

**MURPHY OIL AND NORRIS LAGUARDIA TO THE RESCUE:
PRESERVING EMPLOYEE RIGHTS TO CONCERTED DISPUTE
RESOLUTION IN AN ERA OF MANDATORY INDIVIDUAL
ARBITRATION**

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In 2012, the National Labor Relations Board (the NLRB or “Board”) held in *In re D.R. Horton, Inc.*,¹ that employers may not compel employees to sign mandatory arbitration agreements waiving their National Labor Relations Act (NLRA)² right to concerted pursuit of legal redress of employment claims.³ It did not strike down arbitration as such; rather, it mandated that any agreements required of covered workers leave open an avenue for collective pursuit of claims, either in arbitration or through the court system.⁴ The Board noted, but did not stress, that a similar result would follow under the Norris LaGuardia Act.⁵ In 2013, we weighed in on the issue in an article in the *Alabama Law Review*,⁶ arguing essentially that, under either statute, arbitration clauses prohibiting employees from all avenues for collective pursuit of legal relief—whether in court or in arbitration—were unenforceable.

Neither the Board nor we had much success initially, with the Fifth Circuit’s rejection of the argument in its review of *Horton*, which

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1. *In re D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012).

2. 29 U.S.C. §§ 151–169 (2012).

3. *D.R. Horton, Inc.*, 357 N.L.R.B. at 2277.

4. *Id.* at 2279–80.

5. 29 U.S.C. § 101 (2012); *D.R. Horton, Inc.*, 357 N.L.R.B. at 2286–87.

6. Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013 (2013).

contained a dismissive footnote about our efforts.⁷ And, for the most part, other federal courts refused to follow *Horton* as well.⁸

But the Board persevered, reiterating and elucidating its position in *Murphy Oil USA, Inc.*⁹ And although the Board's position in *Murphy Oil* was again rejected by the Fifth Circuit,¹⁰ two circuits recently rode to the rescue: the Ninth in *Morris v. Ernst & Young, LLP*,¹¹ and the Seventh in *Lewis v. Epic Systems Corp.*¹² The resultant circuit split led to the Supreme Court's grant of certiorari in all three cases, which are slated to be heard this upcoming Term. Since the Court granted review, the Sixth Circuit has joined the Ninth and Seventh Circuits in agreement with the Board's position in *Murphy Oil*.¹³

The final resolution of this question will turn on two principal propositions from the Board's decisions in *Horton* and *Murphy Oil*. The first is that employees' rights to engage in concerted activity for mutual activity guaranteed in Section 7 of the NLRA and its precursor Section 2 of the Norris-LaGuardia Act¹⁴ include the right to concerted legal redress, whether through the judicial process or arbitration.¹⁵ The second is that nothing in the Federal Arbitration Act (FAA)¹⁶ changes this result. Because almost nothing has happened since we published our article that calls the first proposition into question, we can dispose

7. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 n.11 (5th Cir. 2013).

8. *See, e.g., Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1054 (8th Cir. 2013); *Carey v. 24 Hour Fitness USA, Inc.*, No. H-10-3009, 2012 WL 4754726, at *2 (S.D. Tex. Oct. 4, 2012); *Tenet HealthSystem Phila., Inc. v. Rooney*, No. 12-mc-58, 2012 WL 3550496, at *2-3 (E.D. Pa. Aug. 17, 2012).

9. *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, 2014 WL 5465454, at *2 (Oct. 28, 2014).

10. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1021 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (2017).

11. *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 990 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017).

12. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1161 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017).

13. *NLRB v. Alt. Entm't., Inc.*, 858 F.3d 393, 404 (6th Cir. 2017).

14. 29 U.S.C. §§ 101-115 (2012).

15. "Section 7 [of the NLRA] provides that '[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.'" 29 U.S.C. § 157 (2012). Under Section 8(a)(1) of the Act, it is an unfair labor practice "for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, 2014 WL 5465454, at *9 (Oct. 28, 2014) (quoting 29 U.S.C. § 158(a)(1) (2012)). Section 2 of Norris LaGuardia in relevant part, "declares that the 'public policy of the United States' is to ensure that the 'individual unorganized worker' is 'free from the interference, restraint, or coercion of employers . . . in . . . concerted activities for the purpose of . . . mutual aid or protection.'" *Id.* at *13 (quoting 29 U.S.C. § 102 (2012)).

16. 9 U.S.C. §§ 1-16 (2012).

of it fairly quickly here. We will delve more deeply into the second point, since it has proven more contested, and the dispositive role of the Norris-LaGuardia Act has, until now, been underappreciated.

