circuit split created by the Seventh Circuit's decision in *Lewis*. Finally, this article will discuss the potential implications of the *Lewis* decision, and suggest how the decision created a framework for the U.S. Supreme Court to invalidate class action waivers in employment agreements. This article will highlight the current landscape of the U.S. Supreme Court after the 2016 presidential election, and the potential influence of that landscape on the outcome of class action waivers in employment agreements.

II. U.S. SUPREME COURT PRECEDENT GOVERNING CLASS ACTION WAIVERS

In the 1960s, the U.S. Supreme Court "revolutionized" arbitration in the labor context by deciding the "*Steelworkers Trilogy*."¹³ The *Steelworkers Trilogy* cases encouraged the practice of arbitration to resolve labor disputes, and also directed courts to limit any merits review of arbitral disputes.¹⁴ Further, in the 1980s, the U.S. Supreme Court exercised deference to arbitration clauses found within employee collective bargaining agreements.¹⁵ Businesses soon "seized on the judicial approval of statutory claims" and began placing adhesive arbitration provisions in both consumer and employment contracts.¹⁶ The disadvantages of these agreements for both consumers and employees

¹⁰ See *Lewis* 823 F.3d at 1151.

¹¹ *Id.* at 1157.

¹² SCOTUSBLOG, *supra* note 9.

¹³ See Ann C. Hodges, *Trilogy Redux: Using Arbitration to Rebuild the Labor Movement*, 98 MINN. L. REV. 1682, 1682 (2014).

¹⁴ *United Steelworkers of Am. v. Enter. Wheel and Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960).

¹⁵ See generally *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

¹⁶ Hodges, *supra* note 13, at 1682-83.

include (1) the deprivation of jury trials; (2) limited discovery and available damages; and (3) a limited, or even no ability to bring class action suits.¹⁷

The U.S. Supreme Court, in a recent trilogy of arbitration cases, continued to strip away the rights of consumers and employees who are forced into agreements to arbitrate.¹⁸ This recent trilogy of U.S. Supreme Court cases did not address class action waivers in employment agreements, but each decision interpreted the FAA, and such precedent “has been interpreted to cover arbitration agreements in the employment setting.”¹⁹ While the strong federal policy favoring arbitration is undeniable, the value of collective actions, in particular for consumers and employees, cannot be overlooked. The Seventh Circuit’s *Lewis* decision, along with proposed rules by the Consumer Financial Protection Bureau (“CFPB”), represent a fundamental shift in the future validity of class action waivers in adhesive arbitration agreements.

To further understand the U.S. Supreme Court’s hostility toward class actions in the arbitral context, an analysis of *Concepcion* provides insight.²⁰ First, the Court was concerned with the “structural” issues surrounding class-wide arbitration.²¹ Next, the Court stated that class arbitration made the arbitral process “slower, more costly, and more likely to generate procedural morass than final judgment.”²² The Court also noted that Congress did not envision class arbitration when the FAA was passed in 1925.²³ The Court continued its analysis by generally providing that “class arbitration greatly increases risks to defendants,” and “[a]rbitration is poorly suited to the higher stakes of class litigation.”²⁴

¹⁷ Hodges, *supra* note 13, at 1683.

¹⁸ See generally *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013) (noting that *Concepcion* resolved the case at issue, and further that class arbitration interfered with the fundamental attributes of arbitration); *Concepcion*, 563 U.S. at 352 (holding that the FAA preempted a California rule that attempted to ban class action waivers in adhesive consumer contracts); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684 (2010) (holding that an arbitration panel exceeded its powers by concluding that the arbitration clause allowed for class arbitration).

¹⁹ See Hodges, *supra* note 13, at 1689 (summarizing the holdings of these three Supreme Court cases: “(1) class arbitration cannot be ordered where an arbitration agreement does not explicitly provide for it; (2) a California rule that invalidated most class action waivers in arbitration agreements as unconscionable was preempted by the FAA; and (3) a class action waiver is enforceable even if an individual claim would cost more to litigate than is available in damages, rejecting the argument that the arbitration agreement denied affective vindication of the statutory claim.”).

²⁰ See generally *Concepcion*, 563 U.S. at 347-51.

²¹ See *id.* at 347-48 (stating several concerns, including (1) the fact that class arbitration includes absent parties, (2) confidentiality becomes more difficult, and (3) arbitrators are not generally knowledgeable in the procedural aspects of certification).

²² *Id.* at 348.

²³ See *id.* at 349.

²⁴ *Id.* at 350.

Thus, even though the U.S. Supreme Court has defined arbitration as a “mere form of trial,”²⁵ it is yet unwilling to give parties to arbitration the same ability to bring claims collectively in the arbitral forum.²⁶ Without considering the advantages of class arbitration for consumers and employees who are forced into arbitration through adhesion, the U.S. Supreme Court engaged in a one-sided argument, which, as a result, has limited the rights of many individuals to act collectively.²⁷

The four Justices who dissented in the *Concepcion* decision attacked several of the majority’s arguments. The dissenters recognized the generalizations made by the majority and exposed the lack of evidence used for support.²⁸ The dissenting opinion, written by Justice Breyer, and joined by Justices Ginsburg, Kagan, and Sotomayor, argued that the *Discover Bank* rule was consistent with the FAA’s language.²⁹ Next, the dissent emphasized that Congress’ primary objective in enacting the FAA was not solely to guarantee the procedural advantages of arbitration.³⁰ The dissent emphasized the *Discover Bank* rule’s efforts to “[do] just what § 2 requires, namely, put[] agreements to arbitrate and agreements to litigate ‘upon the same footing.’”³¹

The dissent continued by invalidating the majority’s opinion that the *Discover Bank* rule increased the complexity of arbitration procedures.³² The dissent criticized the majority’s comparison of class arbitration with that of bilateral arbitration, stating the correct comparison, if anything, was between class arbitration and judicial class actions.³³ The dissent also recognized that no “rational lawyer” would have signed on to represent the *Concepcions* for the possibilities of fees stemming from a \$30.22 claim.³⁴ Finally, the dissent criticized the lack of any “meaningful support for [the Court’s] views in [the]

²⁵ *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477, 480 (1989).

²⁶ *See generally Concepcion*, 563 U.S. at 352.

²⁷ *See id.*

²⁸ *See id.* at 360-61.

²⁹ *Id.* at 359 (noting in addition that the *Discover Bank* rule was consistent with the purpose behind the FAA, in that the purpose was to “make valid and enforceable agreements for arbitration”).

³⁰ *Id.* at 359-60 (explaining that the primary objective was to secure the “enforcement” of agreements to arbitrate).

³¹ *Concepcion*, 563 U.S. at 361.

³² *Id.* at 363-65 (noting that class arbitration was consistent with the use of arbitration, and further, that class arbitration was well known in California and followed elsewhere).

³³ *Id.* at 363 (emphasizing that California applied the same legal principles to address the unconscionability of class arbitration waivers as it did to address the unconscionability of any other contractual provision).

³⁴ *Id.* at 365 (agreeing with California’s “perfectly rational view” that nonclass arbitration over such sums would sometimes have the effect of depriving claimants of their claims).

Court's precedent."³⁵ The dissent cited precedent that authorized complex arbitration procedures, upheld nondiscriminatory state laws that slowed down arbitration proceedings, and found *no* precedent "strik[ing] down a statute that treat[ed] arbitrations on par with judicial and administrative proceedings."³⁶

Concepcion's dissenting Justices carefully and meticulously stripped down the majority's opinion, recognizing the lack of support and empirical evidence provided by Justice Scalia, the author of the opinion. Thus, although the U.S. Supreme Court has yet to weigh in on the use of class action waivers in the employment context, the 5-4 split in *Concepcion* reveals strong ideological differences among the Justices. With the passing of Justice Scalia, the largely unsettled issue of class action waivers in U.S. arbitration law will be at the mercy of the newly confirmed Justice, Neil Gorsuch.

III. THE VALUE OF CLASS ACTIONS FOR EMPLOYEES AND THE PURPOSE OF THE NLRA

The ability to bring a class action among low-wage workers is particularly important because these individuals often have "legitimate claims with low, individual value."³⁷ A class action "is a procedural device that permits one or more plaintiffs to file and prosecute a lawsuit on behalf of a larger group, or 'class.'"³⁸ Section 7 of the NLRA seeks to protect such workers by equalizing the bargaining power between employees and employers by granting the right to collective bargaining.³⁹ This section will explore why class actions are so important for low-wage employees, the efforts of the NLRA to protect such rights, and how the U.S. Supreme Court has restricted these rights by weakening exceptions to the FAA.

A. *The Need for Class Action Rights Among Low-Wage Employees*

The rights of low-wage workers are frequently violated, and low-wage workers particularly struggle to bring individual claims against employers for several reasons.⁴⁰ These reasons include, but are not limited to, the costs of litigation, a lack of financial

³⁵ *Concepcion*, 563 U.S. at 366.

³⁶ *Id.*

³⁷ Nicole Wredberg, Note, *Subverting Workers' Rights: Class Action Waivers and the Arbitral Threat to the NLRA*, 67 HASTINGS L.J. 881, 885 (2016).

³⁸ *Class Action*, CORNELL UNIVERSITY LAW SCHOOL, https://www.law.cornell.edu/wex/class_action ("Put simply, the device allows courts to manage lawsuits that would otherwise be unmanageable if each class member . . . were required to be joined in the lawsuit as a named plaintiff.").

