NOTES

DEFERENCE AND THE FEDERAL ARBITRATION ACT: THE NLRB'S DETERMINATION OF SUBSTANTIVE STATUTORY RIGHTS

INTRODUCTION

Modern Supreme Court jurisprudence has dramatically expanded the scope of the Federal Arbitration Act[1] (FAA), which generally provides that agreements to arbitrate disputes are enforceable by courts.[2] The Court's decisions have also supported the use of arbitration agreements to require that disputes be arbitrated on an individual basis, precluding class actions or other collective litigation.[3]

However, on January 3, 2012, the National Labor Relations Board (NLRB or Board) decided *D.R. Horton, Inc.*,[4] holding that it is unlawful under the National Labor Relations Act[5] (NLRA) for employers to require that employees agree to arbitrate all employment-related claims on an individual basis and thereby prohibit employees from accessing class or collective procedures in both judicial and arbitral forums.[6] According to the Board, those arbitration agreements violate the central right the NLRA provides to employees: the right to engage in "concerted activities for . . . mutual aid or protection."[7]

In its decision, the NLRB carefully considered the interaction between the NLRA and the FAA and found that holding the arbitration agreements unlawful presented no conflict between the two statutes.[8] The Supreme Court has held that contracting parties may agree to arbitrate claims arising under a federal statute, but has repeatedly stated that in doing so "a party does not forgo the substantive rights afforded by the statute."[9] The Board held that the "right" of employees to act concertedly by collectively bringing a legal claim was "the core substantive right" established by the NLRA.[10] Because the arbitration agreement impermissibly waived a right that is substantive and not merely

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[1] 9 U.S.C. §§ 1–16 (2012).

[2] *Id.* § 2.

[3] *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

[4] 357 N.L.R.B. No. 184, 2012 WL 36274 (Jan. 3, 2012). Unless otherwise stated, *D.R. Horton* will refer to the NLRB's decision, not the Fifth Circuit's decision on review.

[5] 29 U.S.C. §§ 151–169 (2012).

[6] *D.R. Horton*, 2012 WL 36274, at *1–2.

[7] *Id.* at *2 (quoting 29 U.S.C. § 157 (2006)).

[8] *Id.* at *10–15.

[9] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

[10] *D.R. Horton*, 2012 WL 36274, at *12.

procedural, the FAA would not support enforcing the agreement and therefore there was no conflict between the NLRA and the FAA.

Many scholars have strongly and persuasively supported *D.R. Horton*.[11] Yet on review, a divided panel of the Fifth Circuit rejected the decision.[12] In addition, the Eighth and Second Circuits,[13] and nearly all district courts to have considered the issue,[14] have declined to follow *D.R. Horton*'s reasoning.[15]

Rather than considering only the merits, this Note focuses on judicial deference and argues that the courts have erred by not showing deference to a key portion of the NLRB's decision. Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[16] courts give deferential review to an agency's interpretation of the statute it administers.[17] Courts discussing *D.R. Horton* generally have given deference to the Board's analysis of the scope of employees' section 7 rights, but have given no deference to the entire portion of the Board's decision evaluating the interaction between the NLRA and the FAA on the ground that the NLRB is not charged with administering the FAA.[18]

Their treatment sweeps too broadly, without adequate attention to the task the NLRB actually performs in each part of its analysis. This Note argues that deference is also warranted for the Board's finding that the NLRA provides employees with a substantive statutory right to pursue legal claims collectively, which would render the arbitration agreements waiving that right unenforceable under the FAA. Although most

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[11] *See, e.g.*, Stephanie M. Greene & Christine Neylon O'Brien, *The NLRB v. the Courts: Showdown over the Right to Collective Action in Workplace Disputes*, 52 AM. BUS. L.J. (forthcoming 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2406577 [http://perma.cc/PDS6-UNKM]; Charles A. Sullivan & Timothy P. Glynn, Horton *Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013 (2013); *see also generally* Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 WAKE FOREST L. REV. 173 (2003).

[12] D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 364 (5th Cir. 2013) (enforcing only the Board's ruling that an arbitration agreement may not waive employees' rights to file a claim with the Board). *But see id.* (Graves, J., concurring in part and dissenting in part) ("I would . . . affirm[] the Board's decision in toto . . . .").

[13] Owen v. Bristol Care, Inc., 702 F.3d 1050, 1055 (8th Cir. 2013); Sutherland v. Ernst & Young LLP, 726 F.3d 290, 297 n.8 (2d Cir. 2013) (per curiam).

[14] *Owen*, 702 F.3d at 1054 & n.3 (citing, among others, Delock v. Securitas Sec. Servs. USA, Inc., 883 F. Supp. 2d 784, 789 (E.D. Ark. 2012); and Morvant v. P.F. Chang's China Bistro, Inc., 870 F. Supp. 2d 831, 845 (N.D. Cal. 2012); but noting Herrington v. Waterstone Mortg. Corp., No. 11-cv-779, 2012 WL 1242318, at *6 (W.D. Wis. Mar. 16, 2012)).

[15] Despite the adverse judicial decisions, administrative law judges continue to enforce *D.R. Horton* in accordance with the NLRB's longstanding policy of nonacquiescence. *See, e.g.*, Leslie's Poolmart, Inc., No. 21-CA-102332, slip op. at 6–7 (NLRB Div. of Judges Jan. 17, 2014). *See generally* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 705–12 (1989).

[16] 467 U.S. 837 (1984).

[17] *Id.* at 842–43.

[18] *See infra* notes 90–97 and accompanying text.

of the Board's discussion of the FAA is not entitled to deference, the Board's finding that concerted legal activity is a substantive right under the NLRA is different. That determination is based on the NLRB's interpretation of the nature of the rights guaranteed by the NLRA, the statute it administers, and therefore *Chevron* deference applies.[19]

This Note proceeds as follows. Part I provides relevant background information, giving an overview of the rights created by the NLRA, the provisions of the FAA and related Supreme Court decisions, and the NLRB's *D.R. Horton* decision. Part II discusses *Chevron* deference and observes how scholars and courts have applied deference principles to *D.R. Horton*. Part III develops the central argument that *Chevron* deference should apply to the NLRB's determination that the ability to bring collective legal action is a substantive right under the NLRA, and argues that courts should uphold the determination as reasonable under *Chevron*. Part IV concludes.

