

# NATIONAL LABOR RELATIONS BOARD V. MURPHY OIL USA, INC.: A TEST OF MIGHT

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## INTRODUCTION

*National Labor Relations Board v. Murphy Oil USA, Inc.*<sup>1</sup> presents a conflict between two long-standing federal statutes in the context of employment contracts.<sup>2</sup> The class action waivers at issue in this case involve arbitration agreements in which employees waive any right to collective action over legal disputes with their employers in any forum. The National Labor Relations Act of 1935 (“NLRA”) and the Federal Arbitration Act of 1925 (“FAA”), each with its own set of underlying interests, have come head to head. Foreclosing the option of collective action offends the former, while failure to enforce an arbitration agreement undermines the latter. The Supreme Court is no stranger to challenges against the FAA. It has yet, however, to decide a case in which enforcing the FAA might risk directly violating an equally powerful federal law. As each side contemplates the conflicts, compatibility, and potential inapplicability of the statutes in relation to the waivers at issue, the Supreme Court faces a question of policy. Its decision will likely depend on whether it applies one of the two exceptions available to the mandate on arbitration enforcement. But the Court must recognize the policy concerns at stake. Ultimately, ruling against the employees’ interests risks a greater harm to them than against Respondents’ interest in maintaining strong arbitration rights in this particular context.

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1. N.L.R.B. v. Murphy Oil USA, Inc., 137 S. Ct. 809 (Jan. 13, 2017) (No. 16-307).

2. Three separate matters have been consolidated into this case: (1) *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015); (2) *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016); and (3) *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016). This commentary focuses only on the primary matter, *Murphy Oil*, in the interest of clarity.

## I. FACTS & PROCEDURAL HISTORY

In November 2008, Sheila Hobson signed an arbitration agreement in connection with her application to work at a Murphy Oil gas station in Calera, Alabama.<sup>3</sup> Murphy Oil USA, Inc., a national company, operates retail gas stations in 26 states.<sup>4</sup> Murphy Oil required all applicants and current employees, like Hobson, to sign the binding arbitration agreement at issue in this case.

By signing this contract, Hobson waived her right to pursue legal action over disputes relating to her employment in court, agreeing that any such claim would be brought in an arbitral forum.<sup>5</sup> The contract specified that the disputes might involve violations of state or federal statutes, including alleged violations of the Fair Labor Standards Act (“FLSA”).<sup>6</sup> Hobson also waived her right to collective action by signing the contract, which mandated that any claim be pursued individually: “Individual and the Company waive their right to commence, be a party to, or [act as a] class member [in, any class] or collective action . . . against the other party relating to employment issues . . . in arbitration or any other forum.”<sup>7</sup> As such, she would not be permitted to consolidate any claims or join in an action with another employee.<sup>8</sup> The arbitration provision concluded: “INDIVIDUAL AND COMPANY UNDERSTAND THAT, ABSENT THIS AGREEMENT, THEY WOULD HAVE THE RIGHT TO SUE EACH OTHER IN COURT, TO INITIATE OR BE A PARTY TO A GROUP OR CLASS CLAIM.”<sup>9</sup>

Hobson worked at the Murphy Oil gas station from November 2008 until September 2010.<sup>10</sup> In June 2010, Hobson, with three other Murphy Oil employees, filed a collective action suit against the company in the United States District Court for the Northern District

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

4. Brief for Respondent at 4, *N.L.R.B. v. Murphy Oil USA, Inc.*, 137 S. Ct. 809 (June 9, 2017) (No. 16-307), 2017 WL 2591012, at \*4 [hereinafter Brief for Respondent].

5. Petition for Writ of Certiorari at 3, *N.L.R.B. v. Murphy Oil USA, Inc.*, 137 S. Ct. 809 (No. 16-307), 2016 WL 4761717, at \*3 [hereinafter Petition for Writ of Certiorari] (“Excluding claims which must, by statute or other law, be resolved in other forums, Company and Individual agree to resolve any and all disputes . . . which relate in any manner whatsoever as to Individual’s employment . . . by binding arbitration.”).

6. *Id.* at app. 25a.

7. *Id.* at app. 25a–26a.

8. *Id.* at app. 25a (“The parties agree that any claim by or against Individual or the Company shall be heard without consolidation of such claim with any other person or entity’s claim.”).

9. *Id.* at app. 25a–26a.

10. *Id.* at app. 26a.

of Alabama.<sup>11</sup> Their complaint alleged that, in violation of the FLSA, the company failed to compensate the employees for overtime and other work-related activities.<sup>12</sup>

In July 2010, Murphy Oil filed a motion to compel the plaintiff-employees to submit their claims separately in individual arbitration actions, pursuant to each arbitration agreement the plaintiffs signed, and to dismiss the suit altogether.<sup>13</sup> The plaintiff-employees opposed the motion, arguing that the FLSA protected their substantive right to collective action, thus making their signed arbitration agreements unenforceable.<sup>14</sup> They also argued that enforcement of the arbitration agreements would interfere with their right to engage in concerted activity, protected by § 7<sup>15</sup> of the National Labor Relations Act (“NLRA”).<sup>16</sup>

In January 2011, while the defendant-employers’ motion was pending, Hobson filed an unfair labor practice claim with the National Labor Relations Board (the “Board”).<sup>17</sup> Hobson’s complaint with the Board alleged that Murphy Oil had violated § 8(a)(1) of the NLRA by “maintaining and enforcing a mandatory arbitration agreement that prohibits employees from engaging in protected, concerted activities.”<sup>18</sup> The Board postponed a hearing on the complaint while it considered another similar action.<sup>19</sup>

In January 2012, as Hobson’s hearing was pending, the Board issued an opinion in a separate action that would be determinative in

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11. *Id.*

12. *Id.* at app. 27a; Fair Labor Standards Act of 1939, ch. 676, 52 Stat. 1060, 1060 (codified at 29 U.S.C. § 216(b) (2012)).

13. *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013, 1015 (5th Cir. 2015).

14. *Id.*

15. The relevant briefs and opinions in this case refer to the various provisions in the NLRA interchangeably as sections codified in the individual act and the United States Code. So, “§ 7” also refers to 29 U.S.C. § 157. This Commentary will also refer to these sections interchangeably.