³⁹ See 29 U.S.C. § 157.

⁴⁰ See Wredberg, *supra* note 37, at 885.

resources, and fear of retaliation from employers.⁴¹ Because class actions are threatening to employers, arbitration agreements increasingly and strategically are drafted to include class and collective action waivers.⁴² Low-wage employees, who often do not have the financial capacity to reject an opportunity to work, are forced to enter into adhesive arbitration agreements. Justice Scalia, in the majority opinion of *Concepcion*, noted that “class arbitration greatly increase[ed] risks to defendants.”⁴³ However, a more accurate statement would be “that class arbitration levels the playing field in agreements that have historically left plaintiffs at a significant disadvantage.”⁴⁴ Both courts and legal scholars have recognized that adhesive arbitration agreements are advantageous to defendants such as AT&T Mobility because (1) consumers often do not understand or pay attention to the wording of an arbitration provision; (2) the consumer has little bargaining power even if the individual knows the consequences of an adhesive arbitration provision; and (3) individual arbitration is not practical for consumers with small-value claims.⁴⁵ Companies and employers alike have placed class action waivers in adhesive arbitration provisions with knowledge of these disadvantages. However, in the employment arena, NLRA Section 7 provides a potential defense to employees who want to aggregate claims.⁴⁶ The U.S. Supreme Court will have to decide whether NLRA Section 7 can be reconciled with the overwhelming enforcement of arbitration agreements.⁴⁷

⁴¹ *Id.*

⁴² See Hodges, *supra* note 13, at 1687-88 (explaining, “Class actions are the legal bane of businesses. They enable large groups of consumers or employees to band together to sue the employer in one action. They are particularly useful for cases where each plaintiff has a small claim that would cost more to litigate than the claim is worth. Litigating as a group makes it cost-effective to bring the case. Thus, the ability to bring a class action may increase the business’s vulnerability to legal claims. Additionally, class actions are costly and time-consuming to litigate. They often attract media attention and accordingly may affect a company’s reputation. As a result, there is considerable pressure on companies to settle such claims when they are filed.”).

⁴³ *Concepcion*, 563 U.S. at 350.

⁴⁴ Peter Danysh, Comment, *Employing the Right Test: The Importance of Restricting AT&T v. Concepcion to Consumer Adhesion Contracts*, 50 HOUS. L.REV. 1433, 1449 (2013).

⁴⁵ *Id.* at 1149-50.

⁴⁶ See generally 29 U.S.C. § 157.

⁴⁷ SCOTUSBLOG, *supra* note 9.

B. Section 7 of the NLRA

Section 7 of the NLRA seeks to equalize the bargaining power between employers and employees by bestowing the rights to bargain collectively.⁴⁸ Section 7 of the NLRA reads:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).⁴⁹

In summary, Section 7 of the NLRA permits employees to engage collectively against more powerful employers.⁵⁰ Circuit courts have struggled to reconcile the strong federal policy in favor of arbitration with federal employment statutes like the NLRA.⁵¹ There are two general statutory exceptions to the strong federal policy in favor of arbitration.⁵² The first exception, also known as the “savings clause” exception, can be found in the final sentence of Section 2 of the FAA, and reads “save upon such grounds as exist at law or in equity for the revocation of any contract.”⁵³ The “savings clause” of the FAA, also referred to as Section 2, reads:

A written provision in any maritime transaction or 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, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract,

⁴⁸ See generally 29 U.S.C. § 157.

⁴⁹ 29 U.S.C. § 157.

⁵⁰ See *id.*

⁵¹ See generally *Lewis*, 823 F.3d at 1157 (reconciling the FAA with the NLRA); *D.R. Horton, Inc. v. NLRB*, 737 F.3d at 357 (refusing to reconcile the FAA and NLRA and rejecting the NLRB’s interpretation of the NLRA as precluding class action waivers); *Morris v. Ernst & Young*, 834 F.3d 975, 986 (9th Cir. 2016) (concluding the arbitration clause at issue interfered with the NLRA’s Section 7 right to concerted activity and therefore could not be enforced); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 296-97 (2d Cir. 2013) (concluding the Fair Labor Standards Act “FLSA” did not have a “contrary congressional command” sufficient to override the FAA); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053 (8th Cir. 2013) (finding the FLSA lacked a “contrary congressional command” sufficient to override the mandate of the FAA).

⁵² *Wredberg*, *supra* note 37, at 899-900.

⁵³ Federal Arbitration Act, 9 U.S.C. § 2 (2012).

transaction, or refusal shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.⁵⁴

The second exception exists where another statute conflicts with the FAA and provides a “clear congressional command” to override the FAA.⁵⁵ The “effective-vindication” doctrine, created by the courts, is a method to ensure that arbitration is an “effective mechanism” for vindicating federal statutory rights.⁵⁶ The necessity of the effective-vindication doctrine was reinforced by a fiery dissent from Justice Kagan in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013)⁵⁷ (“*Italian Colors*”). Justice Kagan noted the majority’s disregard of the effective vindication exception, and emphasized that “an arbitration clause may not thwart federal law, irrespective of exactly how it does so.”⁵⁸ However, although these remedies do exist to combat the strong federal policy favoring arbitration, the U.S. Supreme Court has illustrated its willingness to enforce arbitration agreements despite the potential for unfairness among aggrieved parties.⁵⁹

As a result, several circuit courts have struggled to reconcile the FAA with other statutory rights proscribed in federal employment statutes. The Seventh Circuit and the Ninth Circuit created a circuit split by supporting the Board’s interpretation of the NLRA as precluding class action waivers, and both opinions attempted to reconcile two very powerful federal statutes, the FAA and the NLRA.⁶⁰ Alternatively, the Fifth Circuit, on the other side of the split, held that the NLRA did not contain a “contrary congressional command” exempting the statute from application of the NLRA.⁶¹

⁵⁴ 9 U.S.C. § 2.

⁵⁵ Wredberg, *supra* note 37, at 900.

⁵⁶ Okezie Chukwumerije, *The Evolution and Decline of the Effective Vindication Doctrine in U.S. Arbitration Law*, 14 PEPP. DISP. RESOL. L.J. 375, 375 (2014) (noting the Supreme Court’s decision in *Italian Colors* “severely restricted the availability of the doctrine”).

⁵⁷ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

⁵⁸ *Id.* at 2313.

⁵⁹ *See generally id.* at 2312; *Concepcion*, 563 U.S. at 346-52.

⁶⁰ *See Morris*, 834 F.3d at 985; *Lewis*, 823 F.3d at 1157.

⁶¹ *D.R. Horton, Inc. v. NLRB*, 737 F.3d at 362 (refusing to reconcile the two federal statutes and emphasizing the superiority of the FAA).

IV. THE CIRCUIT SPLIT: *LEWIS* IN SUPPORT OF THE BOARD

A. *The Michael Cuda Decision and the Fifth Circuit's Reversal*

In January of 2012, the Board published an opinion in an effort to reconcile the FAA and the NLRA.⁶² In *Michael Cuda*, a homebuilder began to require each new and current employee to execute a “Mutual Arbitration Agreement” (“MAA”) as a condition of employment.⁶³ Application and enforcement of the MAA waived the rights of employees to proceed in a class or collective action because the agreement required that all employment-related disputes were to be resolved through individual arbitration.⁶⁴

The Board found in favor of the employee, while asserting several ideas throughout the opinion that would prove to be controversial.⁶⁵ The Board stated Section 7 of the NLRA was a “substantive right.”⁶⁶ The “substantive right” of NLRA Section 7 “lies at the heart of the restructuring of employer/employee relationships that Congress meant to achieve in the statute.”⁶⁷ Most controversially, *Michael Cuda* established a three-prong analysis, ultimately concluding there was no conflict between the FAA and NLRA under the circumstances of the case at hand.⁶⁸ First, the Board stated the purpose of the FAA was to prevent courts from treating arbitration agreements less favorably than other private contracts, and therefore, “[t]o find that an arbitration agreement must yield to the NLRA is to treat it no worse than any other private contract that conflicts with Federal Labor Law.”⁶⁹ Second, the Board cited U.S. Supreme Court precedent that an agreement to arbitrate federal statutory claims, including employment claims, may not require a party to lose the substantive rights afforded by such statute.⁷⁰ Third, the Board noted that nothing in the text of the FAA suggested that an arbitration agreement inconsistent with the NLRA is “nevertheless enforceable.”⁷¹

⁶² See *Michael Cuda*, 357 N.L.R.B. at 2285.

⁶³ *Michael Cuda*, 357 N.L.R.B. at 2277.

⁶⁴ *Id.* at 2277.

⁶⁵ See *id.* at 2280-88.

⁶⁶ *Id.* at 2278.

⁶⁷ *Lewis*, 823 F.3d at 1160 (emphasizing that the right to collective action under NLRA Section 7 is not merely a procedural one).

⁶⁸ *Michael Cuda*, 357 N.L.R.B. at 2285-88.

⁶⁹ *Id.* at 2285.

⁷⁰ *Id.* (citing *Gilmer v. Johnson/Interstate Lane Corp.*, 500 U.S. 20 (1991)).

⁷¹ *Id.* at 2287.