I. BACKGROUND

A. Rights Under the NLRA

The NLRA, originally enacted in 1935, was passed to remedy the "inequality of bargaining power" between employees and employers.[20] Section 7 of the NLRA provides that employees have "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[21] Section 8(a)(1) makes it "an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]."[22] Section 10 authorizes the NLRB "to prevent any person from engaging in any unfair labor practice"[23] and gives the Board remedial authority to "requir[e] such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of

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[19] While this Note was pending publication, the NLRB "reexamined *D. R. Horton*" and "reaffirm[ed] that decision" and its "reasoning." Murphy Oil USA, Inc., 361 N.L.R.B. No. 72, 2014 WL 5465454, at *2 (Oct. 28, 2014). *Murphy Oil* emphasized that *D.R. Horton* "rel[ied] on the substantive right, at the core of the [NLRA], to engage in collective action to improve working conditions." *Id.* Consistent with this Note's thesis on judicial deference, *Murphy Oil* highlighted that *D.R. Horton*'s finding that section 7 provides a substantive right to concerted activity "turn[s] on the [NLRB's] understanding of national labor policy," over which the Board has primary responsibility. *Id.* at *9. *Murphy Oil* embraced and expanded upon *D.R. Horton*'s reasoning and does not significantly impact this Note's analysis.

[20] 29 U.S.C. § 151 (2012).

[21] *Id.* § 157.

[22] *Id.* § 158(a).

[23] *Id.* § 160(a).

employees with or without back pay, as will effectuate the policies of this [Act]."[24]

Section 7 has been construed by the NLRB and the Supreme Court to extend far beyond the ability to form unions and collectively bargain with employers. In the leading case, *Eastex, Inc. v. NLRB*,[25] the Supreme Court wrote, "Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context."[26] Particularly relevant to *D.R. Horton*, the Court cited with approval NLRB decisions recognizing that the NLRA protects employees when "they seek to improve working conditions through resort to administrative and judicial forums."[27] Employee resort to collective legal action has become an increasingly important mechanism for workers to protect their legal rights as unionization and collective bargaining have declined.[28]

B. The FAA and Supreme Court Doctrine

The FAA was originally enacted in 1925 to counter "widespread judicial hostility to arbitration agreements."[29] The Act provides that "[a] written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable."[30] The Act's "saving clause," however, states that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."[31] The Supreme Court has described the FAA as embodying a "liberal federal policy favoring arbitration agreements."[32]

A crucial aspect of the Supreme Court's expansive interpretation of the FAA has been its application to claims arising under federal statutes.[33] Particularly relevant because the decision involved the employment context, the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*[34] found it permissible to arbitrate a claim arising under the

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[24] *Id.* § 160(c).

[25] 437 U.S. 556 (1978).

[26] *Id.* at 565.

[27] *Id.* at 566.

[28] *See generally* Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685 (2008).

[29] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745 (2011).

[30] 9 U.S.C. § 2 (2012).

[31] *Id.*

[32] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

[33] *See* CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 670–71 (2012) (discussing the Court's past statutory arbitration cases).

[34] 500 U.S. 20 (1991).

Age Discrimination in Employment Act[35] (ADEA).[36]

The Supreme Court's decisions make clear, however, that arbitration agreements cannot be used to circumvent federal statutory rights. The Supreme Court has repeatedly asserted that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[37]

The expansion of the FAA has been accompanied by limitations on class actions in arbitration, with the Court describing arbitration as primarily an individual dispute resolution mechanism.[38] In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[39] the Court held that arbitrators may not impose class arbitration without the explicit consent of the parties.[40] The Court has also rejected challenges to arbitration agreements based on the unavailability of class actions. In *AT&T*

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[35] 29 U.S.C. §§ 621–634 (2012).

[36] *See Gilmer*, 500 U.S. at 35. In *Gilmer*, the Court did not decide the scope of section 1 of the FAA, which provides that "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." *Id.* at 25 n.2 (quoting 9 U.S.C. § 1 (1988)). Later, in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the Supreme Court narrowly construed section 1 such that only workers engaged in transportation were exempted from the FAA. *See id.* at 109.

[37] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (quoted in, for example, *Gilmer*, 500 U.S. at 26; Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 229–30 (1987)). Although the Court's recent decision in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, does not repeat this language, the fundamental premise underlying the arbitration of federal statutory claims appears intact. The Court in *CompuCredit* distinguished between the "principal substantive provisions" of the statute at issue, *id.* at 669, and the "right to sue," *id.* at 670 (internal quotation marks omitted), that was waived in the arbitration agreement. *See id.* at 669–71.

In addition to the principle that substantive statutory rights cannot be waived, the Supreme Court has articulated two doctrinal limits on parties' ability to agree to arbitrate statutory claims.

First, arbitration of "statutory claims may not be appropriate . . . [if] Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors*, 473 U.S. at 628) (internal quotation mark omitted). "If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Id.* (quoting *McMahon*, 482 U.S. at 227). In *CompuCredit*, the Court stated that statutory claims are arbitrable "unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit*, 132 S. Ct. at 669 (quoting *McMahon*, 482 U.S. at 226).

Second, the Supreme Court has stated that parties must be able to effectively vindicate their statutory rights in an arbitral forum, *Mitsubishi Motors*, 473 U.S. at 637, and that the Court would "condemn[] . . . as against public policy" an agreement that "operated . . . as a prospective waiver of a party's right to pursue statutory remedies," *id.* at 637 n.19. In *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), the Court noted that it has never invalidated an arbitration agreement by applying an "'effective vindication' exception" to the FAA, but indicated that such an exception "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Id.* at 2310.

[38] *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750–52 (2011).

[39] 130 S. Ct. 1758 (2010).

[40] *See id.* at 1775.

Mobility LLC v. Concepcion,[41] the Court held that the FAA preempted a rule created by the California Supreme Court that class action waivers in consumer contracts of adhesion, including arbitration agreements, were unenforceable as unconscionable where money damages were predictably small.[42]

In the statutory context, the Court rejected plaintiffs' arguments in *Gilmer* that because the ADEA creates a private right of action that explicitly provides for class actions, the inability to bring class claims rendered arbitration inadequate to vindicate their statutory rights.[43] Although class mechanisms were in fact available to the *Gilmer* plaintiffs, the Court, in dicta, wrote, "[T]he fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred."[44] The Court has also noted that Rule 23 of the Federal Rules of Civil Procedure, which provides the procedural mechanism for class certification in federal court, does not itself provide "a nonwaivable opportunity" to invoke class procedures to vindicate statutory claims in arbitration.[45]

C. The NLRB's D.R. Horton *Decision*

D.R. Horton arose out of an effort by a superintendent of a building company to initiate arbitration on behalf of himself and a nationwide class of similarly situated superintendents alleging that their employer, D.R. Horton, "was misclassifying its superintendents as exempt from . . . the Fair Labor Standards Act (FLSA)."[46] D.R. Horton refused to arbitrate on the grounds that the superintendent signed an arbitration agreement that required all claims be arbitrated but prohibited the arbitration of collective claims.[47] The superintendent filed an unfair labor practice charge with the NLRB.[48]

1. The Arbitration Agreement Violates the NLRA. — The NLRB first established that the ability to bring a collective legal action in a judicial or arbitral forum is protected activity under section 7 of the NLRA. Building on the Supreme Court's past approval of the NLRB's interpretation that section 7 protects collective "resort to

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41 131 S. Ct. 1740.