CONCERTED DISPUTE RESOLUTION IS PROTECTED CONCERTED ACTIVITY

That the right to engage in concerted activities includes seeking concerted legal redress—and that employer agreements limiting or waiving this right are unlawful—can almost be described as a no-brainer in light of a long line of precedent. Because we have canvassed this before, as did the Board in *Murphy Oil*,¹⁷ we will not repeat the full analysis here. In our view, it suffices to highlight that federal courts and the Board have repeatedly found as much over the last half century.¹⁸ And, in *Eastex, Inc. v. NLRB*,¹⁹ the Supreme Court itself confirmed as much, declaring that Section 7 of the NLRA “protects employees from retaliation by their employers when they seek to improve [their] working conditions through resort to administrative and judicial forums.”²⁰ The three circuit courts that have adopted the Board’s reasoning in *Horton* and *Murphy Oil* have not only extended this list, but also confirmed through careful analysis the strength of their reasoning.²¹ In *Morris* and *Lewis*, for example, which both contain robust discussion of the meaning of Section 7, the courts found that the statutory term “concerted activity” unambiguously includes concerted pursuit of legal redress.²²

Of equal note, since the Board’s decision in *Horton*, no circuit court has found to the contrary, despite the existing circuit split. The Second

17. *Murphy Oil USA*, 2014 WL 5465454, at *9–11, 16–24.

18. See, e.g., *In re D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2278 n.4 (2012) (collecting and citing NLRB decisions and cases); *Brady v. Nat’l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) (“[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is ‘concerted activity’ under § 7 of the National Labor Relations Act.”); *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1189 (D.C. Cir. 2000) (finding a single employee’s filing of a judicial petition constituted “concerted action” under the NLRA because it was “supported by fellow employees”); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973); 127 Rest. Corp., 331 N.L.R.B. 269, 275–76 (2000) (“It is well settled that the filing of a civil action by employees is protected activity . . . [and] by joining together to file the lawsuit [the employees] engaged in concerted activity.”).

19. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

20. *Id.* at 566.

21. See *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 980–84 (9th Cir. 2016), cert. granted, 137 S. Ct. 809 (2017); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1153–54 (7th Cir. 2016), cert. granted, 137 S. Ct. 809 (2017).

22. See *Morris*, 834 F.3d at 983; *Lewis*, 823 F.3d at 1153.

and Eighth Circuit panels that declined to follow *Horton* offered cursory analyses that did not confront this issue at all.²³ Of greatest import, the Fifth Circuit, in its *Horton* decision, largely conceded that Section 7 protects concerted dispute resolution:

Board precedent and some circuit courts have held that [Section 7] protects collective-suit filings. “It is well settled that the filing of a civil action by employees is protected activity . . . [and] by joining together to file the lawsuit [the employees] engaged in concerted activity.” *127 Rest. Corp.*, 331 NLRB 269, 275–76 (2000). “[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is ‘concerted activity’ under Section 7” of the NLRA. *Brady v. Nat’l Football League*, 644 F.3d 661, 673 (8th Cir. 2011). . . .

These cases under the NLRA give some support to the Board’s analysis that collective and class claims, whether in lawsuits or in arbitration, are protected by Section 7. To stop here, though, is to make the NLRA the only relevant authority. The Federal Arbitration Act (“FAA”) has equal importance in our review.²⁴

And in *Murphy Oil*, the Fifth Circuit relied on its *Horton* decision without further analysis on this issue.²⁵

In light of all of this, most arguments to the contrary have fallen away. Two, however, in zombie-like fashion, continue to re-appear in briefs and occasional dissents. The first is that nothing in the NLRA or Norris LaGuardia provides that employees have a right to pursue a class action or a right to class treatment of their claims.²⁶ That argument is pitched on the claim that the right to concerted activity does not guarantee access to particular court or arbitration procedures. It then proceeds to contend that, because neither the modern class action nor collective action under the FLSA existed at the time both statutes were enacted, there is no right to such procedures. We do not so much as dispute either point as we find them irrelevant—as did the

23. See *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–54 (8th Cir. 2013).

24. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 356–57 (5th Cir. 2013).

25. See *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1019 (5th Cir. 2015) (adhering to the court’s prior *Horton* decision without further analysis).

26. *Morris*, 834 F.3d at 995 (Ikuta, J., dissenting).