The Board's interpretation of the NLRA as precluding class action waivers was short-lived after the Fifth Circuit invalidated the Board's opinion.⁷² The Fifth Circuit, in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 357 (5th Cir. 2013) ("*D.R. Horton, Inc. v. NLRB*"), rejected the Board's reconciliation of the FAA and the NLRA and granted significantly more weight to the FAA.⁷³ The Fifth Circuit first stated the use of class action procedures was not a "substantive right," and continued its analysis by citing *Concepcion*, ultimately concluding that the Board's rule did not fit within the savings clause of the FAA.⁷⁴ The Fifth Circuit also rejected the "contrary congressional command" exception to the FAA.⁷⁵

Two additional circuit courts have analyzed the issue of class action waivers in employment agreements.⁷⁶ The Eighth Circuit, in *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013) ("*Bristol Care*"), directly rejected the plaintiff's request to follow the Board's rationale in *Michael Cuda*, and held that arbitration agreements containing class waivers were enforceable in claims brought under the Fair Labor Standards Act ("FLSA").⁷⁷ The Second Circuit, in *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) ("*Sutherland*"), addressed the issue of whether an employee could invalidate a class action waiver provision in the arbitration agreement when that waiver removed the financial incentive for her to pursue a claim under the FLSA.⁷⁸ The Second Circuit began its analysis by citing the liberal federal policy in favor of arbitration,⁷⁹ and swiftly rejected the "contrary congressional command" and "effective vindication" exceptions to the FAA.⁸⁰

⁷² See *D.R. Horton, Inc. v. NLRB*, 737 F.3d at 348.

⁷³ See *id.* at 357.

⁷⁴ *D.R. Horton, Inc. v. NLRB*, 737 F.3d at 359.

⁷⁵ *Id.* at 360.

⁷⁶ See generally *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

⁷⁷ *Bristol Care*, 702 F.3d at 1055 (emphasizing the absence of any contrary congressional command from the FLSA that a right to engage in class actions overrides the mandate of the FAA in favor of arbitration).

⁷⁸ *Sutherland*, 726 F.3d at 292.

⁷⁹ *Id.* at 296.

⁸⁰ *Id.* at 296-98 (citing *Italian Colors*, which held the effective vindication doctrine could not be used to invalidate class-action waiver provisions in circumstances where the recovery sought is exceeded by the costs of individual arbitration).

B. *The Lewis Decision and Reasoning*

In a recent decision out of the Seventh Circuit, the court in *Lewis* became the first federal circuit court of appeals to support the Board's interpretation of the NLRA as precluding class arbitration waivers.⁸¹ *Lewis* simultaneously provided a framework for the U.S. Supreme Court to decide once and for all the validity of class action waivers in the employment context.⁸² The underlying dispute in *Lewis* involved an email sent by Epic Systems to some of its employees.⁸³ The email contained an arbitration agreement mandating that wage-and-hour claims could be brought only through individual arbitration and that employees waived "the right to participate in or receive money or any other relief from any class, collective, or representative proceeding."⁸⁴

The court first established that filing a collective or class action suit constituted "concerted activit[y]" under Section 7 of the NLRA.⁸⁵ Next, the court cited the important policy implications favoring the right of employees to engage in collective or class action suits.⁸⁶ The Seventh Circuit most importantly provided a thorough analysis reconciling the NLRA with the FAA.⁸⁷ The Seventh Circuit refused to follow the precedent of other circuits, and rather than allow the FAA to override the NLRA, the court in *Lewis* emphasized, "[B]efore we rush to decide whether one statute eclipses another, we must stop to see if the two statutes conflict at all."⁸⁸

The Seventh Circuit, unlike court opinions before *Lewis*, fluidly reconciled the FAA and the NLRA, even going as far to state the two federal statutes worked "hand in glove."⁸⁹ The Seventh Circuit directly attacked the Fifth Circuit's decision in *D.R. Horton, Inc. v. NLRB*, noting the logic of the Fifth Circuit's decision had "several problems."⁹⁰ The

⁸¹ See *Lewis*, 823 F.3d at 1159.

⁸² *Id.* at 1157-59 (concluding the employment agreement in question violated the NLRA and was unenforceable under the FAA).

⁸³ *Id.* at 1151.

⁸⁴ *Lewis*, 823 F.3d at 1151.

⁸⁵ *Id.* at 1152.

⁸⁶ *Id.* at 1153 (stating "Collective, representative, and class legal remedies allow employees to band together and thereby equalize bargaining power.").

⁸⁷ *Id.* at 1157.

⁸⁸ See *id.* at 1156 (emphasizing that a conclusion in which the FAA trumps the NLRA "puts the cart before the horse.").

⁸⁹ *Lewis*, 823 F.3d at 1157.

⁹⁰ *Id.* at 1158 (diminishing the logic of *D.R. Horton II* because the Fifth Circuit (1) relied on dicta of Supreme Court precedent, (2) made no effort to harmonize the FAA and NLRA, and (3) failed to note that the NLRA is in fact pro-arbitration.).

Seventh Circuit gave “equal footing” to the FAA and the NLRA.⁹¹ The Seventh Circuit’s final point established that the right to collective action in Section 7 was a substantive right, not a procedural one.⁹² On September 2, 2016, Epic Systems Corporation filed a writ of certiorari, and on January 13, 2017, the petition was granted by the U.S. Supreme Court.⁹³ *Lewis* was consolidated with *Morris* and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), and will be argued in front of the Supreme Court in the October 2017 Term.⁹⁴

C. The Author of the Lewis Decision: Judge Diane P. Wood

The *Lewis* opinion was carefully drafted, and seamlessly reconciled the NLRA with the FAA, a solution that circuit courts had been previously unwilling to apply. The author of the *Lewis* decision, Judge Diane P. Wood, cannot be overlooked. Judge Wood is a highly respected judge among her peers in the legal profession.⁹⁵ Judge Wood has played the role “of philosophical outlier, a left-leaning woman in a world of right-leaning men,”⁹⁶ including Judge Posner and Judge Frank H. Easterbrook. Judge Wood was appointed by President Clinton in 1995 and became the second woman on the Seventh Circuit Court of Appeals.⁹⁷ Judge Wood has focused on the importance of individual rights in many of her Seventh Circuit opinions.⁹⁸

Judge Wood’s ideas on constitutional interpretation and her opinions supporting individual rights would have placed her “firmly on the left in the Court.”⁹⁹ Further, the more liberal justices have generally agreed with Judge Wood’s views, and her opinions

⁹¹ *Id.*

⁹² *Id.* at 1160 (stating “It instead lies at the heart of the restructuring of employer/employee relationships that Congress meant to achieve in the statute.”).

⁹³ SCOTUSBLOG, *supra* note 9.

⁹⁴ *Id.*

⁹⁵ See generally Sheryl G. Stolberg, *Judicial Bouts Reveal Power of Persuasion*, N.Y. TIMES (April 21, 2010), http://www.nytimes.com/2010/04/22/us/politics/22court.html?_r=0; Kristina Moore, *Nominee Analysis: Judge Diane Wood*, SCOTUSBLOG (May 20, 2009, 5:08 PM), <http://www.scotusblog.com/2009/05/nominee-analysis-judge-diane-wood/>.

⁹⁶ Stolberg, *supra* note 95.

⁹⁷ Moore, *supra* note 95.

⁹⁸ *Id.* (citing *Crawford v. Marion County Election Board*, 484 F.3d 436 (7th Cir. 2007); *St. John’s United Church of Christ v. City of Chicago*, 502 F.3d 616 (7th Cir. 2007)).

⁹⁹ *Id.*

have “generally fared well before the court as a whole.”¹⁰⁰ Judge Wood has been called “an articulate proponent for a dynamic Constitution.”¹⁰¹ Judge Wood is well known for her lecture on her understanding of constitutional interpretation.¹⁰² In her lecture, Judge Wood thoroughly explained her argument that the Framers of the Constitution enshrined “only the broadest principles in the Constitution.”¹⁰³ An excerpt from Judge Wood’s lecture reads:

First and most important is the idea that we should take seriously the fact that the text of the Constitution tends to reflect broad principles, not specific prescriptions. Neither James Madison, for whom this lecture is named, nor any of the other Framers of the Constitution, were oblivious, careless, or otherwise unaware of the words they chose for the document and its Bill of Rights. The papers they left behind leave no doubt that they hoped to be writing for the ages. There is no more reason to think that they expected the world to remain static than there is to think that any of us holds a crystal ball. The only way to create a foundational document that could stand the test of time was to build enough flexibility that later generations would be able to adapt to their own needs and uses.¹⁰⁴

Judge Wood’s willingness to reconcile the NLRA and the FAA in her Seventh Circuit *Lewis* decision likely flows naturally from her strong beliefs in the ever-growing and ever-changing dynamics of the law. Judge Wood creates practical, logical analyses to support her arguments, and is not afraid to stand up for her views against the “conservative jurisprudence of the right.”¹⁰⁵

Judge Wood was even considered by President Obama as a possible Supreme Court nominee in 2010.¹⁰⁶ Although President Obama did not appoint Judge Wood in the end, the President sought “an intellectual counterweight” to Chief Justice Roberts, but who also possessed “the same consensus-building skills” as Justice Stevens, such skills that could

¹⁰⁰ *Id.* (citing *Wallace v. Kato*, 549 U.S. 384 (2007); *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742 (1998)).

¹⁰¹ *Id.*

¹⁰² See The Honorable Diane P. Wood, *Our 18th Century Constitution in The 21st Century World*, 80 N.Y.U. L. REV. 1079, 1081 (2005).

¹⁰³ Wood, *supra* note 102, at 1099.