42 *Id.* at 1745–53.

43 *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991); *see also* 29 U.S.C. § 626(b) (2012) (incorporating *id.* § 216(b)).

44 *Gilmer*, 500 U.S. at 32 (second alteration in original) (quoting Nicholson v. CPC Int'l Inc., 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting)) (internal quotation mark omitted).

45 Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310 (2013) (emphasis omitted).

46 D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012 WL 36274, at *1 (Jan. 3, 2012) (discussing 29 U.S.C. §§ 201–219 (2012)). Exempt employees are not covered by the FLSA's overtime rules.

47 *Id.*

48 *Id.* at *2.

administrative and judicial forums,"[49] the NLRB found that concerted employee resort to arbitration is also protected activity.[50] As the Board explained, just as employees have the right to strike "to induce the [employer] to comply with" its obligations under employment laws, so too do employees have the right to jointly seek to redress the same grievance through collective arbitration.[51]

The Board held that the arbitration agreement constituted an unfair labor practice because it "expressly restricts protected activity."[52] The provision was unlawful even though the employee and employer agreed to it. Quoting the Supreme Court, the NLRB stated that permitting employees to agree to waive their statutory rights to concerted activity would "reduce[] [the NLRA] to a futility."[53]

2. Reconciling the NLRA and the FAA. — The Board then addressed and rejected the argument that "finding the restriction on class or collective actions unlawful under the NLRA would conflict with the [FAA]."[54] Recognizing that the FAA does not permit contracting parties to "forgo the substantive rights afforded by the statute,"[55] the Board held that the "right" to act "concertedly," including through legal action, was a substantive right and not "merely 'procedural.'"[56] "The right to engage in collective action — including collective *legal* action — is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest."[57] To draw the substance-procedure distinction, the Board compared the rights under the NLRA to Rule 23 and the collective action mechanism created by the FLSA. Plaintiffs' right to use the latter collective action mechanism is "procedural . . . only, ancillary to the litigation of substantive claims."[58] By contrast, workers' ability to engage in collective activity is not ancillary to other substantive rights under the NLRA; it is the central right provided by the statute.[59]

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[49] *Id.* (quoting Eastex, Inc. v. NLRB, 437 U.S. 556, 566 (1978)) (internal quotation mark omitted).

[50] *Id.* at *3.

[51] *Id.* at *4. The NLRA does not assure class certification in any particular case, but rather provides employees a right "to take the collective action inherent in seeking class certification, whether or not they are ultimately successful." *Id.* at *12.

[52] *Id.* at *5.

[53] *Id.* at *6 (quoting J.I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944)).

[54] *Id.* at *10.

[55] *Id.* at *11 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)) (internal quotation marks omitted).

[56] *Id.* at *12.

[57] *Id.*

[58] *Id.* (quoting Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 332 (1980)) (internal quotation mark omitted).

[59] *See id.* The arbitration agreement impermissibly waived a substantive right notwithstanding *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), which upheld a collectively bargained arbitration agreement that waived employees' ability to bring employment discrimination suits in court. *D.R. Horton*, 2012 WL 36274, at *13. The fundamental distinction was that, unlike an individual

The Board emphasized that the arbitration agreement waived employees' substantive statutory rights under the NLRA, not those provided by the FLSA, and therefore presented an analytically different issue from that in *Gilmer*.[60] *Gilmer*, which involved an individual claim and did not discuss the NLRA, evaluated whether the rights provided by the ADEA barred the arbitration of age discrimination claims.[61] The analogous question in *D.R. Horton* would be whether the rights created by the FLSA barred the arbitration of wage and overtime claims.[62] The Board's analysis was distinct because it did not look to the statute giving rise to the employees' legal claim. It instead asked whether entering into the arbitration agreement in the first instance impermissibly waives a substantive right under the NLRA.[63]

Because the class waiver required employees to "forgo the NLRA's substantive protections," the Board concluded that the arbitration agreement was unenforceable under the FAA and therefore its decision did not create a conflict between the NLRA and the FAA.[64]

The Board's remedy was limited. The Board ordered D.R. Horton to cease and desist from imposing arbitration agreements preventing employees from collectively bringing legal actions related to their employment in *both* judicial and arbitral forums.[65] The decision explicitly stated that an employer may lawfully require that all arbitration with an employee be on an individual basis, so long as the employee may bring a class or collective suit in court.[66] *D.R. Horton* thus did not contravene *Stolt-Nielsen* because it did not require that employers collectively arbitrate disputes with employees.[67]

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employee acting alone, a "union may waive certain section 7 rights of the employees it represents . . . in exchange for concessions from the employer" as "an *exercise* of Section 7 rights[] [through] the collective-bargaining process." *Id.* (citing Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 280 (1956)).

60 *Id.* at *12.

61 *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991).

62 *Cf., e.g.*, Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294, 297–98 (5th Cir. 2004) (finding FLSA claims arbitrable).

63 *See D.R. Horton*, 2012 WL 36274, at *12 & n.21.

64 *Id.* at *13. In an alternative description of its conclusion, the Board stated that the arbitration agreement's waiver of the substantive statutory right to act collectively created an inherent conflict between the NLRA and the FAA under *Gilmer*, and that therefore the arbitration agreement was unenforceable. *See id.*

In *Murphy Oil*, the NLRB also alluded to the effective vindication exception to the FAA, reasoning that "mandatory arbitration agreements like those involved in *D. R. Horton* purport to extinguish a substantive right to engage in concerted activity . . . [and] amount[] to a prospective waiver of a right guaranteed by the NLRA." Murphy Oil USA, Inc., 361 N.L.R.B. No. 72, 2014 WL 5465454, at *11 (Oct. 28, 2014) (citing portions of *Mitsubishi Motors* and *Italian Colors* discussed at note 37, *supra*).