Board in *Murphy Oil*,²⁷ and we in our earlier piece.²⁸ We suspect their continued assertion is partially a rhetorical maneuver to coax federal jurists—some of whom have manifested a wariness towards class actions—into thinking of this dispute as principally about some claimed right to class action treatment. But, of course, it is not.

For one thing, as the *Murphy Oil* Board and the *Lewis* court have explained, if enforceable, the mandatory arbitration clauses at issue would preclude *all* concerted dispute resolution,²⁹ not just class actions, including pursuit of joint claims by as few as two employees (via simple party joinder under Rule 20 and its analogues).³⁰ More importantly, the right at issue here (whether under Section 7 or Norris-LaGuardia) is not to any particular joinder mechanism; it is, instead, a right to pursue claims jointly and without employer interference to the extent such joinder is otherwise generally available.³¹ In rejecting contrary suggestions in the dissent, the Board majority in *Murphy Oil* compellingly swept away this mischaracterization:

[T]he NLRA does not create a right to class certification or the equivalent; rather, it creates a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint. There should be no doubt on this score Contrary to any suggestion in the dissent, we make no “assumption that Congress, in the NLRA, vested authority in the Board to guarantee that . . . claims [will] be afforded ‘class’ treatment in litigation.” We do not “suggest that Congress, in 1935, incorporated into the NLRA a guarantee that non-NLRA claims will be afforded ‘class’ treatment.” We do not hold that “Section 7 guarantee[s] class-type procedures relating to claims brought under non-NLRA statutes.” This case, like *D. R. Horton*, is not about *guaranteeing* class treatment. It is about the legality of mandatory waivers of employees’ right to *seek* class treatment or the equivalent for their workplace claims (where that potential exists as a matter of law) in any forum, judicial or arbitral. Such employer-imposed restraints, as we have shown here, violate the Act because they purport to

27. *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, 2014 WL 5465454, at *22 (Oct. 28, 2014).

28. See Sullivan & Glynn, *supra* note 6, at 1030 n.91.

29. See *Murphy Oil USA*, 2014 WL 5465454, at *22; *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1154 (7th Cir. 2016).

30. FED. R. CIV. P. 20.

31. See Sullivan & Glynn, *supra* note 6, at 1030 n.91.

preclude *all* forms of group litigation or arbitration, regardless of whether they would otherwise be available to employees.³²

In addition, it is simply incorrect to claim that because collective pursuit of claims is limited by external legal constraints—that is, the various requirements for party joinder—it is different from other kinds of concerted activity. On the contrary, *all* types of concerted activity—pickets, protests, communications, etc.—are subject to external legal constraints and limitations (including property rights, safety limitations, and many others).³³

The second counterargument that seems to linger on and on, despite the stake planted firm in its heart, is that, even if employees have the right to act concertedly in pursuing legal redress, that right is limited to working together and pooling resources to prepare to litigate or arbitrate, not to pursue their claims collectively in joint, collective, or class proceedings.³⁴ Admittedly, we find it difficult to take such a contention seriously. As we have said previously, the only obvious reason to treat concerted preparation and support of such claims differently than the actual, collective pursuit of them is to make such activity less effective.³⁵ Further, the notion that an employer can deploy individual employment agreements to limit *how* individual employees' seek mutual aid or protection is fundamentally at odds with the protections afforded in the NLRA and Norris LaGuardia.³⁶ Certainly, an employer could not enforce a contractual term that provides that

32. *Murphy Oil USA*, 2014 WL 5465454, at *22 (emphasis in original); see also *Lewis*, 823 F.3d at 1154 (“Congress was aware of class, representative, and collective legal proceedings when it enacted the NLRA. The plain language of Section 7 encompasses them, and there is no evidence that Congress intended them to be excluded. Section 7’s plain language controls . . . and protects collective legal processes. Along with Section 8, it renders unenforceable any contract provision purporting to waive employees’ access to such remedies.”) (citations omitted).

33. See, e.g., Sullivan & Glynn, *supra* note 6, at 1030–31; see generally ROBERT A. GORMAN, MATTHEW W. FINKIN & TIMOTHY P. GLYNN, *COX AND BOK’S LABOR LAW: CASES AND MATERIALS* 90–187 (16th ed. 2016) (discussing these and other types of limitations on concerted activity).