¹⁰⁴ Wood, *supra* note 102, at 1098-99.

¹⁰⁵ Moore, *supra* note 95 (noting that Judge Wood has written over fifty dissents and concurrences, and has joined dozens more).

¹⁰⁶ Stolberg, *supra* note 95.

potentially tip a 5-4 court toward more liberal outcomes.¹⁰⁷ President Obama saw potential in Judge Wood, largely as a result of her time with Judges Easterbrook and Posner on the Seventh Circuit Court of Appeals.¹⁰⁸ Judge Posner has been quoted as stating, “I think [Judge Wood has] been very tactful in dealing with people – not giving up her views but trying to look for common ground.”¹⁰⁹ This “common ground” approach taken by Judge Wood is clearly illustrated in her *Lewis* decision, and reflects a practical approach to resolving the problem of class action waivers found in adhesive arbitration agreements.

D. The Morris Decision and Reasoning

Just a few months later, in August of 2016, the Ninth Circuit published an opinion agreeing with the Seventh Circuit, and deepening the circuit split.¹¹⁰ In *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), the Ninth Circuit held that an employer violated the NLRA by requiring employees to sign a concerted action waiver as a condition of employment because preventing concerted work-related legal claims interfered with the exercise of the employees’ right to act in concert under NLRA Section 7.¹¹¹ Two employees working for the accounting firm Ernst & Young brought an action against their employer.¹¹² As a condition of employment, the employees were required to sign agreements not to join with other employees in bringing legal claims against the company.¹¹³ The “concerted action waiver” required employees to (1) pursue any legal claims against the company exclusively through arbitration; and (2) arbitrate only as individuals and in “separate proceedings.”¹¹⁴ In effect, the “concerted action waiver” prevented employees from initiating concerted legal claims against Ernst & Young in any forum, including in court, or in arbitration proceedings.¹¹⁵

The Ninth Circuit first established important employee rights that were to be binding on the court’s decision.¹¹⁶ The Ninth Circuit stated “employees have the right to

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *See Morris*, 834 F.3d at 979.

¹¹¹ *Morris*, 834 F.3d at 979.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 979.

¹¹⁶ *Morris*, 834 F.3d at 980-81.

pursue work-related legal claims together,”¹¹⁷ and further, that the Supreme Court has reaffirmed the “considerable deference” owed to the Board’s interpretations of the NLRA.¹¹⁸ Next, the Ninth Circuit accepted the Board’s interpretation of Section 7 and Section 8 of the NLRA.¹¹⁹ Similar to the reasoning of the Seventh Circuit, the Ninth Circuit reconciled the FAA with the NLRA, concluding the FAA did not reach a contrary result.¹²⁰ The Ninth Circuit framed the issue in favor of the liberal federal policy in favor of arbitration, because the problem with the contract was the waiver of a substantive federal right, and not the requirement of arbitration.¹²¹

In line with the reasoning of the Seventh Circuit, the Ninth Circuit established the right to concerted action under Section 7 of the NLRA as a “substantive” right.¹²² The Ninth Circuit also refused to allow the NLRA and the FAA to “trump” the other.¹²³ Instead, the Ninth Circuit determined that when an arbitration contract waives a substantive federal right, “the saving clause of the FAA prevents the enforcement of that waiver.”¹²⁴

The Ninth Circuit provided a brief analysis of why “[t]he interaction between the NLRA and the FAA makes this case distinct from other FAA enforcement challenges in at least three additional and important ways.”¹²⁵ First, the Ninth Circuit stated the terms of the contract were accurately described as “illegal” because the employment contract waived a federal substantive right.¹²⁶ Second, the enforcement defense in the issue at hand

¹¹⁷ *Id.* at 980.

¹¹⁸ *Id.* (citing *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984)).

¹¹⁹ *Id.* at 980-81.

¹²⁰ *Id.* at 984 (stating “But the arbitration requirement is not the problem. The same provision in a contract that required court adjudication as the exclusive remedy would equally violate the NLRA. The NLRA obstacle is a ban on initiating, in any forum, concerted legal claims –not a ban on arbitration.”).

¹²¹ *Morris*, 834 F.3d at 984.

¹²² *Morris*, 834 F.3d at 980 (stating, “This case turns on a well-established principle: employees have the right to pursue work-related legal claims together. Concerted activity—the right of employees to act together—is the essential, substantive right established by the NLRA. Ernst & Young interfered with that right by requiring its employees to resolve all of their legal claims in ‘separate proceedings.’ Accordingly, the concerted action waiver violates the NLRA and cannot be enforced.”).

¹²³ *Id.* at 987.

¹²⁴ *Id.*

¹²⁵ *Id.* at 988.

¹²⁶ *Id.* at 988 (noting that “the NLRA is unambiguous: concerted activity is the touchstone, and a ban on the pursuit of concerted work-related legal claims interferes with a core, substantive right.”).

had nothing to do with the adequacy of the arbitration proceedings.¹²⁷ Third, the Ninth Circuit noted that the “enforcement” defense did not “disfavor” arbitration.¹²⁸ The Ninth Circuit concluded its reasoning with nothing short of a blow to the FAA, stating, “Further, nothing in the Supreme Court’s recent arbitration case law suggests that a party may simply incant the acronym “FAA” and receive protection for illegal contract terms anytime the party suggests it will enjoy arbitration less without those illegal terms.”¹²⁹ The Ninth Circuit emphasized that parties invoking the FAA cannot exploit the strong federal policy in favor of arbitration to usurp the legal system.¹³⁰

The majority’s decision was followed by a strong dissent by Judge Sandra Segal Ikuta, reflecting the strong liberal policy in favor of arbitration.¹³¹ Judge Ikuta stated:

Today the majority holds that § 7 of the National Labor Relations Act (NLRA) precludes employees from waiving the right to arbitrate their disputes collectively, thus striking at the heart of the Federal Arbitration Act’s (FAA) command to enforce arbitration agreements according to their terms. This decision is breathtaking in its scope and in its error; it is directly contrary to Supreme Court precedent and joins the wrong side of a circuit split.¹³²

Judge Ikuta’s dissent illustrates the strong ideological differences among judges faced with the issue of class action waivers in arbitration agreements. These ideological differences are also present on the U.S. Supreme Court, and therefore, the *Lewis* decision will be resolved in some capacity by a deeply divided bench in the October 2017 Term.¹³³

¹²⁷ *Morris*, 834 F.3d at 988 (stating “Here, the NLRA’s prohibition on enforcing the ‘separate proceedings’ clause has nothing to do with the adequacy of arbitration.”).

¹²⁸ *Id.* at 989 (emphasizing that the contract provided by Ernst & Young would face the same scrutiny if employees were required to resolve their disputes in court, because the forum provision was coupled with a restriction on concerted activity).

¹²⁹ *Id.*

¹³⁰ *See generally id.*

¹³¹ *Id.* at 990-98.

¹³² *Morris*, 834 F.3d at 990.

¹³³ SCOTUSBLOG, *supra* note 9.

V. IMPLICATIONS OF THE *LEWIS* AND *MORRIS* DECISIONS

A. *Lewis* and Class Action Waivers

The Seventh and Ninth Circuit decisions are the only circuits thus far to agree with the Board's interpretation of the NLRA as precluding class action waivers. The Seventh Circuit, similar to the Board, attempted to reconcile the FAA and NLRA.¹³⁴ The *Michael Cuda* and *Lewis* decisions attempted to justify their progressive holdings by placing important limits on the rights of employees to engage in class actions. The Board emphasized the limits of its holding, noting that only a small percentage of arbitration agreements would be potentially affected.¹³⁵ The Seventh Circuit also justified its decision by recognizing that the NLRA was "pro-arbitration."¹³⁶

Both decisions recognized that invalidating class action waivers would likely receive scrutiny under the current federal policy in favor of arbitration.¹³⁷ The Board and the Seventh Circuit, by reconciling the FAA and the NLRA, engaged in an analysis that the U.S. Supreme Court, and several other circuit courts, have refused to engage in. The NLRA's strong federal policy equalizing the bargaining rights between employers and employees cannot be ignored in light of the U.S. Supreme Court's willingness to impose class action waivers found within adhesive arbitration agreements.¹³⁸ The *Lewis* decision engaged in a thorough, substantive analysis to reach its conclusion, unlike the other circuits, which so quickly emphasized the superiority of the FAA.¹³⁹

The *Lewis* decision provides a sound legal analysis for the U.S. Supreme Court to consider. The validity of class action waivers in the employment context carries heavy weight, as collective action for employees may be the only avenue to ensure equal bargaining power against employers who attempt to insulate their business from these remedies that, according to the Seventh Circuit, are guaranteed by Section 7 of the NLRA and can be reconciled with the FAA.¹⁴⁰ The *Morris* decision, decided within months of

¹³⁴ *Lewis*, 823 F.3d at 1157.

¹³⁵ *Michael Cuda*, 357 N.L.R.B. at 2288 (noting (1) only agreements applicable to "employees" as defined in the NLRA even potentially implicate Section 7 rights; (2) the employment-related contracts of those transportation workers covered by the Act appear already to be exempted by the FAA through Section 1 of the statute, and (3) only those agreements that would be reasonably read to bar protected, concerted activity are vulnerable).

¹³⁶ *Lewis*, 823 F.3d at 1158 (stating the NLRA allows unions and employers to arbitrate disputes between each other, and to negotiate collective bargaining agreements that require employees to arbitrate individual employment disputes).

