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I. INTRODUCTION

When two parties willingly enter into an agreement with one another, each party is generally expected to abide by that agreement. This was not always the case with arbitration agreements so Congress enacted the Federal Arbitration Act (FAA) on February 12, 1925 in response to judicial hostility against arbitration.[1] The FAA was ratified to provide validity to arbitration agreements into which parties had willingly entered.[2] Initially, supporters of the FAA stated the Act was designed to cover contracts between people in different states who shipped, bought, or sold commodities.[3] While this was the original intention of the Act, courts have since given the FAA more weight.[4] Since the passage of the FAA, courts have favored arbitration agreements and have generally given deference to arbitration awards and decisions.[5]

Section 1 of the FAA states "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[6] In 2001, the United States Supreme Court held the employment contract exclusion only applied to contracts of interstate transportation workers, abrogating the Ninth Circuit's decision in *Craft v. Campbell Soup Co.*,[7] which opined that all employment contracts were exempt from the FAA.[8]

The FAA started out as an attempt to give weight to arbitration agreements, but now the reach of the FAA has extended beyond the commercial claims it was intended to cover. The right to arbitrate claims has become a substantive right. The current concern is *AT&T Mobility v. Concepcion* established that the FAA preempts state laws prohibiting consumer contracts from disallowing class-wide arbitration.[9] *Concepcion* gave even more weight to the FAA by holding it preempts state laws, giving rise to the possibility of the FAA displacing federal laws particularly in the context of employment contracts. This Comment will discuss whether courts have

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1. 9 U.S.C. § 2 (2012).
2. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985).
3. *Id.* at 625-26.
4. Case Comment, *Deference and the Federal Arbitration Act: The NLRB's Determination of Substantive Statutory Rights*, 128 HARV. L. REV. 907, 907 (2014).
5. *Id.*
6. 9 U.S.C § 1 (2012).
7. Craft v. Campbell Soup Co., 177 F.3d 1083 (9th Cir. 1998).
8. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114-15 (2001).
9. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011).

given too much weight to the FAA at the cost of making other federal laws such as the National Labor Relations Act (NLRA) and the Fair Labor Standards Act (FLSA) less effective. The NLRA and the FLSA are not the only federal laws that stand to be affected by the expanding application of the FAA. The Age Discrimination in Employment Act (ADEA) has also been affected by the FAA.

II. LEGAL BACKGROUND

Courts have increasingly expanded the application of the FAA. Initially the FAA made arbitration agreements between parties enforceable; but recently, in *AT&T Mobility v. Concepcion*, the United States Supreme Court held the FAA preempts state laws that prohibit contracts from disallowing class-wide arbitration.[10] The Court has yet to accept a case that addresses the issue of whether the FAA supersedes other federal laws. However, other federal courts have specifically addressed whether the FAA supersedes the NLRA or the FLSA. Giving more deference to the FAA affects both the NLRA and the FLSA, but in different ways. The NLRA allows employees to engage in concerted activity and the FAA could prevent employees from exercising a statutory right. The FLSA provides that engaging in class action is a right. Federal courts have primarily held that mandatory arbitration does not deprive individuals of their right to class action, but limits the forum in which those rights can be enforced. This section will discuss the NLRA and the FLSA how federal courts have addressed those laws when the FAA is also at issue.

A. AT&T Mobility v. Concepcion

Concepcion is a very important case because it recently expanded the application of the FAA by preempting state laws that prohibit states from disallowing class-wide arbitration.[11] In 2002, Vincent and Liza Concepcion signed a contract for cellphone service with AT&T Mobility.[12] This contract included an arbitration agreement that required all claims be brought individually and not as a class.[13] When the Concepcions purchased service, the advertisement for phones stated that the phones were free, but the Concepcions were charged the sales tax for the phones.[14] In March 2006, the Concepcions filed a complaint, which was later consolidated with a putative class action.[15] AT&T moved to compel arbitration.[16] The District Court denied the motion relying on California Supreme Court's decision in *Discover Bank v. Superior Court*, which held a waiver of class arbitration in a consumer contract of adhesion is per se unconscionable.[17] The Ninth Circuit affirmed the district court finding the arbitration was per se unconscionable.[18]