34. See, e.g., *Murphy Oil USA*, 2014 WL 5465454, at *16–17 (arguing against concerns “that filing joint, class, or collective claims is rarely, if ever, protected by Section 7”); see also *NLRB v. Alt. Entm’t, Inc.*, 858 F.3d 393, 414 (6th Cir. 2017) (Sutton, J., dissenting) (“Whether a group of employees brings a class action, joint claims, separate claims, or whether the group supports a single-plaintiff suit, their legal action is protected if they are substantively cooperating in the litigation campaign—say by pooling money, coordinating the timing of their claims, or sharing attorneys and legal strategy. These are the sort of collaborative activities—which employees can engage in of their own accord and not at the leave of a judge—that Section 7 protects.”).

35. See Sullivan & Glynn, *supra* note 6, at 1031.

36. *Id.* at 1030.

employees can work together to make “unfair” signs for picketing but then requires each of them to picket alone.³⁷ Likewise, it could not enforce a term that such workers could plan a strike, but only stop work one at a time. Nor could an employer, by graciously permitting employees to discuss and prepare work-related grievances together, somehow claim the right to mandate that each of them submit complaints to the employer separately. The same obviously is true for other forms of concerted activity, including concerted pursuit of legal claims.³⁸

In sum, then, overwhelming authority supports the conclusion that concerted dispute resolution is protected concerted activity under the NLRA and Norris LaGuardia, and, as with other such activity, employers cannot utilize contractual waivers—one kind of yellow-dog provision—to interfere with employee exercise of this right. This, and

37. See *id.* (internal citations omitted).

38. See *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942). *Stone* held that where the “employee was obligated to bargain individually,” an arbitration agreement limiting Section 7 rights was a *per se* violation of the NLRA and could not “be legalized by showing the contract was entered into without coercion.” *Id.* Again, there is no reason to treat concerted dispute resolution less favorably than other forms of concerted activity. See, e.g., *Murphy Oil USA*, 2014 WL 5465454, at *10 (“There is no basis in the Act or its jurisprudence to carve out concerted *legal* activity as somehow entitled to less protection than other concerted activity. Indeed, concerted legal activity would seem, if anything, to be a *favored* form of concerted activity under the Act because it would have the least potential for economic disruption, the harm that Congress sought to prevent in enacting the NLRA, as Section 1 of the Act explains.”) (citation omitted).

The notion that formal proceedings, rather than more diffuse kinds of resistance, are the preferred way to approach many kinds of employment-related disputes can be found in the anti-retaliation provisions of Title VII and other federal antidiscrimination statutes. While such laws protect employees in both “participation” conduct (such as filings with the EEOC and filing or testifying in subsequent suits) and “opposition” conduct (more direct challenges to employer discrimination), see, e.g., 42 U.S.C. § 2000e-3(a) (2012) (declaring it unlawful for an employer to discriminate against any employee or applicant “because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter”), the protection provided by the “participation” clause is much broader in two respects. First, the courts have required a reasonable belief that the opposed conduct was illegal under the opposition clause, while not so requiring under the participation clause. *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001). Second, the lower courts have required the manner of opposition conduct to be reasonable, which is not generally true of the participation clause. *E.g.*, *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 260 (4th Cir. 1998) (holding unprotected opposition conduct that violated plaintiff’s duty to keep her supervisor’s information confidential); *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1446 (9th Cir. 1985) (finding that Title VII does not protect a plaintiff who “violates legitimate company rules, knowingly disobeys company orders, [or] disrupts the work environment.”); see generally Deborah L. Brake, *Retaliation in the EEO Office*, 50 TULSA L. REV. 1, 32 n.157 (2014).

the complete absence of contrary authority, means that the Board's decisions in *Horton* and *Murphy Oil* were correct—and not merely reasonable on this point.³⁹ Indeed, a contrary determination by the Board would be unreasonable.⁴⁰

Thus, in the absence of an arbitration provision, employer-compelled waivers of the right to pursue collective legal redress violate the NLRA and Norris LaGuardia.⁴¹ The only genuine dispute then is how adding an arbitration provision, which draws the FAA into the discussion, might alter the analysis.

THE INTERACTION BETWEEN THE FAA, NLRA, AND THE TO-DATE UNDERAPPRECIATED NORRIS LA GUARDIA ACT

The more interesting—and controversial—prong of the *Horton* analysis is its conclusion that nothing in the Federal Arbitration Act changes the foregoing conclusion.⁴² However, a straightforward reading of the FAA, NLRA, and Norris LaGuardia makes clear that, here too, the Board's analysis is correct.