¹³⁷ See *Lewis*, 823 F.3d at 1159; *Michael Cuda*, 357 N.L.R.B. at 2288.

¹³⁸ See generally *Concepcion*, 563 U.S. at 352.

¹³⁹ See generally *Lewis*, 823 F.3d at 1153-60.

¹⁴⁰ *Id.* at 1153-57.

the *Lewis* decision, deepened the circuit split and further established that the U.S. Supreme Court will need to address the issue of class action waivers in employment arbitration agreements.

B. Deference Owed to the National Labor Relations Board

At the core of the *Morris* decision in particular, Chief Judge Sidney R. Thomas placed a heavy emphasis on the deference courts owe to the National Labor Relations Board.¹⁴¹ Chief Judge Thomas, in his Ninth Circuit opinion, began his analysis by recognizing the importance of the Board's interpretation of the NLRA, while weighing the balancing act that has developed between the judicial system and federal agencies of the United States.¹⁴² Chief Judge Thomas stated that "[C]onsiderable deference" is owed to the Board's interpretation of the NLRA, and that the Ninth Circuit's analysis would begin with the Board's "treatment of similar contract terms."¹⁴³ Chief Judge Thomas established the Board's conclusion that an employer violates the NLRA when "[I]t requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial."¹⁴⁴ Chief Judge Thomas next introduced the concept of "*Chevron*" deference to the Ninth Circuit's opinion.¹⁴⁵ Under the theory of "*Chevron* deference," a court cannot substitute its own construction "of a statutory provision for a reasonable interpretation made by the administrator of an agency."¹⁴⁶

The issue relevant to this article is the tension between the National Labor Relations Board (an administrative agency of the United States established by the National Labor Relations Act) and the Supreme Court of the United States. The NLRA established that

¹⁴¹ *Morris*, 834 F.3d at 980.

¹⁴² *Id.* at 981 (noting "The Supreme Court has 'often reaffirmed that the task of defining the scope of [NLRA] rights' is for the Board to perform in the first instance as it considers the wide variety of cases that come before it.").

¹⁴³ *Id.* at 980.

¹⁴⁴ *Morris*, 834 F.3d at 980 (recognizing that the Board's determination rested on two "precepts," including an employee's right to engage in concerted activities, and also, the principle that an employer may not "circumvent the right to concerted legal activity by requiring that employees resolve all employment disputes individually").

¹⁴⁵ *Id.* at 980-81 (citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984)).

¹⁴⁶ Kristine Cordier Karnezis, *Construction and Application of "Chevron Deference" to Administrative Action by United States Supreme Court*, 3 A.L.R. FED. 2d 25, 1 (2005) (stating, "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

employees have the right to “concerted action,”¹⁴⁷ but whether “concerted action” is required as an arbitral remedy is not clear. The *Chevron* decision greatly increased the legitimacy and power of federal administrative agencies, where the U.S. Supreme Court held that the EPA’s definition of the term “source” was a permissible construction of the Clean Air Act, which sought to accommodate progress in reducing air pollution with economic growth.¹⁴⁸ The U.S. Supreme Court established the standard for when courts could interfere with statutory interpretation and where such interference would be beyond the scope of the Supreme Court’s authority.¹⁴⁹ Setting forth the standard, the U.S. Supreme Court stated:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.¹⁵⁰

Essentially, courts engage in a two-step analysis under *Chevron*, looking to whether (1) Congress spoken directly to the precise question at issue; and (2) if not, whether the agency’s construction of the statute reasonable.¹⁵¹ Justice Stevens also states several important policy arguments for why administrative agencies are owed deference. For example, Justice Stevens stated that (1) judges are not experts in the field, unlike agencies; (2) the executive branch of government should be making policy choices, and not judges; and (3) judges have a duty to respect policy choices of executive branch agencies because they are ultimately accountable to the people.¹⁵² Justice Stevens’ strong policy argument represented the U.S. Supreme Court’s willingness to yield to the expertise of administrative agencies that administered statutes in “light of everyday realities.”¹⁵³ Because the issue of

¹⁴⁷ 29 U.S.C. § 157.

¹⁴⁸ *Chevron*, 467 U.S. at 866.

¹⁴⁹ *Id.* at 842-44.

¹⁵⁰ *Id.* at 842-43.

¹⁵¹ *See Chevron*, 467 U.S. at 842-43.

¹⁵² *Id.* at 865-66.

¹⁵³ *Id.* at 866.

class action waivers in employment agreements will reach the U.S. Supreme Court, the Court should recognize the *Chevron* deference principle.¹⁵⁴ If the Court gives deference to the Board’s interpretation of the NLRA, then the Court will have to invalidate class action waivers in employment agreements because such waivers violate employees’ statutory right to “concerted activity” under the NLRA.¹⁵⁵

Chief Judge Thomas applied the *Chevron* principles to the issue in *Morris*.¹⁵⁶ Chief Judge Thomas emphasized, “In this case, we need go no further. The intent of Congress is clear from the statute and is consistent with the Board’s interpretation.”¹⁵⁷ Chief Judge Thomas began with the plain language of the NLRA and precedential cases to determine that the NLRA established the rights of employees to pursue work related claims together.¹⁵⁸ Chief Judge Thomas also recognized the importance of Section 8 of the NLRA, which enforces Section 7 and “has long been held to prevent employers from circumventing the NLRA’s protection for concerted activity by requiring employees to agree to individual activity in its place.”¹⁵⁹ Chief Judge Thomas then referenced the very clause at issue.¹⁶⁰ The “separate proceedings” clause did not allow employees to pursue work-related claims individually, and further, employees were legally bound by the result.¹⁶¹ Chief Judge Thomas determined that “[t]his restriction is the ‘very antithesis’ of § 7’s substantive right to pursue concerted work-related legal claims.”¹⁶² Concluding his *Chevron* deference analysis, Chief Judge Thomas recognized the Board’s accurate interpretation of Section 7 and Section 8 of the NLRA.¹⁶³ Chief Judge Thomas did not proceed to the second step of *Chevron* analysis because under his impression, the NLRA was “unambiguous.”¹⁶⁴

Applied together, the Seventh Circuit’s *Lewis* decision and the Ninth Circuit’s *Morris* decision applied reasoning that the U.S. Supreme Court cannot ignore. The Seventh Circuit’s reconciliation between the FAA and NLRA, combined with the Ninth Circuit’s

¹⁵⁴ SCOTUSBLOG, *supra* note 9.

¹⁵⁵ *Michael Cuda*, 357 N.L.R.B. at 2288.

¹⁵⁶ *Morris*, 834 F.3d at 981.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 981-83 (citing *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822).

¹⁵⁹ *Id.* at 983.

¹⁶⁰ *Id.*

¹⁶¹ *Morris*, 834 F.3d at 983.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

Chevron deference analysis, represent the tension between two federal statutes as well as the tension between the judicial system and administrative agencies. The U.S. Supreme Court will soon resolve the issue of class action waivers in the employment context in the October 2017 Term, and the Court will likely have to address these important power struggles recognized by the *Lewis* and *Morris* decisions.¹⁶⁵

C. Is Class Arbitration Realistic Procedurally?

Taking a brief step away from the legal analysis, the ability of arbitration procedures to handle “class arbitration” will be an issue that the U.S. Supreme Court will need to address for the first time since *Concepcion*.¹⁶⁶ In the *Concepcion* decision, the late Justice Scalia addressed what he believed to be structural issues surrounding class-wide arbitration.¹⁶⁷ Justice Scalia stated:

Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.¹⁶⁸

Justice Scalia also believed the switch from “bilateral” to multilateral arbitration would sacrifice the “informality” of arbitration and thereby increase costs, time, and procedural delay.¹⁶⁹ Justice Scalia cited the American Arbitration Association (“AAA”) statistics and recognized the AAA’s class arbitration procedures.¹⁷⁰ Justice Scalia emphasized that “not a single” class arbitration had resulted in a final award on the merits, and further, that the average time from filing to settlement, withdrawal, or dismissal, was 630 days for class arbitrations.¹⁷¹

Justice Scalia continued his analysis with reference to the AAA rules governing class arbitrations, and recognized that the rules “mimic[ed]” the Federal Rules of Civil

¹⁶⁵ SCOTUSBLOG, *supra* note 9.

¹⁶⁶ *See generally Concepcion*, 563 U.S. at 347-51.

¹⁶⁷ *See id.* at 348.

¹⁶⁸ *Id.*

¹⁶⁹ *Concepcion*, 563 U.S. at 348.

¹⁷⁰ *See id.*

¹⁷¹ *Id.* at 348-49.

Procedure for class litigation.¹⁷² Justice Scalia noted concern for absent class members who would not be bound by the arbitration, because of the ability of parties to alter class arbitration procedures by contract.¹⁷³ Justice Scalia also recognized the potential for arbitrator errors that may go uncorrected because of the “absence of multilayered review” in arbitration procedures.¹⁷⁴ Justice Scalia concluded his grievances with class arbitration procedures by stating that “[a]rbitration is poorly suited to the higher stakes of class litigation.”¹⁷⁵ Justice Scalia supported his proposition by recognizing the minimal authority of the courts to vacate an arbitral award, as well as the inability of parties to expand the grounds or nature of judicial review.¹⁷⁶

While several of Justice Scalia’s arguments in *Concepcion* do raise practical concerns, a look into the AAA’s “Supplementary Rules for Class Arbitrations” and a glimpse at more recent statistics suggest that class-wide arbitration may not be completely out of reach for consumers and employees who would benefit from the aggregation of claims.¹⁷⁷ In a 2015 article titled *Have Class Arbitrations Found New Life?* (“NYLJ Article”), the authors suggested that “in spite of [that] critique and the widespread use of clauses in which the parties waive any right to arbitration on a class basis, class arbitrations continue to be filed and result in decisions.”¹⁷⁸ The NYLJ Article also referenced the same AAA brief mentioned in Justice Scalia’s *Concepcion* majority opinion.¹⁷⁹ The AAA recognizes, that at the time of submittal, out of 283 separate class arbitrations filed, no class arbitrations have resulted in a final award on the merits.¹⁸⁰ However, since the submittal of

¹⁷² *Id.* at 349.