10. *Id.*
11. *Id.*
12. *Id.* at 336.
13. *Id.*
14. *Id.* at 337
15. *Concepcion*, 563 U.S. at 337..
16. *Id.* at 338.
17. *Id.*
18. *Id.*

The United States Supreme Court reversed, holding when a state law prohibits arbitration of a particular type of claim, the FAA displaces the conflicting rule.[19] The Court listed three reasons why the FAA preempted state laws that prohibit arbitration.[20] First, class arbitration disrupts the informality of arbitration, slowing down the process and making it more costly.[21] When arbitration is bilateral, each party forgoes procedural rigor and appellate review for private dispute resolution, which includes lower costs, speed and efficiency, and the ability to choose expert adjudicators.[22] Second, class arbitration requires procedural formality.[23] Arbitration proceedings are less formal and if procedures are too informal, absent members would not be bound by the arbitration.[24] For a class action decision to bind absent class-members, such parties must be adequately represented and that would not occur in class arbitration.[25] Third, class arbitration increases the risks to defendants.[26] While individual defendants may be willing to accept the costs of errors in arbitration, when damages are owed to thousands of potential claimants, those errors become devastating.[27]

B. National Labor Relations Act

The National Labor Relations Act was passed in 1935 to protect private sector employees.[28] The Act allowed for employee representation in collective bargaining and protected employee rights to engage in concerted activity.[29] The Act also established the National Labor Relations Board (NLRB) to implement its policies.[30] Since 1935, the NLRA has been amended twice. In 1947, the Labor Management Relations Act, better known as the Taft-Hartley Act, limited the power and activities of labor unions.[31] Previously, the Act only prohibited unfair labor practices of employers.[32] Under the Taft-Hartley Act, unfair labor practices such as mass picketing, jurisdictional strikes, and political strikes were not allowed.[33] The NLRA was amended again in 1959, this time by the Labor Management Reporting and Disclosure Act, also known as the Landrum-Griffin Act.[34] The Landrum-Griffin Act regulates the internal affairs of labor unions and the relationship between the unions and employers.[35] The Act requires unions to hold secret elections for all local offices and gives the United States Department of Labor the power to review claims of improper election activity.[36]

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19. *Id.* at 341.
20. *Id.* at 348-51.
21. *Concepcion*, 563 U.S. at 348.
22. *Id.*
23. *Id.* at 349.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Concepcion*, 563 U.S. at 349.
28. 29 U.S.C. § 151 (2012).
29. *Id.*
30. 29 U.S.C § 153 (2012).
31. Labor Management Relation (Taft-Hartley) Act § 301(a). 29 U.S.C § 185(a) (2012).
32. 29 U.S.C. § 151 (2012).
33. 29 U.S.C. § 141 (2012).
34. 29 U.S.C. 401 (2012).
35. *Id.*
36. 29 U.S.C. §§ 481-82 (2012).

The following cases discuss how the NLRB has addressed the issue of the NLRA and the FAA. *D.R. Horton, Inc. v. NLRB* was an important decision because it was seen as an attempt by the NLRB to stop efforts by employers to reduce their risk of class action claims.[37] However, the Fifth Circuit Court of Appeals reversed this decision.[38] The Fifth Circuit reached the same decision in *Murphy Oil v. NLRB*.[39] In *Totten v. Kellogg Brown and Root LLC*, the United States District for the Central District of California opted not to follow the Fifth Circuit's decision finding proceeding in a class action was a remedy.[40]

i. D.R. Horton, Inc. v. NLRB

D.R. Horton is a home-builder with operations in over twenty states.[41] Beginning in 2006, Horton required new and existing employees to sign a Mutual Arbitration Agreement.[42] This agreement stated all employees "voluntarily waive all rights to trial in court before a judge or jury on all claims between them" and all claims would be settled through arbitration and precluded employees from consolidating claims with each other.[43] Michael Cuda, a Horton superintendent from July 2005 to 2006, sought to initiate arbitration of a consolidated claim with other similarly situated superintendents that Horton had misclassified as exempt from statutory overtime protections in violation of the FLSA.[44] Horton told Cuda that the Mutual Arbitration Agreement did not allow for collective claims.[45] Cuda then filed a claim alleging the class action waiver violated the NLRA.[46]