The FAA was enacted in 1925 to “reverse the longstanding judicial hostility to arbitration agreements” and “to place arbitration agreements upon the same footing as other contracts.”⁴³ The Supreme Court has since viewed the FAA as manifesting “a liberal federal policy favoring arbitration agreements,” and it requires that questions of arbitrability “be addressed with a healthy regard for the federal policy favoring arbitration.”⁴⁴ Consistent with that view, the Court has

39. See, e.g., *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 983 (“In sum, the Board’s interpretation of § 7 and § 8 is correct.”); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1153 (7th Cir. 2016) (stating that because the ordinary meaning of “concerted activity” includes resort to concerted legal redress, one would have to strain to find ambiguity in the term).

40. See, e.g., *Morris*, 834 F.3d at 983 (“The NLRA is unambiguous, and there is no need to proceed to the second step of *Chevron*.”).

41. It should be noted, however, that there is a major difference between the remedies available under the NLRA, which the court in *Eastex* addressed, and those under the Norris-LaGuardia Act. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 561–62 (1978). An agreement in violation of the NLRA can be challenged before the NLRB as an unfair labor practice (which was also true in *Horton* and *Murphy Oil* themselves), while a violation of the latter law merely renders the agreement invalid and therefore unenforceable. See *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 355–58 (5th Cir. 2013); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018–19 (5th Cir. 2015). The former, then, is pursued in formal proceedings while the latter can be raised defensively to an effort to enforce such an agreement as in *Morris* and *Lewis*. See *Morris*, 834 F.3d at 984–85; *Lewis*, 823 F.3d at 1159.

42. See *D.R. Horton*, 737 F.3d at 361.

43. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

44. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

construed the FAA's reach broadly⁴⁵ and issued opinions that subject almost all claims to arbitration where the parties have so agreed. For example, claims under the antitrust laws,⁴⁶ the securities acts,⁴⁷ the Racketeer Influenced and Corrupt Organizations Act,⁴⁸ the Truth in Lending Act,⁴⁹ and the antidiscrimination laws,⁵⁰ have all been held arbitrable. Further, although the FAA could have been viewed as *pro tanto* repealed by subsequent federal statutes explicitly creating private rights of action, the Court has, to date, uniformly rejected the repeal argument.⁵¹

Moreover, the Court has declared that the enforcement of arbitration clauses as written means, absent other qualifying language, that arbitration must be bilateral.⁵² In both *Stolt-Nielsen* and *Concepcion*, the Court detailed why class procedures are inconsistent with this ordinary understanding of arbitration and defeat arbitration's primary benefits, including procedural informality.⁵³ This meant that the term "arbitration," standing alone, implies bilateral—as opposed to aggregated—dispute resolution.⁵⁴ In other words, absent modifying language in the agreement itself, arbitration means adjudication limited to the (two) contracting parties. That is because, in the Court's view, class arbitration sacrifices the principal benefits of private dispute resolution.⁵⁵ Thus, based on this conceptualization, the Court held in *Stolt-Nielsen* that the arbitrators who had imposed class arbitration on shipping companies in the absence of express provisions for class

45. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 127 (2001) (interpreting Section 1's language, "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce," to exempt only employment contracts for transportation workers).

46. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628–29 (1985).

47. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989); *Shearson/American Express v. McMahon*, 482 U.S. 220, 220 (1987).

48. *McMahon*, 482 U.S. at 221.

49. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

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

51. *E.g.*, *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 104 (2012) (holding that, despite the Credit Repair Organizations Act's mandate of notification to customers of their "right to sue," the act is silent on whether claims can proceed in an arbitrable forum, and thus, the FAA requires the arbitration agreement to be enforced according to its terms); *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247, 258–59 (2009) (rejecting the argument that the Older Workers Benefit Protection Act's prohibition of prospective waivers of rights applied to the arbitration agreements waiving procedural rights to a court suit).

52. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011).

53. *Concepcion*, 563 U.S. at 347–50; *Stolt-Nielsen*, 559 U.S. at 684–87.

54. *Concepcion*, 563 U.S. at 347–50; *Stolt-Nielsen*, 559 U.S. at 684–87.

55. See *Stolt-Nielsen*, 559 U.S. at 685.

treatment in the underlying arbitration agreements exceeded their power under the FAA.⁵⁶ In *Concepcion*, the Court held that the FAA preempts California's rule that class action waivers in consumer contracts with arbitration clauses are unconscionable; such a rule interferes with arbitration, even though it applied equally to class waivers not involving arbitration provisions.⁵⁷

In short, the FAA, *read alone*, would seem to permit employee waivers of any right to pursue collective relief in arbitration as part of the trade off any agreement to arbitrate entails between speed and efficiency on the one hand and the more elaborate processes of judicial relief on the other. Nevertheless, Section 2, the FAA's primary substantive provision, states that a clause that provides for arbitrating any controversy arising out of a covered agreement "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*"⁵⁸ This plain language imposes a limitation on the enforcement of arbitration clauses and seems to anticipate exactly what the labor statutes subsequently provided: a policy invalidating arbitration agreements that would imperil national goals under those regimes.