¹⁷³ *Id.* (recognizing the protections afforded to parties involved in class litigation, including the requirement that class representatives must at all times adequately represent absent class members, notice to absent class members, an opportunity to be heard, and a right to opt out of the class).

¹⁷⁴ *Concepcion*, 563 U.S. at 350 (noting, “[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable.”).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 350-51 (citing *Hall St. Assocs., L.L.C. v. Mattel, Inc.* 552 U.S. 576 (2008)).

¹⁷⁷ AM. ARBITRATION ASS’N, SUPP. RULES FOR CLASS ARBITRATIONS (effective Oct. 8, 2003), available at https://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004129.pdf [hereinafter AAA].

¹⁷⁸ James H. Cartier & John H. Pierce, *Have Class Arbitrations Found New Life?* N.Y.L.J., Nov. 16, 2015, https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/2015-11-16-ny-law-journal-have-class-arbitrations-found-new-life.pdf (noting that the “American Arbitration Association (AAA) has recorded 473 class arbitrations on its docket under its Supplementary Rules for Class Arbitration over the past 12 years, including 35 new cases filed in 2011, 28 cases filed in 2012, 27 cases filed in 2013, 39 cases filed in 2014 and 32 cases filed so far in 2015.”).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

the AAA's brief and the *Concepcion* decision, there *have* been class arbitrations that proceeded to merit awards.¹⁸¹

For example, the NYLJ Article cited two recent cases to support the proposition that class arbitrations may be feasible components to class litigation. First, the NYLJ Article cited a Fourth Circuit case that confirmed a class arbitration award in favor of 487,066 consumers using "credit repair" services.¹⁸² The NYLJ Article noted that some defendants entered into class-wide settlements "that resulted in an arbitral award of \$2.6 million in attorney fees to counsel for claimants."¹⁸³ The second case involves a class certification of 44,000 current and former female employees at retail jewelry stores who challenged pay and promotion practices carried out by their employers.¹⁸⁴ The NYLJ Article also recognized that "[t]here has been no record of widespread complaints of procedural irregularities or unfairness in such cases, and class arbitrations can result in settlements administered much as class settlements in courts would be and in merits awards."¹⁸⁵

The "Supplementary Rules for Class Arbitrations" also represent sophisticated and thorough guidelines for those who wish to engage in class-wide arbitration.¹⁸⁶ For example, similar to the rules governing class litigation, a class may be certified for class arbitration only if each of the following six conditions are met:

- (1) the class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
- (4) the representative parties will fairly and adequately protect the interests of the class;
- (5) counsel selected to represent the class will fairly and adequately protect the interests of the class; and
- (6) each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.¹⁸⁷

¹⁸¹ *Id.* (citing *Jones v. Dancel*, 792 F.3d 395 (4th Cir. 2015); *Jock v. Sterling Jewelers*, 646 F.3d 113 (2d Cir. 2011)).

¹⁸² *Id.* (citing *Jones v. Dancel*, 792 F.3d 395 (4th Cir. 2015)).

¹⁸³ *Cartier*, *supra* note 178.

¹⁸⁴ *Id.* (citing *Jock v. Sterling Jewelers*, 646 F.3d 113 (2d Cir. 2011)).

¹⁸⁵ *Id.*

¹⁸⁶ AAA, *supra* note 177.

¹⁸⁷ AAA, *supra* note 177.

Thus, with recent successful attempts at class-wide arbitration, the U.S. Supreme Court will have to recognize the developments that have been made since the *Concepcion* decision now that *Lewis* has been granted certiorari.

As illustrated by the factors above, the AAA requires several considerations by an arbitrator before a class can be certified. Further, under the “Confidentiality” section of the Supplemental Rules, the AAA states that “The presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations. All class arbitration hearings and filings may be made public, subject to the authority of the arbitrator to provide otherwise in special circumstances.”¹⁸⁸ The AAA also maintains a docket of arbitrations filed as class arbitrations on the AAA website.¹⁸⁹ Finally, the AAA requires any award rendered under the Supplementary Rules to be in writing, with reasoning, and signed by the arbitrator or majority of arbitrators.¹⁹⁰ A preliminary filing fee alone amounts to \$3,350 for a party seeking class arbitration.¹⁹¹ The significant costs of entering into arbitration illustrate why aggregating smaller claims in the hopes of achieving larger settlements may be attractive to parties with common questions of law or fact.

The AAA rules are an example of one vehicle that provides for class arbitration procedures. There is no denying that a very small number of class arbitration procedures have reached an award on the merits.¹⁹² However, class-wide arbitration procedures do exist, and provide a tool for consumers and employees to aggregate claims that will likely not be worth arbitrating alone.¹⁹³ Thus, adhesive arbitration provisions found in consumer and employee contracts deny these individuals the right to engage in class action litigation or class-wide arbitration if they so choose.

VI. LOOKING FORWARD: THE FATE OF CLASS ACTION WAIVERS

A. *Push-Back by Consumers after Concepcion*

Although the U.S. Supreme Court’s message in *Concepcion* validated class action waivers in consumer agreements, consumer advocates have pushed back in favor of protecting the rights of consumers. The Consumer Financial Protection Bureau (“CFPB”) proposed the prohibition of mandatory arbitration clauses that deny groups of consumers

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Cartier*, *supra* note 178.

¹⁹³ *Cartier*, *supra* note 178.

their day in court.¹⁹⁴ In a press release from the CFPB, the statement recognized that “widely used [adhesive arbitration] clauses” leave consumers with no choice but to seek individual relief.¹⁹⁵

The CFPB recognized the wide reach of these mandatory arbitration clauses, bringing to light the “hundreds of million of consumer contracts” affected by this business practice.¹⁹⁶ The Dodd-Frank Wall Street Reform Act,¹⁹⁷ in conjunction with the Consumer Protection Act¹⁹⁸ (“CPA”), required the CFPB to study the use of mandatory arbitration clauses in consumer financial markets.¹⁹⁹ Congress also gave the CFPB the power to issue regulations that are in the public interest, for the protection of consumers, and consistent with the study.²⁰⁰

The CFPB’s study, released in March 2015, found that “Consumers are generally unaware of whether their credit card contracts include arbitration clauses.”²⁰¹ The study found that class actions provided a more effective means for consumers to challenge the practices used by companies in the business of credit cards or bank accounts.²⁰² The CFPB’s proposal referenced potential remedies for consumers.²⁰³ These remedies included (1) prohibiting companies from placing mandatory arbitration clauses in new contracts that prevent class action lawsuits; and (2) requiring companies with arbitration clauses to submit CFPB claims, awards, and certain related materials that are filed in

¹⁹⁴CONSUMER FINANCIAL PROTECTION BUREAU, CFPB PROPOSES PROHIBITING MANDATORY ARBITRATION CLAUSES THAT DENY GROUPS OF CONSUMERS THEIR DAY IN COURT (May 5, 2016), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-prohibiting-mandatory-arbitration-clauses-deny-groups-consumers-their-day-court/> [hereinafter CFPB].

¹⁹⁵ CFPB, *supra* note 194 (noting “The CFPB’s proposal is designed to protect consumers’ right to pursue justice and relief, and deter companies from violating the law.”).

¹⁹⁶ *Id.* (stating “As a result, no matter how many consumers are injured by the same conduct, consumers must proceed to resolve their claims individually against the company”).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ CFPB, *supra* note 194.

²⁰¹ Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, CONSUMER FINANCIAL PROTECTION BUREAU (Mar. 2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [hereinafter CFPB Study].

²⁰² CFPB Study, *supra* note 201, at 2.

²⁰³ CFPB, *supra* note 194.

arbitration cases.²⁰⁴ The CFPB press release recognized three benefits of the proposal, including (1) a day in court for consumers; (2) a deterrent effect [for companies placing these provisions in contracts]; and (3) increased transparency.²⁰⁵ The CFPB's proposed rule has not yet become final, and the CFPB is currently in the process of reviewing public comments.²⁰⁶ If the proposed rule becomes final, the CFPB's efforts will represent a major victory for consumers and a major blow to consumer product and service providers. This is because the proposed rule represents an effort to chip away at the U.S. Supreme Court's *Concepcion* decision, which left consumers at the mercy of adhesive arbitration provisions.

B. Granted Certiorari: The Issue Before the Supreme Court

On January 13, 2017, the U.S. Supreme Court granted Epic Systems' petition for a writ of certiorari.²⁰⁷ The U.S. Supreme Court ordered that *Lewis* be consolidated with the Ninth Circuit's *Morris* decision and the Fifth Circuit's *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015) decision.²⁰⁸ The issue before the U.S. Supreme Court is "whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act."²⁰⁹ The issue of class action waivers in employment disputes will likely be resolved along the lines of political ideology, similar to the *Concepcion* decision,²¹⁰ which illustrated the sharp ideological divide between Supreme Court Justices.²¹¹ With the nomination and appointment of Justice Neil Gorsuch by President Trump,²¹² the likelihood of a decision coming down against class action waivers is slim.