65 *D.R. Horton*, 2012 WL 36274, at *16.

66 *Id.*

67 *Id.*; *see also* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775–76 (2010).

II. DEFERENCE TO THE NLRB'S *D.R. HORTON* DECISION

Nearly all courts that have considered *D.R. Horton* have declined to follow the Board's decision. Especially in this context, the crucial preliminary question of whether courts owe deference to the Board's reasoning deserves careful consideration.

A. Chevron *Deference and the NLRB*

Chevron deference applies when "a court reviews an agency's construction of [a] statute which it administers."[68] *Chevron*'s "two-step" inquiry requires that courts ask two questions: First, "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[69] Second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[70] In Step Two, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[71]

Before applying the *Chevron* two-step inquiry, courts must decide whether *Chevron* applies to the particular agency interpretation, a decision that may include various inquiries commonly referred to as *Chevron* "Step Zero."[72] One aspect of Step Zero pertains to the form agency action takes. Agencies are entitled to *Chevron* deference if Congress has "vested" the agency with "general authority to administer [a statute] through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority."[73] The NLRB's interpretations of the NLRA through its decisions adjudicating labor disputes are entitled to *Chevron* deference.[74]

For the purposes of this Note, the key limitation is that *Chevron* deference applies only to an agency's interpretation of the statute it "administers."[75] "Agencies generally are said to administer statutes 'for which they have some special responsibility' . . . ."[76] Thus, agen-

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[68] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).
[69] *Id.* at 842–43.
[70] *Id.* at 843.
[71] *Id.* at 844.
[72] *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001).
[73] City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013).
[74] Sullivan & Glynn, *supra* note 11, at 1032 & n.104.
[75] *Chevron*, 467 U.S. at 842.
[76] Melissa M. Berry, *Beyond* Chevron*'s Domain: Agency Interpretations of Statutory Procedural Provisions*, 30 SEATTLE U. L. REV. 541, 573 (2007) (quoting GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 459 (3d ed. 2004)).

cies do not receive deference when interpreting general statutes, such as the Administrative Procedure Act[77] (APA), which apply to all agencies and are not within the responsibility of any agency in particular.[78]

As applied to the NLRB, this limitation on judicial deference is captured by the pre-*Chevron* case, *Southern Steamship Co. v. NLRB*[79] (*Southern S.S. Co.*). In *Southern S.S. Co.*, crewmembers of a steamship company were fired for holding a strike.[80] In ordering reinstatement with backpay, the Board reasoned that the crewmembers had not violated federal mutiny laws,[81] but the Supreme Court disagreed.[82] As the Court later described, "the Board's interpretation of a [mutiny] statute so far removed from its expertise merited no deference."[83]

Further limits on judicial deference to agencies apply when an agency's remedy for a statutory violation interferes with another federal statute. In *Southern S.S. Co.*, the Court found that the violation of federal criminal mutiny laws precluded the remedy of reinstatement.[84] "[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives."[85] More recently in *Hoffman Plastic Compounds, Inc. v. NLRB*,[86] the Supreme Court held that the NLRB could not award backpay to an undocumented alien as a remedy for an unfair labor practice committed by his employer because "such relief is foreclosed by federal immigration policy."[87] The Court wrote, "Since *Southern S.S. Co.*, we have . . . never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA."[88]

Although the Court's language is broad, it should not be overread. The main principles these cases establish are that the NLRB must consider the implications of its decisions for other federal statutes and that the Board does not have unfettered discretion in *remedying* violations of the NLRA when other federal statutes are also involved.[89]

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77 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

78 *See* Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 642 n.30 (1986) (plurality opinion).

79 316 U.S. 31 (1942).

80 *Id.* at 34–35.

81 *Id.* at 40.

82 *See id.* at 38–46.

83 Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 143–44 (2002).

84 *Southern S.S. Co.*, 316 U.S. at 48.

85 *Id.* at 47.

86 535 U.S. 137.

87 *Id.* at 140 (discussing the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.)).

88 *Id.* at 144.

89 *See id.* at 142–43 ("This case exemplifies the principle that the Board's *discretion to select and fashion remedies* for violations of the NLRA, though generally broad, is not unlimited." (em-

B. Scholarly and Judicial Treatment of Deference to D.R. Horton

The deference given to *D.R. Horton* has been limited. Generally, scholars and courts agree that the NLRB's analysis of the scope of employees' section 7 rights is entitled to deference. Professors Charles Sullivan and Timothy Glynn write that courts are "bound to follow [the Board's] reading of the NLRA" under *Chevron*, because that portion of the Board's analysis was an "interpretation of the statute it administers."[90] The Fifth and Eighth Circuits do not differ on this point. "'[T]he task of defining the scope of § 7 is for the Board to perform in the first instance . . . .' Where 'an issue . . . implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference.'"[91] In addition to articulating this deferential standard, the Fifth Circuit recognized that there was support for the Board's interpretation "that collective and class claims, whether in lawsuits or in arbitration, are protected by Section 7."[92] This Note fully supports judicial deference to the NLRB's interpretation of employees' section 7 rights in *D.R. Horton*.

However, courts and scholars also generally agree that the entire portion of the NLRB's decision discussing the interaction between the NLRA and the FAA is not entitled to deference.[93] The Eighth Circuit wrote, "[W]e . . . owe no deference to [the Board's] reasoning"[94] because "the Board has no special competence or experience in interpreting the Federal Arbitration Act."[95] The Fifth Circuit struck a similar tone, quoting the language from *Southern S.S. Co.* and *Hoffman Plastic* discussed above.[96] Sullivan and Glynn agree, relying on *Hoffman Plastic*: "[T]he Board is entitled to no deference in either interpreting other statutes, including the FAA, or determining whether and how to

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phasis added) (citations omitted)); *id.* at 147 ("The *Southern S.S. Co.* line of cases established that where the Board's *chosen remedy* trenches upon a federal statute or policy outside the Board's competence to administer, *the Board's remedy* may be required to yield." (emphasis added)).

[90] Sullivan & Glynn, *supra* note 11, at 1032; *see also* Greene & O'Brien, *supra* note 11 (manuscript at 37).

[91] D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 356 (5th Cir. 2013) (first and third alterations in original) (quoting NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 829 (1984) (internal quotation marks omitted)); *see also* Owen v. Bristol Care, Inc., 702 F.3d 1050, 1054 (8th Cir. 2013) (citing Delock v. Securitas Sec. Servs. USA, Inc., 883 F. Supp. 2d 784, 787 (E.D. Ark. 2012)).