On January 3, 2011, an administrative law judge held that the agreement violated sections 8(a)(1) and (4) of the NLRA because it would lead employees to believe they could not file unfair labor practice charges with the Board.[47] On January 3, 2012, the Board upheld the administrative judge's decision and held that the arbitration agreement violated 8(a)(1) because it required employees to waive their right to collective actions in any forum.[48] The Fifth Circuit Court of Appeals held that the FAA does not deny a party any statutory right and that even if it did; the use of class action procedures is not a substantive right, but a procedural right.[49]

37. Holland, Hart LLP, *Will Arbitration Agreements Barring Class Claims Become the Norm?*, 18 NO. 10 MONT. EMP. L. LETTER 1 (2013).
38. D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 361 (5th Cir. 2013).
39. Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1018 (5th Cir. 2015).
40. Totten v. Kellogg Brown & Root LLC, 152 F. Supp. 3d 1243, 1260 (C.D. Cal.2016).
41. *D.R. Horton*, 737 F.3d at 348.
42. *Id.*
43. *Id.*
44. *Id.* at 349.
45. *Id.*
46. *Id.*
47. *D.R. Horton*, 737 F.3d at 349.
48. *Id.*
49. *Id.* at 357.

ii. Murphy Oil USA, Inc. v. NLRB

Murphy Oil USA operates retail gas stations in multiple states.[50] Sheila Hobson began working for Murphy Oil in Alabama in 2008.[51] Hobson signed an arbitration agreement, which stated that all claims between employees and Murphy Oil would be resolved through arbitration.[52] Hobson and three other employees filed a collective action against Murphy Oil in the federal district court in 2010 alleging Murphy Oil had violated the FLSA.[53] Murphy Oil filed a motion to compel arbitration.[54] While the motion to dismiss was pending, Hobson filed an unfair labor charge.[55] The Board held that Murphy Oil violated section 8(a)(1) of the NLRA by requiring employees to sign an arbitration agreement waiving their right to pursue class and collective claims in all forums.[56] In 2012, the district court stayed the FLSA collective action and compelled employees to submit claims to arbitration.[57] At the same time, the petition for review of the Board's decision reached the Fifth Circuit.[58] The Fifth Circuit held that the Board should have applied its decision in *D.R. Horton*.[59] Had the Board applied the Fifth Circuit's decision in *D.R. Horton*, they would have reached the same decision that the Fifth Circuit reached.[60]

iii. Totten v. Kellogg Brown and Root LLC

David Totten began working for Kellogg Brown and Root LLC in January 2012.[61] During hiring orientation, Totten signed Kellogg Brown's Dispute Resolution Program (DRP) as a condition of employment.[62] The DRP required employees to arbitrate all claims against Kellogg Brown.[63] Kellogg Brown fired Totten in June 2014.[64] Totten filed a class action suit on July 22, 2014, alleging that Kellogg Brown failed to pay its employees the minimum wage and failed to provide accurate wage statements for its employees.[65] Kellogg Brown filed a motion to compel arbitration under the DRP.[66] Totten argued that the arbitration agreement was unenforceable because the class action waiver interfered with his right to engage in concerted action under the NLRA.[67] The court looked to *D.R. Horton* in its analysis of whether the arbitration agreement was unenforceable.[68] The district court disagreed with the decision in *D.R. Horton* and found that the right to a class action suit in

50. Murphy Oil USA v. NLRB, 808 F.3d 1013, 1015 (5th Cir. 2015).
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 1016.
56. *Murphy Oil*, 808 F.3d at 1016.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. Totten v. Kellogg Brown & Root LLC, 152 F. Supp. 3d 1243, 1248 (C.D. Cal.2016).
62. *Id.*
63. *Id.*
64. *Id.* at 1249.
65. *Id.* at 1247.
66. *Id.*
67. *Totten*, 152 F. Supp. 3d at 1254.
68. *Id.* at 1256.

section 7 of the NLRA is a substantive non-waivable right.[69] Section 7 protects the right of employees to engage in concerted activity for the purposes of collective bargaining.[70] The court found that proceeding in a class action constituted a concerted activity under the NLRA.[71]

C. Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) was passed in 1938.[72] It set the national minimum wage, provided time-and-a-half pay for overtime, and limited the employment of minors.[73] The purpose of the FLSA was to ensure that employees were protected from unfair practices by employers and could maintain "the minimum standard of living necessary for health, efficiency and general well-being."[74]

Individuals who are considered employees under the FLSA are afforded certain remedies when their rights have been violated.[75] Class actions are one of those remedies.[76] Currently, six federal circuits have held that the statutory right to class action suits in employment contracts can be waived: First, Second, Fourth, Fifth, Eighth, and Eleventh Circuits.[77]

i. First Circuit: Skirchak v. Dynamics Research Corp.[78]

Joseph Skirchak and Barry Aldrich, employees of a government contractor of technology services called DRC, filed a class action suit alleging the company had violated the FLSA by not paying employees time-and-a-half for time worked beyond forty hours per week.[79] DRC filed a motion to compel arbitration pursuant to its 2003 Dispute Resolution Program.[80] The district court ordered arbitration but struck the part of the program that disallowed class actions.[81] The court found that under the FLSA, a class action waiver does not have to be knowing and voluntary as it does under the Age Discrimination in Employment Act (ADEA).[82]

ii. Second Circuit: Sutherland v. Ernst & Young LLP[83]

Stephanie Sutherland was employed at Ernst & Young from 2008 to 2009.[84] When Sutherland began working, she signed an offer letter containing an arbitration

69. *Id.* at 1260.
70. *Id.* at 1261.
71. *Id.*
72. Fair Labor Standards Act of 1938, 29 U.S.C. § 201 (2012).
73. 29 U.S.C. §§ 206-207, 212 (2012).
74. Kasten v. Saint-Gobain Performance Plastics Corp., 561 U.S. 1, 11 (2011).
75. 29 U.S.C. § 216(b) (2012).
76. *Id.*
77. Amelia W. Koch, Jennifer McNamara & Laura E. Carlisle, *Individualizing the FLSA: Collective Action Waivers and the Split in the Federal Courts*, 13 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 99, 104 (2012). *See infra* pp. 8-11.
78. Skirchak v. Dynamics Research Corp., 508 F.3d 49 (1st Cir. 2007).
79. *Id.* at 52
80. *Id.*
81. *Id.*
82. *Id.* at 57.
83. Sutherland v. Ernst & Young, LLP, 726 F.3d 290 (2nd Cir. 2013).
84. *Id.* at 293.

agreement with a class action waiver.[85] Sutherland filed a class action suit, alleging Ernst & Young had incorrectly classified her as exempt from the overtime requirements of the FLSA.[86] Ernst & Young moved to compel arbitration and the district court denied the motion.[87] The Second Circuit Court of Appeals held that an employee can waive the right to pursue a class action suit under the FLSA, citing *AT&T Mobility v. Concepcion* to show class actions can be waived.[88]

iii. Fourth Circuit: Adkins v. Labor Ready, Inc.[89]

Labor Ready was a temporary employment agency that provided manual day labor to different companies throughout the country.[90] Employees would report to the Labor Ready office at the beginning of each workday and would remain until they received a job assignment.[91] At the end of each workday, employees would return to the office where they would receive payment for their work.[92] Curtis Adkins filed a class action suit alleging that the payroll procedures violated the FLSA.[93] Adkins claimed that the employees should be compensated for the travel time to get to the office and for the time spent waiting until employees received work assignments.[94] If those hours were added to the employees' paychecks, many would also be entitled to overtime.[95] Labor Ready filed a motion to compel arbitration, and the district court granted the motion.[96] Adkins appealed, arguing that the arbitration agreement included in the employment contract contained a waiver of class actions, making the cost of pursuing litigation extremely high.[97] The Fourth Circuit Court found that the arbitration agreement was not unconscionable because the plaintiff could not show that the waiver of class action would result in higher costs of arbitration.[98]

iv. Fifth Circuit: Carter v. Countrywide Credit Industries[99]

Employees of Countrywide Credit, which sold and serviced consumer mortgage loans, filed a class action suit against Countrywide, alleging that their employer did not pay the appropriate overtime pay guaranteed under the FLSA.[100] Countrywide filed a motion to compel arbitration as its employment contracts mandated arbitration agreements as a condition of employment.[101] The district court