16. National Labor Relations Act, 29 U.S.C. §§ 151, 157 (2012); *Murphy Oil*, 808 F.3d at 1015–16.

17. *See* *Murphy Oil*, 808 F.3d at 1016. *See also* 29 U.S.C §§ 153, 160 (discussing the powers and review procedure of the Board, and procedure for employees to file charges).

18. Petition for Writ Certiorari, *supra* note 5, at app. 27a. Hobson’s complaint with the NLRB also alleged that the arbitration agreement’s language “would lead employees reasonably to believe that they were prohibited from filing unfair labor practice charges with the Board.” The Fifth Circuit addressed this allegation in its opinion, ruling that a revised version of the language was not problematic. *Murphy Oil*, 808 F.3d at 1020. That issue and analysis will not be addressed further in this Commentary.

19. Petition for Writ of Certiorari, *supra* note 5, at app. 27a.

Hobson’s complaint.<sup>20</sup> In its *D.R. Horton* decision, the Board held that an employer violates the NLRA by requiring employees to waive their right to pursue class and collective claims, and mandating individual arbitration.<sup>21</sup> These arbitration agreements restrict employees’ rights to engage in protected concerted activity.<sup>22</sup> *D.R. Horton* appealed that decision in the Fifth Circuit.<sup>23</sup> In December 2013, the Fifth Circuit rejected the Board’s decision as it related to waivers of collection action in arbitration agreements, holding that those agreements do not violate any substantive right in the NLRA.<sup>24</sup>

In September 2012, an Alabama district court granted the defendant-employers’ motion to compel, requiring that the plaintiff-employees submit their claims to arbitration, pursuant to their employment agreements.<sup>25</sup> The plaintiff-employees did not comply, and the defendant-employers refused to arbitrate their claims on a collective basis.<sup>26</sup> Eventually, the plaintiff-employees moved for reconsideration of the order compelling arbitration, which the district court denied with prejudice.<sup>27</sup>

In October 2014, the Board ruled in favor of Hobson, reaffirming its own *D.R. Horton* decision and disregarding the Fifth Circuit’s *D.R. Horton* opinion.<sup>28</sup> The Board held that by “requiring its employees to agree to resolve all employment-related claims through individual arbitration, and by taking steps to enforce the unlawful agreements in the federal district court,” Murphy Oil violated § 8(a)(1).<sup>29</sup> Murphy Oil filed a timely appeal in the Fifth Circuit to review the Board’s

20. See *Murphy Oil*, 808 F.3d at 1016.

21. *Id.* (citing *In re D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, 2012 WL 36274 (Jan. 3, 2012)).

22. *Id.*; see *N.L.R.B. v. City Disposal Sys. Inc.*, 465 U.S. 822, 841 (1984) (the NLRB “recognizes as concerted activity an individual employee’s reasonable and honest invocation of a right provided for in his collective-bargaining agreement” or other activity in pursuit of the rights provided for in the NLRA).

23. *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 348 (5th Cir. 2013).

24. See *id.*

25. *Murphy Oil*, 808 F.3d at 1016.

26. *Id.* at 1016 n.1.

27. *Id.* (citing *Hobson v. Murphy Oil USA, Inc.*, No. CV-10-S-1486, 2015 WL 4111661, at \*3 (N.D. Ala. July 8, 2015)). The plaintiff-employees filed an appeal, which is pending before the Eleventh Circuit.

28. *Murphy Oil*, 808 F.3d at 1017. The Board prescribed several remedies to correct the violations, including: revising or rescinding the arbitration agreement; posting a notice of their violations at the Murphy Oil facilities; and reimbursing the plaintiff-employees for the attorneys’ fees incurred in opposing the defendant-employers motion in the Alabama district court, among other actions.

29. Petition for Writ of Certiorari, *supra* note 5, at 8.

decision in *Hobson*'s case.<sup>30</sup> After the Fifth Circuit reversed the Board's *Hobson* decision, the Board filed a writ of certiorari with the Supreme Court to review the Fifth Circuit's judgment.<sup>31</sup>

## II. LEGAL BACKGROUND

The questions presented in *Murphy Oil* implicate a variety of statutes, precedents, and institutional bodies that either directly or indirectly regulate employment contracts.<sup>32</sup> As such, it is helpful to take each in turn to understand how they have come to a head in this case.

### A. *The National Labor Relations Act and the National Labor Relations Board*

The National Labor Relations Act of 1935 ("NLRA"), codified in 29 U.S.C. §§ 151–169, was enacted to protect "the exercise by workers of full freedom of association . . . for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."<sup>33</sup> Under § 157, employees are granted the right "to self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."<sup>34</sup>

To enforce, monitor, and provide relief for violations of the NLRA, Congress created the National Labor Relations Board as an agency of the United States, which "asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices."<sup>35</sup> Although the Board's decisions are reviewable by the federal judiciary,<sup>36</sup> the Board has the power to

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30. *Murphy Oil*, 808 F.3d at 1017.

31. Petition for Writ of Certiorari, *supra* note 5, at 1.

32. *See generally id.*

33. 29 U.S.C. § 151 (2012); Brief for Petitioner at 56, *N.L.R.B. v. Murphy Oil USA, Inc.*, 137 S. Ct. 809 (Aug. 9, 2017) (No. 16-307), 2017 WL 3447770, at \*56 [hereinafter Brief for Petitioner].

34. 29 U.S.C. § 157.

35. *Nat'l Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 364 (1940). *See also* 29 U.S.C. § 151 (stating that Congress established the National Labor Relations Board in an effort to relieve obstruction to the free flow of commerce by "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection").