[92] *D.R. Horton*, 737 F.3d at 357.

[93] *But see id.* at 364–65 (Graves, J., concurring in part and dissenting in part); Herrington v. Waterstone Mortg. Corp., No. 11-cv-779, 2012 WL 1242318, at *5–6 (W.D. Wis. Mar. 16, 2012). Although both Judge Graves's partial dissenting opinion in *D.R. Horton* and Judge Crabb's opinion in *Herrington v. Waterstone Mortgage Corp.*, 2012 WL 1242318, contain broad statements of deference to the NLRB's decision, possibly including all or portions of the Board's discussion of the FAA, the precise scope of the deference given is not clear from the opinions.

[94] *Owen*, 702 F.3d at 1054.

[95] *Id.* (quoting *Delock*, 883 F. Supp. 2d at 787) (internal quotation mark omitted).

[96] *D.R. Horton*, 737 F.3d at 356; *see supra* notes 85 and 88 and accompanying text.

accommodate the policies underlying potentially competing statutory regimes."[97]

The courts also rejected the application of judicial deference to specific portions of the Board's analysis. The Fifth and Second Circuits, citing *Hoffman Plastic*, noted that the NLRB's choice of remedy is not necessarily entitled to deference.[98] The Eighth Circuit also explained that deference does not apply to a portion of the NLRB's decision,[99] not described above, that attempted to distinguish *D.R. Horton* from the Supreme Court's decision in *Concepcion*.[100] The court wrote that it "is 'not obligated to defer to [the Board's] interpretation of Supreme Court precedent under *Chevron* or any other principle.'"[101]

III. *CHEVRON* DEFERENCE FOR THE NLRB'S DETERMINATION OF A SUBSTANTIVE RIGHT TO CONCERTED ACTIVITY

A. Chevron *Step Zero*

The crucial *Chevron* Step Zero inquiry here is whether the NLRB's determination that the NLRA provides a substantive right to concerted legal activity constitutes an interpretation of the statute the Board "administers."[102] Although the question of whether an arbitration agreement waives a substantive or procedural right derives its import from the FAA, this Note contends that *Chevron*'s application is not determined by the origin of the question, but rather by the nature of the analysis the agency performs to reach the answer.

1. Interpreting the NLRA. — The NLRB's substantive-rights analysis is an interpretation of the NLRA, the statute the Board administers. The Supreme Court has not provided clear guidance for how to distinguish substantive and procedural statutory rights for FAA purposes, but its cases demonstrate that the determination is made by analyzing the nature of the rights in the statutory scheme.

For example, in *Gilmer*, the Court held that the ADEA's provision granting employees a judicial forum for age discrimination claims may be waived in favor of arbitration because Congress did not "intend[] the substantive protection afforded [by the ADEA] to include protec-

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97 Sullivan & Glynn, *supra* note 11, at 1034 (footnote omitted); *see id.* at 1034 n.113.

98 *D.R. Horton*, 737 F.3d at 356; Sutherland v. Ernst & Young LLP, 726 F.3d 290, 297 n.8 (2d Cir. 2013) (per curiam).

99 *See Owen*, 702 F.3d at 1054.

100 *See* D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012 WL 36274, at *11 (Jan. 3, 2012).

101 *Owen*, 702 F.3d at 1054 (alteration in original) (quoting Delock v. Securitas Sec. Servs. USA, Inc., 883 F. Supp. 2d 784, 787–88 (E.D. Ark. 2012)).

102 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

tion against waiver of the right to a judicial forum."[103] To the Court, the provision of a judicial forum was part of "the ADEA's flexible approach to resolution of [age discrimination] claims."[104]

Similarly, the Court in *CompuCredit Corp. v. Greenwood*[105] analyzed the text and statutory scheme created by the Credit Repair Organizations Act[106] to distinguish the "principal substantive provisions" of the statute from the statute's grant to consumers of a right to sue in a judicial forum.[107] The Court held that, unlike the substantive provisions that regulate the relationship between credit repair organizations and consumers, the right to a judicial forum may be waived through an agreement to bring claims in arbitration, which the Court analogized to a "reasonable forum-selection clause."[108]

Regardless of the exact contours of the substance-procedure dichotomy, it is plain that determining whether a statutory right is substantive or procedural for the purposes of the FAA depends upon an analysis of the statutory scheme creating the right.

The NLRB in *D.R. Horton* analyzed the NLRA's statutory scheme to determine that the right to concerted legal activity that the arbitration agreement waived is a substantive right. Section 7 provides employees with the "right" to engage in concerted activity for mutual aid or protection.[109] The Board squarely addressed whether the right was substantive or procedural by evaluating the role that the right to concerted activity plays in the NLRA's statutory scheme. "The right to engage in collective action — including collective *legal* action — is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest."[110] The Board explained that the ability of employees to act concertedly is not "ancillary"[111] to the achievement of other rights protected by the NLRA, but rather is itself the central right the NLRA seeks to protect.[112]

This analysis is an interpretation of the NLRA, not the FAA, and draws on the NLRB's extensive experience applying the NLRA's statutory scheme. The Board construed the statute it administers and therefore should be reviewed with deference under *Chevron*.

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[103] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 29 (1991) (second alteration in original) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

[104] *Id.*

[105] 132 S. Ct. 665 (2012).

[106] 15 U.S.C. § 1679 (2012).

[107] *CompuCredit*, 132 S. Ct. at 669; *see id.* at 669–70.

[108] *Id.* at 671.

[109] 29 U.S.C. § 157 (2012).

[110] D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012 WL 36274, at *12 (Jan. 3, 2012).

[111] *Id.* (quoting Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 332 (1980)).

[112] *Id.*

2. Chevron*, the NLRA, and the FAA.* — The NLRB analyzed whether the NLRA provides a substantive right to concerted activity to determine if the FAA would treat the class action waivers as enforceable. The D.C. Circuit and First Circuit have found that *Chevron* deference applies in an analogous situation in which an agency interprets a statute it administers to determine if the Administrative Procedure Act requires that the agency use formal adjudication procedures.