The *Murphy Oil* decision appeared before the Fifth Circuit after the National Labor Relations Board concluded that *Murphy Oil USA, Inc.* had "unlawfully required employees at its Alabama facility to sign an arbitration agreement waiving their right to pursue class

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ SCOTUSBLOG, *supra* note 9.

²⁰⁸ *Id.* (citing *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015)).

²⁰⁹ SCOTUSBLOG, *supra* note 9.

²¹⁰ *See generally Concepcion*, 563 U.S. at 352-61.

²¹¹ *See id.*

²¹² Eric Citron, *Potential Nominee Profile: Neil Gorsuch*, SCOTUSBLOG (Jan. 13, 2017, 12:53 PM), <http://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch/>.

and collective actions.”²¹³ Author of the opinion Judge Leslie H. Southwick noted that Murphy Oil strategically used “broad venue rights” to file its petition with the Fifth Circuit knowing that the circuit would rule in its favor, against the Board.²¹⁴ The aggrieved employees in *Murphy Oil* argued that the binding arbitration agreement they signed interfered with their rights under NLRA’s Section 7 to engage in concerted activity.²¹⁵ Judge Southwick’s opinion did not fail to emphasize the Board’s refusal to follow the Fifth Circuit’s *D.R. Horton II* decision.²¹⁶ Judge Southwick also made clear that the Fifth Circuit was not going to repeat its analysis from *D.R. Horton II*.²¹⁷ Judge Southwick once again emphasized the Board’s disregard of *D.R. Horton II* and stated “Our decision was issued not quite two years ago; we will not repeat its analysis here. Murphy Oil committed no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing the arbitration agreements at issue here.”²¹⁸ The Fifth Circuit did note, however, that in the Board’s favor, the Board may “well not know” which circuit’s law would be applied on a petition for review.²¹⁹ Judge Southwick further stated, “We do not celebrate the Board’s failure to follow our *D.R. Horton [III]* reasoning, but neither do we condemn its nonacquiescence.”²²⁰ The *Murphy Oil* decision be consolidated with *Lewis* and *Morris*, and the conflict between the FAA and the NLRA will be decided at some capacity in the October 2017 Term.

Epic Systems Corporation’s “Petition for a Writ of Certiorari” (“Petition”) and Jacob Lewis’ “Brief for the Respondent in Opposition” (“Opposition”) presented two persuasive and significantly differing takes on the issue to be presented before the U.S. Supreme Court, and are worth mentioning in some detail.²²¹ The Petition framed the issue

²¹³ *Murphy Oil*, 808 F.3d at 1015.

²¹⁴ *Id.* (stating, “The Board, also aware, moved for en banc review in order to allow arguments that the prior decision should be overturned. Having failed in that motion and having the case instead heard by a three-judge panel, the Board will not be surprised that we adhere, as we must, to our prior ruling.”).

²¹⁵ *Id.* (arguing that “the FLSA prevented enforcement of the Arbitration Agreement because that statute grants a substantive right to collective action that cannot be waived.”).

²¹⁶ *Id.* at 1017 (stating, “The Board’s decision as to *Murphy Oil* was issued in October 2014, ten months after our initial *D.R. Horton* decision and six months after rehearing was denied. The Board, unpersuaded by our analysis, reaffirmed its *D.R. Horton* decision.”).

²¹⁷ *Id.* at 1018.

²¹⁸ *Murphy Oil*, 808 F.3d at 1018 (appearing annoyed at the Board’s refusal to follow the precedence created by the Fifth Circuit after the *D.R. Horton II* decision and apply the ruling to new parties and agreements).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ See generally Petition for Writ of Certiorari at 4, *Epic Sys. Corp. v. Lewis*, (No. 16-285) (Sept. 2, 2016), cert. granted -- U.S. -- (Jan. 13, 2017); Brief for the Respondent in Opposition at 8, *Epic Sys. Corp. v. Lewis*, (No. 16-285) (Nov. 14, 2016).

around the “contrary congressional command” exception to the FAA, and argued that NLRA’s Section 7 did not possess such command as to override the FAA.²²² Further, the Petition framed the circuit split much differently than the Opposition.²²³ The Petition stated:

The courts are squarely divided over this important and recurring question. Three federal courts of appeals (the Second, Fifth, and Eighth Circuits) and two state courts of last resort (the California and Nevada Supreme Courts) have concluded that the answer is no: agreements to submit employment disputes to individual arbitration are fully enforceable. Two other federal courts of appeals (the Seventh and Ninth Circuits)—as well as the National Labor Relations Board—have concluded that the answer is yes: these agreements are unenforceable because they bar class and collective proceedings.²²⁴

The Petition asked the U.S. Supreme Court to resolve and acknowledge the split.²²⁵ In addition, the Petition described the Fifth Circuit as “squarely and repeatedly” upholding class action waivers in employment arbitration agreements.²²⁶ The Petition described the Eighth Circuit as concluding that employment arbitration agreements containing class action waivers were enforceable under the FAA, “notwithstanding federal labor laws or the NLRB’s interpretation of those laws,”²²⁷ and the Second Circuit as agreeing with the Fifth and the Eighth Circuits.²²⁸ The circuit split was characterized as “fully developed” and “ripe for resolution” by the U.S. Supreme Court.²²⁹

The Petition continued by discussing the conflict between the NLRA and the FAA, and immediately noted that “[f]ederal statutes are not all on equal footing when it comes to arbitration agreements.”²³⁰ The Petition also cited *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012) as authority for the notion that the FAA is the proper statute

²²² Petition for Writ of Certiorari, *Lewis*, (No. 16-285).

²²³ Brief for the Petitioner, *supra* note 221, at 4.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Brief for the Petitioner, *supra* note 221, at 7.

²²⁷ *Id.* at 9.

²²⁸ *Id.* at 10.

²²⁹ *Id.* at 13.

²³⁰ *Id.* at 14 (referencing the “liberal federal policy favoring arbitration agreements” cited in *Moses H. Cone*, 460 U.S. at 24).

governing arbitration provisions, even when other federal statutes are involved.²³¹ The Petition also cited the argument previously referenced in *Concepcion*, that the FAA envisioned “bilateral” and not “multilateral” arbitration.²³² The Petition criticized the Seventh Circuit’s failure to address whether the NLRA presented a “contrary congressional command,” and called the Seventh Circuit’s analysis “flawed from start to finish.”²³³ Finally, the Petition concluded its argument by citing policy reasons driving the resolution of the circuit split.²³⁴ The Petition noted the uncertainty faced by both employers and employees because of the unresolved issue of class action waivers in employment agreements.²³⁵ The Petition also highlighted the “range” of companies affected by the split of authority.²³⁶ The Petition stated, “Absent action by this Court, the courts will continue to face repeat litigation on this question.”²³⁷

In response, the Opposition framed the issue under the question that will ultimately be decided by the U.S. Supreme Court.²³⁸ The Opposition asked the U.S. Supreme Court to decide whether the FAA’s savings clause bars enforcement of class action waivers that violate NLRA Section 7.²³⁹ Further, the Opposition immediately criticized the Petition’s argument by stating that the Petition:

(1) mischaracterizes and exaggerates any split, (2) fails to address the merits of the issue the courts below actually did consider, (3) spins as “important and recurring,” [Pet. 4], an issue missing from the case, and (4) ignores

²³¹ Brief for the Petitioner, *supra* note 221, at 14 (citing *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012)).

²³² *Id.*

²³³ *Id.* at 15-16 (concluding, “Accordingly, the NLRA does not give employees a right to proceed in class arbitration, and certainly not a right that trumps the FAA’s presumption that arbitration agreements are enforceable as written.”).

²³⁴ *Id.* at 20.

²³⁵ *Id.* at 20 (stating, “Arbitration agreements with class and collective waivers are commonly used in the employment context, but the split of authority over the enforceability of those waivers creates tremendous uncertainty for employers and employees alike. And the problem is particularly acute for entities whose operations span multiple circuits.”).

²³⁶ Brief for the Petitioner, *supra* note 221, at 20-21 (referencing: “Epic (health software), D.R. Horton (home construction), Murphy (convenience stores), Bristol Care (residential care services), Cellular Sales of Missouri (telecommunications retail), Ernst & Young (professional services), Bloomingdale’s (department stores), CLS Transportation (trucking), and CPS Security (security services; in *Tallman*, the Nevada Supreme Court case.”).

²³⁷ *Id.* at 23.

²³⁸ Brief for the Respondent in Opposition, *Lewis*, (No. 16-285).