36. 29 U.S.C. § 160(a). *See also Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 568 (1978) (holding that the task of "attempt[ing] to delineate precisely the boundaries of the mutual aid or protection clause" is for the "Board to perform in the first instance").

prevent persons from engaging in unfair labor practice, provided in § 158.<sup>37</sup>

Section 158 defines “unfair labor practices” to include the interference with, restraint, or coercion of “employees in the exercise of the rights guaranteed in § 157.”<sup>38</sup> The Supreme Court has stated that § 157 protects employees’ rights to “seek to improve working conditions through resort to administrative and judicial forums.”<sup>39</sup> Furthermore, in *J.I. Case Co. v. N.L.R.B.*,<sup>40</sup> the Court recognized that “wherever private contracts conflict with” the functions of the NLRA, “they obviously must yield or the Act would be reduced to a futility.”<sup>41</sup> Therefore, the NLRA jurisprudence demonstrates how the Supreme Court has shown its commitment to effectuating Congress’s strong interest in protecting employees’ collective action rights.

### *B. The Federal Arbitration Act*

The Federal Arbitration Act (“FAA”) provides that contractual provisions requiring disputes be settled by arbitration “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or inequity for the revocation of any contract.”<sup>42</sup> Congress enacted the FAA in 1925 in an effort to place “private arbitration agreements upon the same footing as other contracts” by mandating judicial enforcement.<sup>43</sup> There are two exceptions to this mandate: (1) the saving clause, and (2) the finding of a contrary congressional command.

The saving clause, beginning “save upon . . . ,” allows arbitration agreements to be invalidated when contract law would normally invalidate an agreement, like in the case of fraud.<sup>44</sup> An arbitration

37. 29 U.S.C. §§ 160(e)–(f).

38. 29 U.S.C. § 158.

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

40. 321 U.S. 332 (1944) (holding that the collective bargaining agreement between a union and company properly superseded the series of individual contracts between the employees and the company based on the NLRA’s jurisdiction).

41. *Id.* at 337.

42. 9 U.S.C. § 2 (2012).

43. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (holding that a claim pursuant to the Age Discrimination in Employment Act was subject to compulsory arbitration as provided in a securities registration application and as required under the FAA). The Court noted that the petitioner was “bound by his agreement to arbitrate unless he [could] show an inherent conflict between arbitration and the ADEA’s underlying purposes.” *Id.* at 20.

44. See *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (asserting that the FAA prevents any state law from outrightly prohibiting arbitration on its face or from “covertly accomplish[ing] the same objective by disfavoring contracts that (oh so coincidentally)

agreement is defined by its waiver of the right to seek relief in court and receive a jury trial.<sup>45</sup> Furthermore, the Supreme Court has emphasized that the FAA's protection of the right to an arbitral forum may not come at the expense of the substantive rights protected by the statute in the saving clause.<sup>46</sup> If a challenge to the enforcement of an arbitration agreement does not fall under the saving clause, then a party opposed to arbitration must show "a contrary congressional command" to overcome the congressional policy favoring arbitration.<sup>47</sup> Specifically, there must be evidence that "Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue," which may be discerned from that statute's legislative history, text, or underlying purpose.<sup>48</sup>

The FAA often preempts any conflicting state law on the grounds that federal policy strongly favors arbitration agreements, and its saving clause will not be construed to undermine the purpose of the FAA.<sup>49</sup> In *AT&T Mobility v. Concepcion* ("*Concepcion*"), the Supreme Court held that the FAA preempted a California judicial rule that outlawed class arbitration waivers in consumer contracts because of unconscionability.<sup>50</sup> The Court found that the FAA's underlying policy interests heavily favored protecting the benefits of

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have the defining features of arbitration agreements").

45. *See id.* at 1427 (explaining that the Kentucky Supreme Court acted contrary to an outright *AT&T Mobility LLC v. Concepcion* prohibition in adopting a legal rule that discriminated against the primary characteristic of an arbitration agreement: "a waiver of the right to go to court and receive a jury trial").

46. *Gilmer*, 500 U.S. at 26.

47. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (holding that a court's duty to rigorously enforce arbitration agreements is "not diminished when a party bound by an agreement raises a claim founded on statutory rights"). *See also* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) ("Just as it is the congressional policy manifested in the [FAA] that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.")

48. *Shearson*, 482 U.S. at 226–27.

49. *AT&T Mobility LLC v. Concepcion* (*Concepcion*), 563 U.S. 333, 345–46 (2011) (citation omitted) ("[O]ur cases place it beyond dispute that the FAA was designed to promote arbitration. They have repeatedly described the Act as embodying [a] national policy favoring arbitration . . . and a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."). *See also* *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) ("In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.")

50. *Concepcion*, 563 U.S. at 341–42. The Court noted that "nothing in [the saving clause] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 343.

the streamlined proceedings available when parties design their own arbitration processes.<sup>51</sup> In fact, it found that “[r]equiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration . . . creat[ing] a scheme inconsistent with the FAA.”<sup>52</sup> Citing earlier precedent, the Court also noted that permitting class-wide arbitration when a contract is silent on the issue is inconsistent with the FAA because of the various formal procedures that such actions require.<sup>53</sup> Further, the Court included several concerns it had over the compatibility of arbitration and class-wide proceedings.<sup>54</sup>

### *C. The Board’s Decision in D.R. Horton*

In *D.R. Horton*, the Board reviewed a petition regarding individual-arbitration mandates in employment contracts.<sup>55</sup> The employer-respondent argued that non-enforcement of this contract violated the FAA.<sup>56</sup> As in the present case, the employee-petitioner argued that enforcing the arbitration agreement violates the protection of the substantive right of collective action, as provided in the NLRA.<sup>57</sup> When two federal statutes present this type of conflict, the reviewer is required to try to accommodate them.<sup>58</sup> Unless there exists a “clearly express congressional intention to the contrary,” the two statutes must be construed to co-exist with each other.<sup>59</sup>

The Board found that arbitration is a satisfactory substitute for a judicial forum only if a litigant can effectively vindicate his rights.<sup>60</sup> Additionally, the FAA’s saving clause permitted it and the NLRA to co-exist, as it provides for the invalidation of any arbitration agreement that is otherwise revocable upon grounds in law or equity.<sup>61</sup> Accordingly, finding that the NLRA grants a substantive

51. *See id.* at 344–45 (requiring, for instance, that arbitration be individual).

52. *Id.* at 344.

53. *Id.* at 347–48 (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 681–82 (2010)).

54. *See id.* at 349–51 (opining that class-wide arbitration lacks the informality and low cost, and increases risk to the defendants).