It appears obvious that the labor statutes trump the FAA. For one thing, the FAA was enacted in 1925, before either the Norris-LaGuardia Act (1932) or the NLRA (1935), so it cannot *sub silentio* amend either. And, while the Supreme Court clearly views arbitration as an important national policy, that is also true of the commands of Norris-LaGuardia and NLRA.⁵⁹ Moreover, while the Supreme Court has stressed that courts should try to reconcile potentially conflicting statutes before finding that the later one prevails,⁶⁰ reconciliation is precisely the path the *Horton* Board proposed: employers can still require their workers to arbitrate disputes (thus honoring the FAA) but

56. *Id.* at 684–87 (finding that the arbitration panel exceeded its power).

57. *Concepcion*, 563 U.S. at 343–52.

58. 9 U.S.C. § 2 (2012) (emphasis added).

59. *See, e.g., San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959) (speaking of the need for both state and federal courts to defer to the NLRB "if the danger of state interference with national policy is to be averted").

60. *See Dorsey v. United States*, 567 U.S. 260, 264–97 (2012), in which both the majority and the dissent agreed on two broad governing principles: first, a later statute prevails over an earlier one when two statutes contradict one another, but, second, that implied repeals are disfavored, which means that courts should seek to reconcile two potentially conflicting enactments rather than find the later one to have superseded the earlier one. *See also Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) ("When two statutes are capable of co-existence, however, 'it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974))).

may not bar joint, collective, class arbitration (thus honoring Norris LaGuardia and NLRA). Any outcome that would give priority to the FAA over the federal labor laws would be exactly contrary to the Court's command by having the earlier statute prevail over the later one.⁶¹

Nor does this result somehow reflect the kind of hostility to arbitration that the FAA was designed to combat. As the Ninth Circuit noted, the problem is not that the labor laws disfavor arbitration; requiring employees to contract away their right to join collectively in court proceedings would equally violate Section 7:

The same infirmity would exist if the contract required disputes to be resolved through casting lots, coin toss, duel, trial by ordeal, or any other dispute resolution mechanism, if the contract (1) limited resolution to that mechanism and (2) required separate individual proceedings. The problem with the contract at issue is not that it requires arbitration; it is that the contract term defeats a substantive federal right to pursue concerted work-related legal claims.⁶²

But there is no need to engage in a judicially imposed reconciliation to begin with since the texts of both the FAA and Norris LaGuardia provide a plain language answer to the question of what law must prevail if the Court chooses not to reconcile them in the manner the *Horton* and *Murphy Oil* Boards proposed. Indeed, the language of the FAA anticipates the passage of inconsistent subsequent laws to the extent that its savings clause permits invalidation of agreements to arbitrate "upon such grounds as exist at law or in equity for the revocation of any contract,"⁶³ which would certainly include illegality under another federal statute (which is, of course, what we have here, as discussed above).⁶⁴ Further, Norris LaGuardia contains its own

61. Some have argued that the relevant date for enactment of the FAA should not be 1925 but rather 1947 when it was re-enacted as part of the codification of the U.S. Code. We have demonstrated the fallacy of that argument elsewhere, and it has gained little traction. See Sullivan & Glynn, *supra* note 6, at 1046–51. In any event, it would not affect the textual analysis of the FAA, whose savings clause would necessarily require it to give way before Norris LaGuardia and NLRA. Otherwise, the result would be to enforce an arbitration agreement that violated another federal policy.

62. *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 985 (9th Cir. 2016); see also *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1160 ("The right to collective action in section 7 of the NLRA is not, however, merely a procedural one. It instead lies at the heart of the restructuring of employer/employee relationships that Congress meant to achieve in the statute.")

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

64. See *Morris*, 834 F.3d at 985 ("When an illegal provision not targeting arbitration is found in an arbitration agreement, the FAA treats the contract like any other; the FAA

language trumping the FAA. It *expressly* repeals inconsistent laws: “[a]ll acts and parts of acts in conflict with the provisions of this chapter are repealed.”⁶⁵ In short, if the FAA and NLA would otherwise conflict, the plain language of both mandates the courts to prioritize Norris LaGuardia. In this sense, Norris LaGuardia is a much more explicit statutory command than the NLRA.