The APA governs the procedures federal agencies use for their two primary activities, rulemaking and adjudication.[113] For both rulemaking and adjudication, the APA distinguishes between formal and informal procedures.[114] The APA requires formal adjudication when an agency decision is "required by statute to be determined on the record after opportunity for an agency hearing."[115] Thus, Congress determines "when an agency must follow formal procedures" through the language of the statutes that agencies administer.[116] Because statutes are sometimes unclear about whether formal or informal adjudications are required,[117] and because the APA does not "dictate when agencies must follow . . . formal procedures[,] . . . agencies must read the APA in conjunction with the relevant agency enabling statute."[118]

The D.C. Circuit in *Chemical Waste Management, Inc. v. EPA*[119] evaluated a provision of the Resource Conservation and Recovery Act of 1976[120] that required the EPA to provide a "public hearing"[121] when the agency orders a facility to take corrective action following a release of hazardous waste.[122] The EPA applied the "public hearing" requirement by providing formal adjudications in certain specified circumstances and informal adjudications in others.[123] The D.C. Circuit upheld the EPA's interpretation under *Chevron*. The court wrote:

> Under [*Chevron*], it is not our office to presume that a statutory reference to a "hearing," without more specific guidance from Congress, evinces an intention to require formal adjudicatory procedures, since such a presumption would arrogate to the court what is now clearly the prerogative of the

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113 Berry, *supra* note 76, at 542–43.

114 *See* 5 U.S.C. §§ 553, 556–557 (2012) (formal rulemaking); *id.* §§ 554, 556–557 (formal adjudication); *id.* § 553 (informal rulemaking). The APA does not provide specific procedures for informal adjudication. *See id.* § 554.

115 *Id.* § 554(a).

116 Berry, *supra* note 76, at 543.

117 *See id.* at 543–44.

118 *Id.* at 550.

119 873 F.2d 1477 (D.C. Cir. 1989).

120 Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended in scattered sections of 42 U.S.C.).

121 *Chem. Waste Mgmt.*, 873 F.2d at 1478 (quoting 42 U.S.C. § 6928(b) (1988)) (internal quotation mark omitted).

122 *Id.* at 1478–79.

123 *Id.* at 1479.

> agency, *viz.*, to bring its own expertise to bear upon the resolution of ambiguities in the statute that Congress has charged it to administer.[124]

The First Circuit reached the same conclusion in *Dominion Energy Brayton Point, LLC v. Johnson*.[125] There, the court applied *Chevron* deference and upheld the EPA's determination that formal procedures were not required under a provision of the Clean Water Act[126] requiring that the EPA provide an "opportunity for public hearing" to electrical generating facilities seeking permits.[127] The court's conviction that *Chevron* applied led the court to abandon prior circuit precedent that had created a rebuttable presumption that statutes calling for a "public hearing" required formal procedures.[128]

The D.C. and First Circuits applied *Chevron* to the EPA's interpretations of the statutes it administered, notwithstanding the courts' recognition that the interpretations involved a procedural framework given meaning by, and used for the purpose of applying, the APA.[129] As the First Circuit explicitly held, for the purpose of determining *Chevron*'s application, the Agency was "plainly" interpreting the Clean Water Act and not the APA.[130]

These decisions support applying *Chevron* deference to the NLRB's determination that the NLRA provides a substantive right to concerted legal activity. The framework of substantive and procedural statutory rights derives its meaning from, and is relevant to the application of, the FAA, just as the formal-informal procedural framework does with regard to the APA. That context does not alter the conclusion that, like the EPA's analyses above, the NLRB's determination is an interpretation of the statute the agency administers and is thus within *Chevron*'s scope.

3. Deference in Light of Southern S.S. Co. *and* Hoffman Plastic. — Courts and scholars have relied heavily on broad language in *Southern S.S. Co.* and *Hoffman Plastic* to deny deference to all parts of the NLRB's discussion relating to the FAA. But the principles of those cases are not violated by giving *Chevron* deference to the NLRB's determination that section 7 of the NLRA provides employees with a substantive right to engage in concerted activity, including legal activity.

As a preliminary matter, it is important to emphasize the scope of this Note's argument. The NLRB is not entitled to deference to its ar-

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124 *Id.* at 1482; *see also id.* at 1480–83.

125 443 F.3d 12 (1st Cir. 2006).

126 33 U.S.C. §§ 1251–1387 (2012).

127 *Dominion Energy*, 443 F.3d at 14 (quoting 33 U.S.C. §§ 1326(a), 1342(a)(1)) (internal quotation marks omitted); *see id.* at 13–17.

128 *See id.* at 16–17.

129 *See Chem. Waste Mgmt.*, 873 F.2d at 1479; *Dominion Energy*, 443 F.3d at 14–15. Recall that the EPA does not administer the APA for *Chevron* purposes. *See supra* note 78 and accompanying text.

130 *Dominion Energy*, 443 F.3d at 18.

ticulation or application of the limits of the FAA. The NLRB therefore does not receive deference to its description of the rule that arbitration agreements cannot waive substantive statutory rights, nor to its subsequent conclusion that because this arbitration agreement waives a substantive right it is unenforceable under the FAA. It is for the courts to articulate the rules and standards that are used to apply the FAA. This Note's argument is that if courts determine that the waiver of a substantive statutory right makes an arbitration agreement unenforceable under the FAA, which the Supreme Court's precedent suggests it does, then courts should deferentially evaluate the NLRB's interpretation that the NLRA provides a substantive right to concerted activity and give that interpretation its proper application under the FAA.

The Board's other discussions related to the FAA are not eligible for deferential review, even though the Board may still be correct on the merits. In addition to the substantive right discussion, the Board reasoned that there was no conflict with the FAA because its decision does not disfavor arbitration agreements,[131] and that its decision was a proper application of the FAA's savings clause.[132] Furthermore, the Board reasoned that if there were a conflict between the FAA and the NLRA, the right to concerted activity would take precedence.[133] Those discussions do not receive *Chevron* deference because the analysis goes beyond a construction of the NLRA.

Given that specification, this Note's argument does not run afoul of *Southern S.S. Co.* or *Hoffman Plastic*. First, it does not advocate for deference to an "interpretation of a statute . . . far removed from [the NLRB's] expertise,"[134] such as the NLRB's interpretation of the federal mutiny statute in *Southern S.S. Co.* Deference is owed for the portion of the Board's analysis that interprets the NLRA.