55. *In re D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, at 2277, 2012 WL 36274 (Jan. 3, 2012).

56. *Id.* at 2284.

57. *Id.*

58. *Id.* (citing *Southern S.S. Co. v. N.L.R.B.*, 316 U.S. 31, 47 (1942)).

59. *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (“[W]hen 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 effective.”).

60. *D.R. Horton*, 357 N.L.R.B. at 2285.

61. *Id.* at 2286–87.

right to collective action, the Board held that individual-arbitration agreements violate the NLRA by mandating that employees waive their rights to seek relief from employment-related claims collectively in all forums.<sup>62</sup> This type of interference by an employer in the engagement of concerted activity exempts those agreements from the FAA's enforcement requirement.<sup>63</sup>

The Fifth Circuit reviewed the Board's decision in *D.R. Horton* and overturned it, holding that the NLRA does not fall within the saving clause, or override the FAA with any congressional command, or grant a substantive right to class action procedures.<sup>64</sup> In *Murphy Oil*, the Board followed its own precedent, holding that the arbitration agreements signed by Hobson and her colleagues violated the NLRA.<sup>65</sup> Upon review, the Fifth Circuit followed its ruling in *D.R. Horton*, again rejecting the Board's conclusions.<sup>66</sup>

### III. HOLDING

In *Murphy Oil*, the Fifth Circuit held that Murphy Oil did not commit an unfair labor practice by mandating that employees waive their NLRA-granted rights to seek class or collective action claims in all forums, relying on its reasoning in *D.R. Horton*.<sup>67</sup> The *D.R. Horton* court found that the Board's rejection of that case's arbitration agreement did not reflect the proper weight of the FAA.<sup>68</sup> While the Board held that the "NLRA invalidates any bar to *class* arbitrations," the court explained that "the use of class action procedures . . . is not a substantive right," but a procedural one.<sup>69</sup> The court stated that the Board wrongly put the policy considerations of the NLRA ahead of those in the FAA by finding the statutes compatible, given two exceptions to the congressional mandate of arbitral enforcement: (1)

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62. *Id.* at 2288.

63. *Id.* at 2281.

64. *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013, 1016 (5th Cir. 2015) ("[A]n employer does not engage in unfair labor practices by maintaining and enforcing an arbitration agreement prohibiting employee class or collective actions and requiring employment-related claims to be resolved through individual arbitration.").

65. *Id.* at 1017.

66. *Id.* at 1017–18.

67. *Id.* at 1017–21. The Fifth Circuit also held that if an arbitration agreement is reasonably construed to prohibit a filing of unfair labor practice charges with the Board, then it violates the NLRA. *Id.* at 1019. However, one that expressly affirms an employee's right to file an unfair labor practices claim with the Board does not. *Id.*

68. *D.R. Horton, Inc., v. N.L.R.B.*, 737 F.3d 344, 348 (5th Cir. 2013).

69. *Id.* at 357.

the saving clause, and (2) the finding of another statute's contrary congressional command.<sup>70</sup>

The court found that the saving clause could not be a basis for prohibiting class action waivers because that reasoning would completely undermine the purposes of the FAA.<sup>71</sup> Specifically, “[r]equiring a class mechanism” impedes the benefits of arbitration by formalizing and slowing what otherwise would be a thorough, individualized, and less costly process to adjudicate claims.<sup>72</sup> Allowing an option for class action in employment contracts would discourage employers from using individual arbitration at all.<sup>73</sup>

Furthermore, the court did not find a contrary congressional command to override the FAA in the NLRA.<sup>74</sup> Deferring significantly to the federal policy favoring arbitration,<sup>75</sup> the court did not recognize any such mandate in the NLRA, especially because the statute does not explicitly provide for the right or procedures associated with this type of collective action.<sup>76</sup> Similarly, the court did not find that the NLRA's legislative history demonstrated Congress's intent to override the FAA.<sup>77</sup> Finally, it found no inherent conflict between the two statutes, as case law and Board practice have consistently shown that arbitration agreements in employment contracts were lawful and compatible with the NLRA.<sup>78</sup>

Accordingly, the Fifth Circuit concluded that the arbitration agreement must be enforced because the Board failed to show either that the NLRA granted a substantive right, that the NLRA fell within the saving clause, or that the NLRA presented a sufficient contrary congressional command to override the policy concerns behind the

70. *Id.* at 358 (noting that “[t]he Board clearly relied on the FAA’s saving clause. Less clear is whether the Board also asserted that a contrary congressional command is present”).

71. *Id.* at 359–60.

72. *Id.* at 360.

73. *Id.* at 359.

74. *Id.* at 360 (“[T]here is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA.”).

75. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.* 460 U.S. 1, 24 (1983)) (“[I]t should be kept in mind that ‘questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.’”).

76. *D.R. Horton*, 737 F.3d at 360 (noting that the NLRA’s text, “mutual aid or protection,” did not implicate either express or strongly implied congressional intent, reasoning that other cases presented more convincing arguments and were still subsequently rejected as lacking a sufficient overriding congressional command).

77. *Id.* at 361.

78. *See id.*

FAA.<sup>79</sup> Following the same line of reasoning, the *Murphy Oil* court held that the arbitration agreement at issue was enforceable, and accordingly overturned the Board's decision.<sup>80</sup>

#### IV. ARGUMENTS

##### A. Petitioners' Argument

Petitioners argue that collective action waivers, like the one at issue here, deprive employees of the opportunity to choose how to initiate or participate in a dispute against an employer.<sup>81</sup> The waiver prevents them from acting concertedly for the mutual aid or protection of each other, which the NLRA grants as a right.<sup>82</sup> Because the initial claim concerned a FLSA violation, it falls within the NLRA's jurisdiction.<sup>83</sup> Petitioners assert that an employees' right to pursue legal claims as a class is substantive and reflects a fundamental right to freely associate.<sup>84</sup> The Board does not dispute that violations of the FLSA may be heard in an arbitral forum in some cases,<sup>85</sup> but it protests any requirement imposed upon an employee to resolve work-related legal disputes on an individual basis.<sup>86</sup>

Furthermore, according to Petitioners, it is consistent with the policies motivating the NLRA to read § 158(a)(1) as prohibitive of waivers of § 157 rights.<sup>87</sup> The NLRA was, in part, passed to address the

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79. *Id.* at 362.