85. *Id.* at 293-94.
86. *Id.* at 294.
87. *Id.* at 294-95.
88. *Id.* at 297.
89. Adkins v. Labor Ready, Inc., 303 F.3d 496, 499 (4th Cir. 2002).
90. *Id.* at 499.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Adkins,*303 F.3d at 499.
96. *Id.* at 500.
97. *Id.* at 502.
98. *Id.* at 502-03.
99. Carter v. Countrywide Credit Industries, 362 F.3d 294 (5th. Cir. 2004).
100. *Id.* at 296.
101. *Id.*

granted the motion, and the plaintiffs appealed, arguing that the arbitration agreement was unconscionable because it disallowed class actions.[102] The Fifth Circuit Court of Appeals held that the arbitration agreements were not unconscionable, because the only provision that was unreasonable was the fee splitting arrangement, which had already been severed by the district court.[103]

v. Eighth Circuit: Owen v. Bristol Care[104]

Bristol Care operates residential-care facilities for elderly patients.[105] Sharon Owen was hired as an administrator at the Cameron, Missouri facility in 2009.[106] When she was hired, Owen signed a Mandatory Arbitration Agreement that contained a class action waiver.[107] The arbitration agreement applied to claims brought under the FLSA.[108] In 2011, Owen brought suit on behalf of herself and other similarly situated employees, alleging that Bristol Care misclassified certain employees as exempt for the purposes of overtime laws.[109] Bristol Care filed a motion to compel arbitration and the district court denied the motion.[110] The court found that nothing in the text of the FLSA barred employees from agreeing to arbitrate FLSA claims individually and a conflict did not exist between the FLSA and the FAA.[111]

vi. Eleventh Circuit: Caley v. Gulfstream Aerospace Corp.[112]

In 2002, Gulfstream Aerospace Corporation adopted a dispute resolution policy.[113] Gulfstream mailed a copy of the policy to all its employees and posted copies on the company intranet.[114] The policy included an arbitration clause that prohibited class actions.[115] Current and former employees of Gulfstream subsequently filed a class action suit alleging Gulfstream did not pay the required overtime pay under the FLSA.[116] Gulfstream moved to compel arbitration.[117] The district court denied the motion.[118] The Eleventh Circuit reversed the district court's decision finding that the dispute resolution policy was not unconscionable because of the class action waiver.[119] The waiver of class action was "part and parcel of arbitration's ability to offer simplicity, informality, and expedition."[120]

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102. *Id.* at 298.
103. *Id.* at 301.
104. Owen v. Bristol Care, 702 F.3d 1050 (8th. Cir. 2013)
105. *Id.* at 1051.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Owen*, 702 F.3d at 1051.
111. *Id.* at 1052.
112. Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2005)
113. *Id.* at 1364.
114. *Id.*
115. *Id.* at 1365.
116. *Id.* at 1366.
117. *Id.*
118. *Caley*, 428 F.3d at 1367.
119. *Id.* at 1378.
120. *Id.*

D. Gilmer v. Interstate/Johnson Lane Corporation and the ADEA

While the focus of this Comment is the effect that increased deference has on the NLRA and the FLSA, the NLRA and the FLSA are not the only federal laws that stand to be affected by the FAA. The following case discusses the ADEA. Robert Gilmer was hired by Interstate/Johnson Lane Corporation (Interstate) in 1981.[121] As a part of his employment, Gilmer was required to register as a securities representative, which provided that Gilmer "agreed to arbitrate any dispute, claim or controversy" arising out of Gilmer's employment or termination of employment.[122] In 1987, Interstate fired Gilmer.[123] Gilmer was 62 at the time and believing he was fired because of his age, Gilmer brought suit alleging violation of the ADEA.[124] Interstate filed a motion to compel arbitration.[125] The district court denied the motion, but the Fourth Circuit reversed the denial, finding that nothing in the ADEA indicated a congressional intent to preclude enforcement of arbitration agreements.[126] The United States Supreme Court granted certiorari to resolve a circuit split concerning the arbitrability of ADEA claims.[127] The Court held that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA, and that while all statutory claims may not be appropriate for arbitration, "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.[128]

III. COMMENT

Congress passed the FAA with the intention of making sure arbitration agreements that parties had entered into willingly were enforced.[129] The United States Supreme Court has urged lower courts to enforce arbitration agreements under the FAA.[130] While arbitration has its advantages, courts have recently given more deference to the FAA. In *Concepcion*, the United States Supreme Court decided that the FAA preempts state laws that prohibit class action waivers in arbitration agreements.[131] The question courts now face is whether the FAA supersedes other federal laws. Currently, federal courts have found that the FAA is controlling when the statutory rights to bring class action under the NLRA and the FLSA and the FAA are at issue.[132] The two major concerns with the increased deference given to FAA are the limited judicial review and the loss of substantive rights.