This Note's argument also does not violate the limits on deference, articulated by *Southern S.S. Co.* and *Hoffman Plastic*, that the NLRB cannot "single-mindedly" enforce the NLRA[135] and that the Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA."[136] This argument does not involve deference to the NLRB's chosen remedy, and it does not advocate deference to the Board's overall attempt to reconcile the NLRA with the FAA through the discussion of substantive rights.[137] Rather, deference is due only to

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131 D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012 WL 36274, at *11 (Jan. 3, 2012).
132 *See id.* at *14–15.
133 *Id.* at *16.
134 Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 143–44 (2002).
135 *Southern S.S. Co.*, 316 U.S. 31, 47 (1942).
136 *Hoffman Plastic*, 535 U.S. at 144.
137 *See* Sullivan & Glynn, *supra* note 11, at 1034.

the Board's evaluation and categorization of the rights provided by the NLRA. The Supreme Court's rejection of the Board's awards of reinstatement and backpay to mutinous crewmembers in *Southern S.S. Co.* and undocumented workers in *Hoffman Plastic* therefore do not impact this argument. These decisions and the language used by the Supreme Court in them do not support precluding deference for all aspects of the NLRB's discussion relating to the FAA as the Fifth Circuit, other courts of appeals, district courts, and scholars have suggested.[138]

4. Agencies Versus Courts as the Proper Decisionmakers. — In the Supreme Court's modern arbitration cases, courts, not agencies, have authoritatively evaluated whether a federal statute provides a substantive right that cannot be waived by an arbitration agreement.[139] So too with lower court decisions on whether the class action mechanism in the FLSA is a substantive right.[140] To decide whether Congress intended to preclude arbitration, these decisions have primarily scrutinized the provisions in federal statutes granting a private cause of action with a federal forum and class mechanisms.[141]

Interpreting statutory provisions granting causes of action is within the exclusive domain of the courts. In *Adams Fruit Co. v. Barrett*,[142] the Supreme Court denied *Chevron* deference to the Department of Labor's (DOL) interpretation of the scope of the private cause of action provided by the Migrant and Seasonal Agricultural Worker Protection Act.[143] While the DOL was responsible for promulgating standards for the statute's protections, the statutory scheme "established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute."[144] The statute provided "direct recourse to federal court," meaning that determining the "scope of [the statute's] judicially enforceable remedy" fell to the courts, not to the DOL.[145]

The NLRA is different in two ways. First, unlike the Migrant and Seasonal Agricultural Worker Protection Act, the ADEA,[146] and the

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138 *See supra* notes 93–97 and accompanying text.

139 *See, e.g.*, CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2012); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

140 *See, e.g.*, Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294, 297–300 (5th Cir. 2004).

141 *See CompuCredit*, 132 S. Ct. at 670–71 (discussing the Supreme Court's past cases); *Carter*, 362 F.3d at 297–300.

142 494 U.S. 638 (1990).

143 29 U.S.C. §§ 1801–1872 (2012); *see Adams Fruit*, 494 U.S. at 649–50.

144 *Adams Fruit*, 494 U.S. at 649.

145 *Id.* at 650.

146 *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27 (1991) (describing the role of the Equal Employment Opportunity Commission in bringing court actions on behalf of individuals); *see also* 29 U.S.C. § 626(b)–(d).

FLSA,[147] the NLRA makes an agency and not courts the primary adjudicator of the rights of workers under the Act.[148] Second, the statutory provision at issue in *D.R. Horton*, section 7 of the NLRA, is not the grant of a private cause of action with access to a judicial forum. It is instead a grant to employees of the right generally to act in a collective manner, including through legal action.[149] Thus, *Adams Fruit*'s determination that the judiciary holds exclusive authority over the interpretation of private causes of action does not apply. It is the NLRB's role to determine the scope and nature of the rights provided by the NLRA, subject to deferential judicial review under *Chevron*.

B. Chevron *Step One*

After establishing that *Chevron* applies, a reviewing court must evaluate the NLRB's determination for reasonableness by following the famous *Chevron* two-step. Step One asks whether Congress has spoken to the precise question at issue in the NLRA.[150]

The NLRA is ambiguous as to whether employees' right to collective activity guaranteed by section 7 is substantive or procedural. Section 7 states that "[e]mployees shall have *the right* . . . to engage in other concerted activities for . . . mutual aid or protection,"[151] and section 8 makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of *the rights* guaranteed" in section 7.[152] Neither of these provisions nor any other in the Act specifies whether these section 7 rights are substantive or procedural.

Section 1 of the NLRA, which states the Act's general policies, may appear to provide guidance, but does not ultimately answer the precise question. Section 1 provides:

> It is . . . the policy of the United States to . . . encourag[e] the practice and procedure of collective bargaining and . . . protect[] 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.[153]

Although collective bargaining is referred to as a "procedure," a process through which negotiations can occur, the "exercise by workers of full freedom of association[] [and] self-organization" is separate from

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147 *See* 29 U.S.C. § 216(c) (authorizing the Secretary of Labor to commence an action in court on behalf of aggrieved workers).

148 *See* NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 829 (1984) ("[T]he task of defining the scope of § 7 'is for the Board to perform in the first instance as it considers the wide variety of cases that come before it . . . .'" (quoting Eastex, Inc. v. NLRB, 437 U.S. 556, 568 (1978))).

149 *See* 29 U.S.C. § 157.

150 *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

151 29 U.S.C. § 157 (emphasis added).

152 *Id.* § 158(a)(1) (emphasis added).

153 *Id.* § 151.

collective bargaining, and suggests that the NLRA aims to provide workers those rights as substantive benefits in themselves, not as a mechanism for achieving other specified rights.

The NLRA does not speak precisely to whether the right to concerted activity is substantive or procedural, nor to whether employees may agree to arbitration agreements waiving that statutory right, leaving room for reasonable interpretation by the NLRB.

C. Chevron *Step Two*

Because the NLRA does not answer the precise question, courts must uphold a reasonable interpretation by NLRB.[154] The Board's interpretation that the NLRA provides a substantive right to concerted legal activity is reasonable. Although the Supreme Court has not defined a standard for distinguishing substantive and procedural statutory rights for FAA purposes, the NLRB's determination and reasoning are consistent with the analysis that the Court has performed in its prior cases.

Many of the Supreme Court's arbitration decisions have centered on the determination that a statute's grant of a judicial forum to pursue a cause of action does not create an unwaivable statutory right.[155] For example, the Court wrote that "the right to select the judicial forum and the wider choice of courts are *not such essential features* of the Securities Act that [they] . . . bar any waiver of these provisions."[156] For the Court, a statute's provision of a judicial forum merely establishes a means for protected individuals to vindicate their other statutory rights by imposing "civil liability in court"[157] and is not itself a "substantive protection" provided by the statute.[158] The Court has also held that Rule 23 and statutory class action devices do not create an unwaivable substantive right to use or access those mechanisms.[159]

These procedural rights stand in contrast to the substantive provisions that the Court has suggested cannot be waived by an agreement to arbitrate. In *CompuCredit*, the Court explained that the "principal substantive provisions" of the consumer protection statute were those that protected consumers by "prohibit[ing] certain practices, establish[ing] certain requirements for contracts with consumers, and

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154 *See Chevron*, 467 U.S. at 843–44.