80. *See* *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013, 1018 (5th Cir. 2015).

81. *See generally* Brief for Petitioner, *supra* note 33. Hobson also submitted a brief on behalf of the N.L.R.B., but it will not be considered here. This summary of Petitioners' arguments is not exhaustive. Rather, it is an overview of the most salient points. *See id.* at 8. Petitioners argue that prospective waivers of § 157 rights "deprive employees of the opportunity to decide, when a dispute arises, whether to proceed alone or to initiate or join a concerted response." *Id.* Furthermore, individual waivers prevent individual employees from engaging in concerted activities "one by one." *Id.*

82. *Id.* at 11–12.

83. *See id.* at 31–32 ("[T]he NLRA and the FLSA establish separate rights and protections, which coexist and apply simultaneously to all employees who qualify for protection under both statutes. Because the NLRA applies at the time an arbitration agreement is signed, it invalidates and prohibits any prospective waiver of protected concerted activity, including one barring concerted proceedings under FLSA Section 216(b).").

84. *See id.* at 11–12 (asserting that "Congress enacted the NLRA to protect employees' 'full freedom of association' to join together to advance their interests as employees . . . Section 157 implements the core objectives of the NLRA by guaranteeing" protection of activities related to self-organization and "other concerted activities").

85. *See id.* at 9 (acknowledging that despite their "hostility towards arbitration . . . the Board recognizes [it] as an effective forum for vindicating federal laws").

86. *Id.*

87. *See id.* at 22–24. Petitioners briefly describe the court's history aligning with the

power imbalance between employees and their employers.<sup>88</sup> Because the NLRA enables employees to pursue claims against employers who would otherwise be able to capitalize on the power imbalance by committing unfair labor practices, it follows that a waiver that breaches this safeguard is not permissible.<sup>89</sup> By limiting an employee's access to collective action rights under the NLRA, an employer infringes upon an interest that is closely associated with the freedom to associate.<sup>90</sup>

Additionally, Petitioners argue that the class action waivers are unenforceable under the FAA's saving clause.<sup>91</sup> In addressing the Fifth Circuit's contention that *Concepcion* rejects this assertion, Petitioners explain that Congress included the FAA saving clause to permit the restriction of arbitration where the agreement is invalid.<sup>92</sup> Therefore, because the agreement here violates a coequal federal statute, and not a state law like in *Concepcion*, it must be invalid.<sup>93</sup> Petitioners also addressed the apparent inconsistency between their position and the holding in *Concepcion*,<sup>94</sup> which viewed a rule mandating the option for class-wide arbitration as incompatible with the FAA.<sup>95</sup> Petitioners respond that preserving the option for employees to engage in collective action in some forum does not impede the equally valued option to individual arbitration.<sup>96</sup> They rely upon *Eastex Inc.* to assert that a forum, either judicial or arbitral, must be available to employees to settle grievances as a group.<sup>97</sup> This interpretation properly leaves the choice with employees, and

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employer's interests in mitigating the labor unions' power. *Id.* at 23–24. In the 1930s, Congress sought to protect employees' interests by restricting federal courts' jurisdiction to grant labor injunctions and expanding federal labor protections through the NLRA. *Id.* at 22–23. Petitioners argue that the Court has already supported a reading of § 158(a) strongly linked to § 157 rights because contracts that restricted § 157 rights were a “continuing means of thwarting the policy of the [NLRA].” *Id.* at 24 (citation and internal quotations omitted).

88. 29 U.S.C. § 151 (2012).

89. Brief for Petitioner, *supra* note 33, at 22–24.

90. *Id.* at 7.

91. *Id.* at 35–46.

92. *Id.* at 41.

93. *Id.*

94. *Id.* at 39–44.

95. *AT&T Mobility LLC v. Concepcion* (*Concepcion*), 563 U.S. 333, 344 (2011).

96. See Brief for Petitioner, *supra* note 33, at 42 (asserting that an employer may still be able to “insist that any arbitral proceedings be conducted on an individual basis, provided it leaves open a judicial forum for collective action”).

97. *Id.* at 7. See also *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 565 (1978) (rejecting the view that “employees lose their protection under the ‘mutual aid or protection’ clause when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employer-employee relationship”).

prevents the violation of an explicit prohibition provided in a coequal federal statute, and comports with the saving clause.<sup>98</sup> Relatedly, Petitioners also reject the Fifth Circuit’s contention that prohibiting these class action waivers defeats the purpose of the FAA, which is to put arbitration agreements “on equal footing.”<sup>99</sup> Rather, Petitioners argue that invoking the saving clause here permits the FAA and NLRA to both be effectuated, and recognizes the statutory exemptions the FAA has put in place for certain types of contracts.<sup>100</sup>

Furthermore, Petitioners assert that the long tradition of cases failing to satisfy the high threshold for the FAA’s second exception, the contrary congressional command, is not pertinent here because no other case has involved a direct violation of another federal statute.<sup>101</sup> Petitioners contend that the NLRA’s underlying policies support the finding of a contrary congressional command that overrides that of the FAA. In any case, Petitioners assert that “[a] valid agreement is a threshold requirement for enforcement under § 2 of the FAA . . . [t]he congressional-command test pre-supposes the existence of an enforceable contract to arbitrate.”<sup>102</sup> Because the agreement is illegal, according to Petitioners, the Board’s decision in *Hobson’s* case must be enforced.<sup>103</sup> Ruling otherwise, they argue, would allow for the contractual nullification of rights provided by any federal statute that does not demonstrate a contrary congressional command.<sup>104</sup>

### *B. Respondents’ Argument*

Respondents argue that collective action waivers at issue here are valid arbitration agreements, and so must be enforced per the FAA.<sup>105</sup> Respondents contend that the FAA and NLRA should be interpreted harmoniously, given the NLRA’s failure to satisfy either of the two exceptions to the FAA.<sup>106</sup> Specifically, the statute does not fall within

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98. Brief for Petitioner, *supra* note 33, at 10.