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121. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991).
122. *Id.*
123. *Id.*
124. *Id.* at 23-24.
125. *Id.* at 24.
126. *Id.*
127. *Gilmer*, 500 U.S. at 24.
128. *Id.* at 26.
129. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985).
130. *Gilmer*, 500 U.S. at 26.
131. AT&T Mobility LLC v. Concepcion, 563 U.S. 331, 341 (2011).
132. *See, e.g.*, D.R. Horton v. NLRB, 737 F.3d 344 (5th Cir. 2013); Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2nd Cir. 2013).

The first major concern with the amount of deference given to the FAA and the preemption of other federal laws is the limited judicial review that arbitration decisions receive. Arbitration decisions are not subject to judicial review by federal courts unless they are in "manifest disregard of the law."[133] However, the United States Supreme Court has not expressly defined this phrase.[134] Furthermore, because the Court has not expressly defined the standard, lower courts have applied a limited reading of this standard.[135] This means that an arbitration award may not be overturned if the arbitrator misapplied or misunderstood the law.[136] The Fifth Circuit and the D.C. Circuit are the only two circuits that have held that the manifest disregard of the law standard requires an arbitrator to apply the correct law.[137]

For other circuits, an arbitration decision will only be overturned for manifest disregard of the law if the law is clear and unambiguous, if the arbitrator knew of the law, and if the arbitrator knowingly misapplied the law.[138] The burden of proof is on the plaintiff to prove that an arbitration decision is in manifest disregard of the law.[139] This is an extremely high burden for a plaintiff to prove considering only two circuits require an arbitrator to correctly apply the law and considering that many arbitration agreements are presented in a take-it-or-leave-it manner.

Arbitration agreements are usually a condition of employment for most employers. When employees challenge the validity of arbitration agreements, many are challenged under state unconscionability law. This results in inconsistent rulings, with some courts requiring employees to bring their claims before an arbitrator and with other courts allowing employees to proceed through the federal courts. As arbitration proceedings are less formal and not held to the same standard as federal judicial proceedings, allowing the FAA increased deference does more harm than good. Often employees must sign an arbitration agreement as a condition of their employment and in most circuits, an arbitrator is not even required to correctly apply the law. If the FAA were to displace the NLRA and the FLSA and individual employees proceed through arbitration, employees have absolutely no remedy if an arbitration decision is reached in error.

Another major concern that comes with increased deference and the inevitable preemption of other federal laws by the FAA is that employees are faced with the loss of substantive rights. Both the NLRA and the FLSA allow employees to proceed through litigation as a class. Proceeding in a class action suit is a remedy provided by both federal statutes but in different forms. The NLRA protects an employee's right to engage in concerted activity; pursuing a claim through a class action suit is a protected concerted activity. Under the FLSA, employees can pursue a class action suit as remedy for violation of FLSA. The FAA limits the forum in which employees can use this remedy provided to them. Circuits are divided on whether employees can waive their right to a class action suit under the FLSA and

133. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995).
134. Elizabeth A. Roma, *Mandatory Arbitration Clauses in Employment Contracts and the Need for Meaningful Judicial Review*, 12 AM. U.J. GENDER SOC. POL'Y & L. 519, 533-34 (2004).
135. Roma, *supra* note 133, at 533.
136. Roma, *supra* note133, at 534..
137. Roma, *supra* note 133, at 533-34; Williams v. Cigna Fin. Advisors, Inc., 197 F.3d 752, 760 (5th Cir. 1999).
138. Greenberg v. Bear, Stearns & Co., 220 F.3d 22, 28 (2000).
139. *Id.*

whether section 7 protects the right to a class action suit under the NLRA.[140] The United States Supreme Court has not addressed either issue. Allowing the FAA to preempt other federal laws eliminates a statutory remedy that is provided for employees.