²³⁹ Brief for the Opposition, *supra* note 221, at 8.

several defects that make this case a poor vehicle to review the question it might actually present, let alone one it does not.²⁴⁰

The Opposition argued that the proper question before the U.S. Supreme Court should have been “(1) whether the NLRA makes collective-action waivers illegal and (2) if so, whether the FAA’s savings clause nonetheless requires their enforcement.”²⁴¹ In addition, the Opposition argued that only three circuits had analyzed the saving clause question.²⁴² Next, the Opposition distinguished the Eighth Circuit and Second Circuit cases because the courts analyzed whether the FLSA constituted a “contrary congressional command,” and did not discuss the conflict between the FAA and the NLRA.²⁴³ The Opposition stated that the Seventh and Ninth Circuits “have identified the proper issue,” and therefore, the issue should be resolved in the lower courts before U.S. Supreme Court intervention.²⁴⁴

The Opposition argued that the plain language and purpose of the NLRA, combined with the U.S. Supreme Court’s and the Board’s interpretations of Section 7, support the conclusion that the NLRA grants employees a substantive right to pursue claims collectively.²⁴⁵ The Opposition also established that “concerted activities” clearly included “collective legal action.”²⁴⁶ The Opposition also referenced the *Chevron* deference owed to the Board because Congress here has “unambiguously spoken to the precise question at issue.”²⁴⁷ Finally, the Opposition rounded out its substantive argument by citing Section 8 of the NLRA, which sets forth the principle that any contractual provisions conflicting with Section 7 of the NLRA are unlawful.²⁴⁸ The Opposition agreed with the decision by Judge Wood from the Seventh Circuit and used similar reconciliation language by stating, “Foreseeing potential conflicts between the FAA and other statutes, Congress included a saving clause...” to ensure that any arbitration provisions violating another federal statute would not be enforced.²⁴⁹

²⁴⁰ *Id.*

²⁴¹ *Id.* at 9.

²⁴² *Id.* (stating “The Fifth Circuit has held that the FAA’s saving clause requires enforcement of such provisions; the Seventh and Ninth Circuits have held it bars their enforcement.”).

²⁴³ *Id.* at 10-11.

²⁴⁴ Brief for the Opposition, *supra* note 221, at 17.

²⁴⁵ Brief for the Opposition, *supra* note 221, at 18.

²⁴⁶ *Id.* at 20.

²⁴⁷ *Id.* at 21 (citing *Chevron*, 467 U.S. at 842).

²⁴⁸ *Id.* at 22.

²⁴⁹ *Id.* at 24 (noting “The problem with the collective-action waiver is not that it requires arbitration as a forum, but rather that it forbids collective action in *any* forum in violation of the NLRA. Asserting illegality

The Opposition even addressed *Concepcion* and *Italian Colors*, and suggested these holdings from the U.S. Supreme Court did not suggest in any manner that the FAA required the enforcement of an arbitration provision found to have violated a federal statute.²⁵⁰ The Opposition also attacked the Petition’s reliance on *CompuCredit* because the U.S. Supreme Court’s decision in that case only answered the narrow question of whether the Credit Repair Organization Act (“CROA”) represented a “contrary congressional command” to foreclose arbitration.²⁵¹ To conclude its brief, the Opposition asked the U.S. Supreme Court to acknowledge that *Murphy Oil* would be “the most appropriate vehicle” for the Supreme Court to review because the Board is a full party in that case.²⁵² The Opposition’s issue presented will go before the U.S. Supreme Court.²⁵³ For the first time since *Concepcion*, the U.S. Supreme Court will weigh in on the validity of class action waivers found within adhesive arbitration provisions. While the issue presented involves the fate of employees, and not consumers, the decision of the U.S. Supreme Court will likely put to rest the validity of class action waivers once and for all. The *Lewis* and *Morris* opinions provide powerful analyses for the U.S. Supreme Court to consider when deciding on the fate of class action waivers in employment agreements. The major arguments set forth include the potential reconciliation of the FAA and the NLRA, and deference owed to the Board’s interpretation of NLRA Section 7. The Fifth Circuit’s decision in *Murphy Oil* provides the opposite side of the argument for why class action waivers should be valid.²⁵⁴ Despite the split of authority, there exists an undeniable policy argument that uncertainty among courts has led to a significant amount of uncertainty for employers and employees.²⁵⁵ The Petition noted that, “employers located in the Second, Fifth, and Eighth Circuits will continue to be subjected to NLRB enforcement actions against their use of class waivers. And when the NLRB inevitably finds that the waivers are unenforceable, the employers must go through the hassle of filing a petition for review, even though the issue has been decided squarely in their favor in those circuits.”²⁵⁶

under the NLRA, moreover, hardly disfavors arbitration. A contract forbidden collective action in court (without mentioning arbitration) would be equally invalid.”).

²⁵⁰ Brief for the Opposition, *supra* note 221, at 28.

²⁵¹ *Id.* at 29 (citing *CompuCredit*).

²⁵² *Id.* at 34.

²⁵³ SCOTUSBLOG, *supra* note 9.

²⁵⁴ *See Murphy Oil*, 808 F.3d at 1015.

²⁵⁵ Brief for the Petitioner, *supra* note 221, at 20.

²⁵⁶ *Id.* at 23 (highlighting the NLRA’s “judicial-review provision,” which allows those aggrieved by Board decisions to seek review in the circuit where the unfair labor practice occurred, the circuit where the person resides or transacts business, or the D.C. Circuit).

C. The Current Legal Landscape of the U.S. Supreme Court

The timing of the Lewis decision may be potentially groundbreaking for the issue of class action waivers in adhesive arbitration agreements. The issue of adhesive arbitration, and more specifically of class action waivers, is one of political ideology. This is illustrated by the *Concepcion* decision, written by Justice Scalia.²⁵⁷ His opinion was followed by a strong dissent from Justice Breyer, Justice Ginsburg, Justice Sotomayor, and Justice Kagan.²⁵⁸ President Trump nominated Judge Neil Gorsuch, who was recently appointed as the ninth Justice on the U.S. Supreme Court.²⁵⁹ Justice Gorsuch was previously appointed to the United States Court of Appeals for the Tenth Circuit by President George W. Bush in 2006.²⁶⁰ Justice Gorsuch was a confidant of the late Justice Scalia, and is known to share “Justice Scalia’s legal philosophy, talent for vivid writing and love of outdoors.”²⁶¹ Justice Gorsuch “also seems to have a set of judicial/ideological commitments apart from his personal policy preferences that drive his decision-making.”²⁶² As a “textualist,” Justice Gorsuch’s opinion on the *Chevron* doctrine may be of particular importance if the U.S. Supreme Court nominee participates in the Lewis decision.²⁶³ Justice Scalia’s take on administrative law involved granting more power to administrative agencies and limiting the role of the courts in reviewing the interpretation of federal statutes by administrative agencies.²⁶⁴ The *Lewis*, *Morris*, and *Murphy Oil* decisions all have roots in the Board’s interpretation of the NLRA. Justice Gorsuch’s view on administrative law involves less deference to administrative agencies and more deference to courts.²⁶⁵ Therefore, the accuracy of the Board’s interpretation of the NLRA

²⁵⁷ See generally *Concepcion*, 563 U.S. at 336-52.

²⁵⁸ See *id.* at 357-66.

²⁵⁹ Mark Walsh, *A “View” From the Rose Garden: Neil Gorsuch Takes the Judicial Oath*, SCOTUSBLOG (Apr. 10, 2017, 4:20 PM), <http://www.scotusblog.com/2017/04/view-rose-garden-neil-gorsuch-takes-judicial-oath/>.

²⁶⁰ Citron, *supra* note 212.

²⁶¹ Adam Liptak, *In Judge Neil Gorsuch, and Echo of Scalia in Philosophy and Style*, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/us/politics/neil-gorsuch-supreme-court-nominee.html?_r=1.

²⁶² Citron, *supra* note 212.

²⁶³ *Id.* (noting that Judge Gorsuch’s approach to the *Chevron* doctrine differ significantly from that of Justice Scalia, because “Unlike Scalia, Gorsuch really does want to apply the basic Gorsuch/Scalia take on ordinary statutes to administrative statutes as well. He believes even those broadly worded enforcement statutes have objective meanings that can be understood from their texts; that it is the job of the courts to say what those laws mean and to tell agencies when they do not have the best reading; and that if the agency disagrees, the only proper recourse is for Congress to change the law or the Supreme Court to correct the error.”).

²⁶⁴ *Id.*

²⁶⁵ *Id.*

will likely be a relevant factor considered by Justice Gorsuch when he presides over the case.

VII. CONCLUSION

Now that the issue in *Lewis* will go before the U.S. Supreme Court, the validity of class action waivers in employment agreements will be settled in the October 2017 Term. Notwithstanding the U.S. Supreme Court's strong disfavor of class action litigation and class-wide arbitration, the *Lewis* decision, *Morris* decision, and the Board's interpretation of the NLRA as precluding class action waivers represent a significant trend toward recognizing the general unfairness of class action waivers in employment agreements. The Seventh Circuit, Ninth Circuit, and the Board all recognize certain rights granted to employees under the NLRA that cannot be stripped away by the strong federal policy in favor of enforcing arbitration agreements. The CFPB's proposed rules also respond to the U.S. Supreme Court's decision in *Concepcion* and illustrate an effort protect consumers, who have also fell victim to the validity of class action waivers present in adhesive arbitration agreements.

Although procedures for class-wide arbitration do exist, there is no denying that class arbitration is difficult to carry out. However, the right of employees to aggregate claims in an effort to level the playing field against employers has long been established by the NLRA, and the U.S. Supreme Court cannot merely disregard a federal statute just because that statute potentially conflicts with the FAA. Opponents to the validation of class action waivers have now let their voices be heard, and the U.S. Supreme Court will have to balance the strong federal policy in favor of arbitration against the strong federal policy protecting the rights of employees to pursue work-related claims collectively against significantly more powerful employers.