99. *Id.* at 44.

100. *Id.* at 44–45.

101. *Id.* at 47–51.

102. *Id.* at 47–48.

103. *See id.* at 50–52.

104. *Id.* at 51. *See also id.* at 55 (“[N]othing in the FAA so much as suggests that Congress intended, in affirming the legitimacy of arbitration agreements as legally binding contracts, to authorize private parties’ use of such agreements to evade their federal statutory obligations.”).

105. *See generally* Brief for Respondent, *supra* note 4. This summary of Respondents’ arguments is not exhaustive. Rather, it is an overview of their most salient points.

106. *See id.* at 39 (“Because the tools of statutory construction all point in the same direction, the meaning of the NLRA is unambiguous: Section 7 does *not* confer a right to ‘engage in concerted activities’ by *litigating as a class*. At a minimum, there is no ‘clearly

the saving clause of the FAA.<sup>107</sup> Also, they argue that no sufficient contrary congressional command exists to override the command of the FAA.<sup>108</sup> Respondents further assert that the NLRA does not unambiguously refer to class proceedings or have jurisdiction over arbitration agreements, like the one at issue here.<sup>109</sup> Finally, they argue that if the Court does not find the FAA and NLRA compatible, the Court must favor the FAA.<sup>110</sup>

To deconstruct Petitioners' argument that the saving clause must be invoked because of the NLRA, Respondents present four reasons that Petitioners' interpretation is faulty.<sup>111</sup> First, Respondents contend that the saving clause only applies to "inferior" laws, and not to other federal statutes.<sup>112</sup> Because a coequal statute, like a federal one, does not need to be saved to have effect, the saving clause may not apply.<sup>113</sup> Second, the NLRA does not extend to "any" contract, as referred to in the saving clause, but only ones between employer and employee. This means that traditional contract defenses, like duress or illegality, do not apply because the clause's phrasing excludes defenses available by another statute, like those in the NLRA.<sup>114</sup> Third, in promoting the policy underscoring the FAA, Respondents argue that the saving clause may not apply for any reason that discriminates against arbitration or its defining features,<sup>115</sup> as such an application would undermine the FAA's purpose and interfere with the "fundamental attributes" of arbitration.<sup>116</sup> So, prohibiting class waivers in arbitration agreements would undercut the FAA's

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expressed congressional intention' that it *does*." (citation and internal quotations omitted) (emphasis in original).

107. *Id.* at 29.

108. *Id.* at 14.

109. *Id.* at 31.

110. *Id.* at 54–57.

111. *Id.* at 20–29.

112. *Id.* at 20.

113. *Id.* (citing *N.L.R.B. v. Alt. Entm't, Inc.*, No. 16-1385, 2017 WL 2297620, at \*18 (6th Cir. May 26, 2017) (Sutton, J., concurring in part and dissenting in part)).

114. *See id.* at 21–24 (citing *Southland Corp. v. Keating*, 465 U.S. 1, 3–4 (1984) (finding "a party may assert *general* contract defenses such as fraud to avoid enforcement of an arbitration agreement . . . [but] the defense to arbitration found in the [state statute at issue] is not a ground that exists at law or in equity 'for the revocation of *any* contract' . . . [R]ather it was, 'merely a ground that exists for the revocation of arbitration provisions in contracts subject to [the state statute at issue]'" )); *id.* at 21.

115. *Id.* at 24 (quoting *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423 (2017)).

116. *Id.* at 24–27 (citing *AT&T Mobility LLC v. Concepcion* (*Concepcion*), 563 U.S. 333, 344 (2011)).

facilitation of efficient procedures tailored to the specific action at hand.<sup>117</sup> Finally, citing a concurring opinion in *Concepcion*, Respondents suggest that the saving clause addresses the proper formation of a contract,<sup>118</sup> and as such, it would not be a ground to prohibit class waivers under the NLRA, because the clause focuses on revocation, and not nonenforcement.<sup>119</sup>

Respondents also argue that the NLRA does not contain any clearly expressed contrary congressional intention that overrides the interests of the FAA.<sup>120</sup> They support this contention with a series of cases in which courts have favored enforcing the FAA over other statutes that have challenged it.<sup>121</sup> They argue that “the pattern in these cases is undeniable . . . the FAA unambiguously ‘mandate[d] enforcement’ of the arbitration agreement at issue.”<sup>122</sup> Respondents support this assertion by pointing out that the only decision in which the Supreme Court was unable to reconcile another statute with the FAA, was eventually overruled.<sup>123</sup> Additionally, when displacing the FAA in other statutes, Congress has spoken with much more specificity than it has in the NLRA, which does not mention the waiver of class proceedings or arbitration at all.<sup>124</sup> Moreover, prohibiting class waivers, while addressing a peripheral NLRA concern, would undermine the very core of the FAA’s protections.<sup>125</sup> Respondents also discuss the text, legislative history, and underlying purposes of the NLRA, concluding that nothing in these sources

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117. *Id.* at 25 (quoting *Concepcion*, 563 U.S. at 344).

118. *Id.* at 28–29 (citing *Concepcion*, 563 U.S. at 357) (Thomas, J., concurring) (considering the history preceding the enactment of the FAA, contending that a 1923 New York court “tied the concept of revocability to the ‘time of the [agreement’s] making’ – suggesting that the saving clause’s concern was limited to whether the agreement was properly made. When Congress enacted the FAA two year later, it was presumably aware of that authoritative interpretation for the statute it was copying.”) (citations omitted).

119. *Id.* at 27–29 (citing *Concepcion*, 563 U.S. at 354) (Thomas, J., concurring) (“Because the NLRA does not relate to contract formation, it is not a ground ‘for the *revocation*’ of a contract within the meaning of the saving clause.”).

120. *Id.* at 14 (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

121. *See, e.g.*, *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (the Court harmonized the FAA’s mandate to enforce arbitration agreements with the Exchange Act and RICO); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23–24 (1991) (the Court found no contrary congressional command in CROA to override FAA’s mandate); *Vimar Seguro y Reasuguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534–35 (1995) (the Court held that the COGSA should be construed to avoid conflict with FAA’s mandate).