There are many arguments as to why deference is given to the FAA and to arbitration. One argument is that arbitration provides a less expensive and quicker alternative to litigation and allowing class arbitration slows down arbitration proceedings, thus undermining the expediency that otherwise makes arbitration preferable. While arbitration proceedings are a quicker alternative to full-scale litigation, the problem with this argument is that it causes the employee to give up a statutory right so that the employer can resolve its issues more efficiently. This contradicts the intent behind the NLRA and the FLSA, both of which were passed to protect the employee. Furthermore, the Supreme Court has held that while efficiency is a worthy state interest, there are higher values than speed and efficiency.[141]

Another argument in favor of deference to the FAA is that because arbitration is quicker and less expensive than litigation, the FAA and other federal laws may not be able to coexist together. The NLRA and the FAA provide a remedy, the class action, which many argue slows down arbitration or make it more expensive. The FAA's preemption power has a limit. It does not require the enforcement of arbitration agreements on "such grounds as exist at law or in equity for the revocation of any contract."[142] In *J.I. Case Co. v. NLRB*, the United States Supreme Court held that an employee cannot waive the benefits of the NLRA.[143] Under section 7 of the NLRA, class actions are a remedy for employees engaged in concerted activities.[144] Under both the NLRA and the FAA, an employer could still resolve issues with its employees through arbitration, and employees can still proceed as a class. Class actions are also a remedy under the FLSA.[145] Employers can still resolve issues through arbitration, and employees can still proceed as a class. Class actions also provide benefits to employees. Through class actions, employees can bring a case on behalf of themselves and others that they may otherwise not have able to afford. Proceeding as an individual, an employee would receive fewer damages than if proceeding as a class. Class actions also help employers as well. While they run the risk of paying more damages in a class action, they do not have to worry about having multiple trials for each individual aggrieved employee.

The NLRA and the FLSA are not the only federal laws that are threatened by the favoritism shown to the FAA. The ADEA and the Americans with Disability Act (ADA) both stand to be affected. In *Gilmer*, the United States Supreme Court found that if parties agree to arbitrate claims, then those claims should proceed

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140. *See, e.g.*, D.R. Horton v. NLRB, 737 F.3d 344, 362 (2013) (holding the FAA does not deny a party any statutory right and that even if it did, the use of class action procedures is not a substantive right, but a procedural right). *But see, e.g.*, Totten v. Kellogg Brown & Root LLC, 152 F. Supp. 3d 1243, 1254-55 (C.D. Cal.2016) (holding Section 7 protects the right of employees to engage in concerted activity for the purposes of collective bargaining and proceeding in a class action is concerted activity for purposes of the NLRA). *See, e.g.*, Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2nd Cir. 2013) (holding that an employee can waive the right to pursue a class action under the FLSA, citing *AT&T Mobility v. Concepcion* to show class actions can be waived).

141. Stanley v. Illinois, 405 U.S. 645, 656 (1972).

142. *Concepcion*, 563 U.S. at 348.

143. J.I. Case Co. v. NLRB, 321 U.S. 332, 336 (1944).

144. *Totten*, 152 F. Supp. 3d at 1261.

145. 29 U.S.C. § 216(b) (2012).

through arbitration even if they are inappropriate for arbitration.[146] The implications of this decision are far-reaching. The Court's analysis was not based on whether an employee was faced with the loss of substantive rights, but whether there was congressional intent in the ADEA to preclude enforcement of arbitration agreements.[147]

IV. CONCLUSION

While the intent of the FAA was to give greater weight to arbitration agreements in the face of judicial hostility, courts have since given extensive weight and deference to the FAA. The United States Supreme Court has already held that the FAA preempts some state laws, but the deference given to the FAA is beginning to preempt other federal laws as well. The increased deference given to the FAA has begun to eliminate key components of both the NLRA and the FLSA. The NLRA and the FLSA can coexist alongside of the FAA without compromising either and it is important for employee protection that the remedies set out in the NLRA and the FLSA are protected with equal vigor.

146. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).
147. *Id.*