To appreciate this in more detail, it is helpful to remember that Norris LaGuardia declared classic yellow-dog agreements—those barring employees from joining unions—as contrary to federal labor policy and thereby unenforceable.⁶⁶ But the statute swept *much more broadly* than just that particular restriction on employee rights; rather, as discussed in the last section, it was framed broadly to shield workers’ rights to a wide range of concerted activity from both employer and judicial hostility. The statute declared that workers “shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁶⁷ It then went on to provide that “any other undertaking or promise in conflict with the public policy [so proclaimed, is] declared to be contrary to the public policy of the United States, [and] shall not be enforceable in any court of the United States.”⁶⁸ In short, Norris LaGuardia invalidated contracts that would preclude concerted action, including concerted resort to the courts and, necessarily, concerted arbitration of court relief were not available.⁶⁹

recognizes a general contract defense of illegality.”); *id.* at 986 (“[W]hen an arbitration contract professes the waiver of a substantive federal right, the FAA’s saving clause prevents a conflict between the statutes by causing the FAA’s enforcement mandate to yield.”); *Epic Sys.*, 823 F.3d at 1159 (“Because the NLRA renders [the defendant’s] arbitration provision illegal, the FAA does not mandate its enforcement.”).

65. 29 U.S.C. § 115 (2006) (“All acts and parts of acts in conflict with the provisions of this chapter are repealed.”).

66. See *In re D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2281 (2012).

67. 29 U.S.C. § 102 (2006) (emphasis added).

68. *Id.* § 103 (emphasis added).

69. Norris-LaGuardia is directed only to federal courts. See *Boys Markets, Inc. v. Retail Clerk’s Union*, 398 U.S. 235, 247 (1970) (agreeing with the California Supreme Court that “whether or not Congress could deprive state courts of the power to give such [injunctive] remedies when enforcing collective bargaining agreements, it has not attempted to do so either in the Norris-LaGuardia Act or section 301” (quoting *McCarroll v. Los Angeles Cty. Dist. Council of Carpenters*, 315 P.2d 322, 332 (1957))). Not only do many states have “little Norris LaGuardia” acts, see, e.g., N.Y. Lab. Law § 807; Benjamin Aaron, *Labor Injunctions in the State Courts—Part I: A Survey*, 50 VA. L. REV. 951, 977–80 (1964) (listing thirty-three states with such laws), but agreements in violation of the parallel provisions of the NLRA are not enforceable in state courts under normal principles of preemption. See Thomas R. Haggard, *Private Injunctive Relief Against Labor Union Violence*, 71 KY. L.J. 509, 567 (1983) (“Like their federal counterpart, the state

Three years later, the NLRA embraced this declared labor policy and enhanced the remedies available by creating the duty to bargain with worker representatives and establishing the National Labor Relations Board to oversee the new regime created. But a core substantive protection of the NLRA, like *Norris LaGuardia*, is the right of workers to engage in concerted activities for mutual aid and protection, regardless of whether the workplace is unionized.⁷⁰ Again, as discussed in the previous section, any agreement between an employer and employee that suppresses an employee's right to act in concert with other employees to pursue legal claims therefore, is as reprehensible as one purporting to bar the workers from organizing, protesting, or striking. That this federal protection—the *central* mandate in *Norris LaGuardia* and the NLRA—is “grounds as exist at law or in equity for the revocation of any contract” and, hence, carved out from the FAA's reach, is inescapable.⁷¹

Even if the FAA were not as clear as it is, the *Horton* Board's reading is the only way to reconcile the statutes. Indeed, a contrary conclusion would not only fly in the face of the language of each of these statutes, but would also lead to results that Congress obviously did not intend. To fully appreciate why the labor laws must not be subject to any putative contractual duty to arbitrate, recall *NLRB v. Washington Aluminum Co.*, the seminal concerted action case in which the Supreme Court affirmed the Board's finding that seven workers who had left work together to protest the shop's bitterly cold but not unlawful conditions had engaged in protected concerted activity under Section 7.⁷² Now imagine an employer like Washington Aluminum had the forethought to have each of its workers sign an agreement to arbitrate individually any dispute they might have concerning terms and conditions of employment—including “controversies over conditions in the shop”—rather than collectively bargain, strike, or otherwise protest.⁷³

As we have argued previously, enforcing such an arbitration agreement would effectively end the labor laws. It would directly interfere with the employees' undisputed right to walk out together or

'Little Norris-LaGuardia Acts' address a problem that no longer exists. They prohibit state courts from issuing injunctions which, for the most part, would be beyond the power of the states in any event due to subsequently-developed doctrines of constitutional law and federal preemption.”)

70. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1935)).

71. 9 U.S.C. § 2 (2012).

72. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16-18 (1962).

73. *Sullivan & Glynn*, *supra* note 6, at 1054.

engage in other forms of collective protest. This is true whether, as a result, employees could be compelled to individually arbitrate such controversies or be subject to discipline; or employers could, in reliance on the FAA, enjoin the collective action in favor of arbitration.⁷⁴ And the existence of such an arbitration clause would interfere with Section 7 rights even if the employer would somehow still be precluded from retaliating against employees who chose to act collectively anyway. The presence of such a clause would chill employees from exercising their Section 7 rights because they naturally would interpret it to prohibit concerted activity (with the explicit or implicit threat of discipline).⁷⁵ Further, the presumptive obligation to make complaints initially in individualized arbitration proceedings would obviously complicate and impede employees' choices at the moment at which they must decide whether to engage in some kind of collective response.⁷⁶

Fortunately, again, given the plain language of the operative statutes, we need not dwell long over such absurdities or fret over those courts that have simply ignored historical context, broader implications, and obvious congressional purpose to reach a contrary result. Of course, we agree with those who argue that no deference is due toward the Board's interpretation of either the FAA or Norris LaGuardia, since it is not charged with enforcing either law. However, deference is irrelevant since the plain language of Norris LaGuardia (and, for that matter, the NLRA) requires the invalidation of agreements by workers purporting to waive rights to concerted dispute resolution as well as the repeal of any statute that would otherwise require a different result. That analysis essentially ends the dispute even if the FAA, considered alone, would permit such waivers. But the icing on the cake is the plain

74. Whether the anti-injunction provisions of the Norris LaGuardia Act might still apply, even if the FAA were somehow read to trump the workers' right to concerted action, is an interesting question that need not be pursued at length here. There would, however, exist yet another potential conflict with the FAA, in this case, the power of the court to order arbitration under 9 U.S.C. § 4, and the anti-injunction mandate of 29 U.S.C. § 104.

75. Again, an employer violates Section 8(a)(1) of the Act if a rule it promulgates would "reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998).

76. In *J. H. Stone & Sons*, the Board reached a similar conclusion:

The terms of this provision preclude an employee from dealing with the respondents through a representative until after there has been an attempt at settlement of the dispute by direct dealing between the respondents and the individual employee. The effect of this restriction is that, at the earliest and most crucial stages of adjustment of any dispute, the employee is denied the right to act through a representative and is compelled to pit his individual bargaining strength against the superior bargaining power of the employer.

In re Stone, 33 N.L.R.B. 1014, 1023 (1941).

language of the FAA that leads to the same place, commanding that it give way in the face of a contrary mandate of law or equity.⁷⁷

At every level of the analysis then, the Board was right in *Horton* and *Murphy Oil*, as were the Seventh, Ninth, and Sixth Circuits. And a closer look at Norris LaGuardia simply bolsters this conclusion. The Supreme Court's task now seems simple. There is only one sensible way to reconcile the FAA and the labor laws. And the Court does not need to dig too far down to do so: if it takes seriously its own admonitions about applying the plain language of statutes, it has no choice but to reach the same conclusion.

77. The only way to avoid this result would be to elevate the FAA above all competing legislation, to make it a kind of "superstatute." That was the point of the *Morris* opinion when it said that "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." *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 989 (9th Cir. 2016); *see also* *NLRB v. Alt. Entm't, Inc.*, 858 F.3d 393, 407–08 (6th Cir. 2017) ("An employer cannot avoid this core tenet of federal labor law simply by nesting a waiver of the right to collective legal action in an arbitration provision."). But the Supreme Court has disclaimed treating the FAA as somehow of a higher order. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 267 n.9 (2009). In rebutting Justice Stevens' accusation that the majority was indulging its preference for arbitration, rather than construing the relevant law, the *14 Penn Plaza* Court stressed that its analysis reflected only fidelity to the text of the statute:

The *Gilmer* Court did not adopt Justice Stevens' personal view of the purposes underlying the ADEA, for good reason: That view is not embodied within the statute's text. Accordingly, it is not the statutory text that Justice Stevens has sought to vindicate—it is instead his own "preference" for mandatory judicial review, which he disguises as a search for congressional purpose. This Court is not empowered to incorporate such a preference into the text of a federal statute.

Id.