122. Brief for Respondent, *supra* note 4, at 17 (citation omitted).

123. *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 479–85 (1985).

124. Brief for Respondent, *supra* note 4, at 54–57.

125. *Id.* at 56.

suggests that Congress intended for the NLRA to override the FAA.<sup>126</sup>

Finally, Respondents examine the NLRA’s text to argue that reading “concerted activities” as including class proceedings would improperly impose an obligation on employers or third parties to treat employees as a class, which is a procedural measure.<sup>127</sup> It is not, as Petitioners argue, a measure to prevent substantive interference by employers.<sup>128</sup> Additionally, Respondents argue that Congress did not view class proceedings as necessary to effectuate the right to engage in concerted activities.<sup>129</sup> Asserting that outcomes of legal actions do not depend on whether claims are brought individually or as a class, Respondents dismiss the notion that waiving the option for class action in both judicial and arbitral forums would deprive an employee of any potential relief.<sup>130</sup> It follows, then, that class action waivers do not violate the NLRA.<sup>131</sup> Regardless of any violation, however, Respondents contend that the FAA’s command must be favored over that of the NLRA because the former is more specific, and the Court has only overridden the FAA when specific language has instructed it to do so.<sup>132</sup> They add that the “enforceability of class waivers forms the core of the FAA.”<sup>133</sup> Therefore, the FAA’s command must be favored over that of the NLRA.<sup>134</sup>

## V. ANALYSIS

The Fifth Circuit erred in ruling in favor of Respondents. The issue before the Supreme Court, whether collective action waivers are permissible in employment arbitration agreements, connects to a broader question of how employees may freely associate with each other to affect change in the workplace or seek relief for the wrongs of their employers.<sup>135</sup> The question is not merely procedural,<sup>136</sup> and

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126. *Id.* at 51–54.

127. *Id.* at 35–38.

128. *See id.* at 35.

129. *Id.* at 43.

130. *Id.* at 43–44.

131. *Id.* at 44.

132. *Id.* at 54–57.

133. *Id.* at 56.

134. *Id.* at 57.

135. *See* Petition for Writ of Certiorari, *supra* note 5, at 2, 24–25.

136. *See* Brief for Respondent, *supra* note 4, at 47. Respondents argued that the right to participate in class proceedings “is a procedural right only ancillary to the litigation of substantive claims.” *Id.*

substantive rights must not be eviscerated through dismantling longstanding statutes, or picking and choosing some clauses while disregarding others.<sup>137</sup> The NLRA protects employees' right to engage in "concerted activities" for their "mutual aid or protection."<sup>138</sup> Therefore, holding that waivers of collective action in all forums in employment contracts violate the rights granted in the NLRA is the proper conclusion. To address the countervailing interest presented by the FAA, the Court should invoke its main exception, the saving clause, to preserve the equal strength of the competing statutes. But, if the Court does not find that the saving clause applies, it should favor the underlying policies of the NLRA, as the interests in the people's rights outweighs a general concern for informality and economy.

The saving clause of the FAA provides that an arbitration agreement is legal and must be enforced, "save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>139</sup> The saving clause is included in the FAA to ensure that no illegal arbitration agreement will be enforced, which maintains the integrity of the arbitral forum. Nothing in the FAA or its jurisprudence suggests that Congress intended for illegal agreements to be enforced under the statute.<sup>140</sup> Therefore, as Petitioners assert, because the class action waivers in this case violate a right in the NLRA, it is imperative to determine how the saving clause might be implicated here.

As Respondents contend, the saving clause is meant only to cover generally applicable contract defenses, and not defenses unique to certain statutes.<sup>141</sup> However, Respondents misconstrue Petitioners'

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137. This analysis will not address Respondents' textual arguments, except to say: the ability to bring a claim, in any forum, as a group, to seek relief for a work-related dispute falls within these bounds. Despite the fact that the NLRA does not mention arbitration explicitly, it also does not mention bringing a claim in any legal forum, judicial or otherwise, except in its discussion of bringing a charge to the Board's attention. It would be absurd to understand this construction to be forgoing employees' rights to bring a claim in a court of law. It is similarly nonsensical to assume that it did not apply to arbitration, either. Therefore, Respondents' argument that the NLRA is ambiguous to the extent that it does not expressly refer to "class proceedings" or arbitration does not hold water, given that the ability for one or more employees to initiate a class action on behalf of the group for an employment dispute falling within the purview of the NLRA. *See* 29 U.S.C. § 157 (2012). There is no mention of class proceedings in relation to concerted activities. *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 565–66 (1978) (explaining that "it has been held that the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums.").

138. 29 U.S.C. § 157.

139. *Id.*

140. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24–26 (1991).

141. Brief for Respondent, *supra* note 4, at 26–27 (citing *AT&T Mobility LLC v.*

argument, because Petitioners do not attempt to invoke a defense that is provided for in the NLRA. Rather, they cite illegality as the applicable contract defense. To determine whether an agreement must be enforced under the FAA, the Court must consider the legality of a contract as a threshold matter.<sup>142</sup> Requiring that individual arbitration be the *only* recourse for an employee who seeks to bring a work-related dispute against her employer violates that employee's right to collective action. Petitioners argue that if the arbitral forum were left available to the employee to pursue a class action, then waiving the right to a judicial forum would not be problematic under the NLRA.<sup>143</sup> Therefore, because neither forum is available in the agreement here, the agreement violates the NLRA and thereby is an illegal contract. So, because illegality is an applicable contract defense to enforcement, it follows that arbitration agreements containing class action waivers in all forums are unenforceable because they are illegal under the NLRA.<sup>144</sup>

Furthermore, Respondents' reliance on *Concepcion* in claiming that the saving clause may not be invoked is misplaced. Unlike the cautionary tales described in *Concepcion*, the NLRA-granted right that the agreement here violated does not derive its "meaning from the fact that an agreement to arbitrate is at issue," or discriminate against arbitration alone.<sup>145</sup> The NLRA also does not disfavor contracts that "have the defining features of arbitration agreements."<sup>146</sup> Again, Petitioners do not deny that arbitration can be a sufficient means of adjudication.<sup>147</sup> Rather, they argue that mandating individual arbitration as the only available legal recourse for an employee disregards the underlying policy concerns of the

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*Concepcion* (*Concepcion*), 563 U.S. 333, 339 (2011)) (internal quotations omitted).

142. See 9 U.S.C. § 2 (2012) (stating that "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon the grounds as exist at law or in equity for the revocation of any contract"); *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017), (holding that "The FAA cares not only about the 'enforce[ment]' of arbitration agreements, but also about their initial 'valid[ity]—that is, about what it takes to enter into them" when analyzing § 2).

143. Brief for Petitioner, *supra* note 33, at 1–2.

144. See *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83–84 (1982) (quoting *Hurd v. Hodge*, 334 U.S. 24, 34–35, 68 S. Ct. 847, 853, 92 L.Ed. 1187 (1948) (footnotes omitted)). The Court asserts that courts must refrain from enforcing contracts that would violate "restrictions and limitations of the public policy of the United States" established in federal statutes. *Id.* (internal quotations omitted).

145. *Concepcion*, 563 U.S. at 333.

146. *Kindred Nursing Ctrs.*, 137 S. Ct. at 1426.

147. Brief for Petitioner, *supra* note 33, at 9.

NLRA.<sup>148</sup> The supposed virtues of arbitration, including its informality and low cost, are not foregone just because the proceedings are brought by a group of employees.<sup>149</sup> In fact, allowing for one group to bring a common claim or set of common claims is more efficient than a separate proceeding for each individual's claim(s). The integrity of the arbitral forum is not undermined by allowing claims to be brought by a group.<sup>150</sup> Finally, the Supreme Court has consistently indicated that the saving clause addresses the revocability, validity, and enforceability of arbitration agreements, which undermine Respondents' contention that the clause only applies to the formation of contracts.<sup>151</sup>

To hold arbitration in a higher regard than the workers' rights to work for their mutual aid or protection also violates the equal treatment principle, which demands that arbitration is given the same effect as judicial proceedings.<sup>152</sup> Ensuring that an employee has a choice to participate collectively does not mean that individual action is extinguished, or that the arbitral forum becomes less forceful. The FAA was enacted to preserve equal treatment for arbitration and the judicial forum. It was not enacted to subvert employees' rights. Therefore, prioritizing the FAA over the NLRA to this extent is as inconsistent with the equal footing principle as completely disregarding arbitration in favor of the protections of the NLRA. For the foregoing reasons, the saving clause should be invoked to maintain the equal might of the FAA and the NLRA, and preserve the legitimacy of the arbitral forum.

Based on the precedent discussed in Respondents' argument, it is difficult to determine whether the Court will find a contrary congressional command "specific" enough within the NLRA to override the FAA. But, because they are coequal statutes, it would appear that weighing their countervailing underlying policies is a

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148. *Id.* at 11.

149. *Concepcion*, 563 U.S. at 350–52.

150. See Brief for Petitioner, *supra* note 33, at 9 ("Section 2's saving clause preserves the Board's rule invalidating agreements that require employees to individually arbitrate work-related claims. That rule is not based on hostility towards arbitration, which the Board recognizes as an effective forum for vindicating federal laws. It is based on longstanding labor-law principles developed without reference to arbitration, which implement the NLRA's express bar on employer interference with employees' right to act together for mutual protection. The rule is entirely neutral with respect to the forum.").

151. See, e.g. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991). *But see Concepcion*, 563 U.S. at 354 (Thomas, J., concurring).

152. See *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

useful exercise to determine which might be a better course. The FAA protects the procedure and integrity of arbitration agreements.<sup>153</sup> It was enacted to provide legitimacy to an alternative to court proceedings that is efficient, informal, and economic.<sup>154</sup> Arbitration reduces the burden on courts and provides litigants with a speedier road to recovery.<sup>155</sup> These are valuable goals and the federal policy and case law clearly demonstrate a tradition favoring arbitration in pursuit of those goals. The NLRA, however, protects people. In an employee-employer relationship more power rests with the employer, especially if the employee must face the employer alone. This is why, by way of the NLRA, Congress sought to ensure that individuals may gather with each other to seek relief for common disputes.<sup>156</sup> Inhibiting individuals from the opportunity to engage in this form of justice-seeking measures skirts around the NLRA itself and offends its mission.<sup>157</sup>

Respondents have not shown that the FAA has ever preempted a directly on point federal law.<sup>158</sup> On this question before the Court, in which the FAA is up against an equally powerful federal statute that directly protects an interest at risk in this arbitration agreement, the Court must consider why Congress was concerned about the employee-employer relationship. In determining how those policy concerns outweigh the economy provided by the FAA, the Court

153. See *Concepcion*, 563 U.S. at 339. While courts must place arbitration agreements on equal footing with other contracts, they will not enforce them “upon such grounds as exist at law or in equity for the revocation of any contract” according to the saving clause. *Id.*

154. *Id.* at 350–52. See also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 (1974) (asserting that “it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution”).

155. See *Alexander*, 415 U.S. at 58.

156. See *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 565–66 (1978) (holding that within § 7, the 74th Congress established its intention to protect concerted activities from employer retaliation when employees sought to improve working conditions).

157. See *id.*; 29 U.S.C. § 151 (2012) (“The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce . . . [E]xperience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.”).

158. See, e.g., *Concepcion*, 563 U.S. at 352 (holding that the FAA preempted California’s judicial rule on the unconscionability of class arbitration waivers in consumer contracts); *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1429 (2017) (holding that Kentucky’s clear statement rule violates the FAA’s mandate).

must be mindful that ruling in favor of Respondents enables employers to mandate that employees bring actions alone. This result would eviscerate the NLRA, leaving it toothless to protect institutionally vulnerable people.

#### CONCLUSION

In its review of *Murphy Oil v. N.L.R.B.*, the Supreme Court must reckon with complex and somewhat conflicting statutory law, case law, and policy concerns. A victory for the employers risks foreclosing any opportunity for effective claim relief for employees across countless industries and sectors. Due to this catastrophic result, the Supreme Court should preserve the fundamental mission of the NLRA, and decide that seeking justice collectively outweighs a slightly faster process.