155 *See* CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 670–71 (2012) (discussing the Court's precedents).

156 Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989) (emphasis added).

157 *CompuCredit*, 132 S. Ct. at 671 (discussing *Gilmer*, *McMahon*, and *Mitsubishi Motors*).

158 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 29 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

159 *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309–10 (2013); *Gilmer*, 500 U.S. at 32.

giv[ing] consumers a right to cancel" an agreement.[160] Separately, the Court characterized the Securities Act's assignment of the burden of proof for securities fraud actions as a substantive provision, suggesting it was a provision "so critical" to the operation of the statute that it could not be waived.[161]

The NLRB carefully evaluated the distinction between substantive and procedural rights, and its analysis echoes the Court's distinctions between those "essential," "critical," or "principal" aspects of a statutory scheme and those that provide or regulate the means through which other rights are vindicated. The NLRB found that "[t]he right to engage in collective action — including collective *legal* action — is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest."[162] The Board distinguished concerted activity under the NLRA from procedural rights, like Rule 23 or statutory class action procedures, which are merely "*ancillary* to the litigation of substantive claims."[163]

Michael Schwartz provides additional support for the NLRB's determination. He argues that the Supreme Court's substance-procedure analysis in the arbitration context is consistent with, and can be understood in light of, the standard articulated in the Court's choice-of-law jurisprudence.[164] Schwartz explains that "procedural rules . . . govern only 'the manner and the means by which the litigants' rights are enforced'; substantive rules . . . alter 'the rules of decision by which [the] court will adjudicate [those] rights.'"[165] The Board's interpretation, he argues, is consistent with that framework. In the choice-of-law context, "invocation of classwide proceedings"[166] under Rule 23 was procedural because it was "the manner and the means by which the litigants' rights are enforced."[167] Under section 7, however, collective "[i]nvocation of classwide proceedings *is* the right. . . . [I]ndeed, there is no other substantive right that the NLRA serves to protect."[168]

Of the courts of appeals, only the Fifth Circuit has addressed and rejected the NLRB's analysis of the substantive-procedural rights distinction, though the court's rationales are unconvincing. The Fifth

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160 *CompuCredit*, 132 S. Ct. at 669 (citations omitted).

161 *Rodriguez de Quijas*, 490 U.S. at 481.

162 D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012 WL 36274, at *12 (Jan. 3, 2012).

163 *Id.* (emphasis added) (quoting Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 332 (1980)).

164 Michael D. Schwartz, Note, *A Substantive Right to Class Proceedings: The False Conflict Between the FAA and NLRA*, 81 FORDHAM L. REV. 2945, 2978–82 (2013).

165 *Id.* at 2980 (third and fourth alterations in original) (quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) (opinion of Scalia, J.) (internal quotation marks omitted)) (internal quotation marks omitted).

166 *Id.* at 2983.

167 *Id.* (quoting *Shady Grove*, 130 S. Ct. at 1442 (opinion of Scalia, J.) (internal quotation marks omitted)) (internal quotation marks omitted).

168 *Id.* at 2983–84.

Circuit reasoned that the right to act collectively as a class is procedural.[169] To its credit, the court acknowledged the Board's view "that the NLRA is essentially *sui generis*. That act's fundamental precept is the right for employees to act collectively. Thus, Rule 23 is not the source of the right to the relevant collective actions. The NLRA is."[170] Nevertheless, the court disagreed, not based on analysis of the nature of the NLRA or the rights it provides, but rather on past decisions about other statutes. "[T]here are numerous decisions holding that there is no right to use class procedures under various employment-related statutory frameworks."[171] The court later elaborated, "[T]he right to proceed collectively cannot protect vindication of employees' statutory rights under the ADEA or FLSA because a substantive right to proceed collectively has been foreclosed by prior decisions."[172]

The Fifth Circuit's reasoning misses the point in one of two ways and therefore does not undermine the reasonableness of the Board's interpretation. Perhaps the Fifth Circuit was saying that there is no substantive right to class action mechanisms under the employment statutes giving rise to the employees' legal claims, such as the ADEA or the FLSA. That premise may be correct but it would be irrelevant to the Board's determination in *D.R. Horton* that concerted activity, not a class action mechanism, is a substantive right under the NLRA.

Alternatively, the Fifth Circuit's reasoning could be that the analysis that led the Supreme Court to suggest that the ADEA would permit arbitration agreements with class waivers, or that led the Fifth Circuit to conclude the same about the FLSA, applies with equal force to the NLRA. But that assessment fails to confront the unique nature of the rights created by the NLRA.[173] The ADEA and the FLSA provide individuals with a cause of action, including access to a judicial forum and class action mechanisms, as a means to vindicate their other statutory rights regarding age discrimination and wages.

Section 7 of the NLRA is fundamentally different. It is neither the grant of a judicial forum nor a device for joining legal claims to facilitate the vindication of some other statutory protection provided by the NLRA. Section 7 provides employees with the general ability to act concertedly, through legal action or otherwise. It is the central protection the NLRA provides employees to further their "full freedom of as-

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169 D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 357, 361 (5th Cir. 2013).

170 *Id.* at 357.

171 *Id.*

172 *Id.* at 361.

173 *See* Catherine L. Fisk, *Collective Action and Joinder of Parties in Arbitration: Implications of* DR Horton *and* Concepcion, 35 BERKELEY J. EMP. & LAB. L. 175, 182–86 (2014); Benjamin Sachs, *Arbitration and Labor Law: Where the Fifth Circuit Went Wrong in* Horton, ONLABOR (Dec. 5, 2013), http://onlabor.org/2013/12/05/arbitration-and-labor-law-where-the-fifth-circuit-went-wrong-in-horton/ [http://perma.cc/PLL3-LV3Y].

sociation."[174] It is therefore reasonable for the NLRB to construe the right to concerted activity not as a procedural means to vindicate other rights, but as a substantive right in itself.

A further counterargument could be made that when, as here, employees collectively seek to vindicate other statutory employment rights in court, the right to concerted activity under the NLRA is procedural rather than substantive. But that would prove too much. The NLRA does not distinguish between the goals of employees' concerted activities, except that the concerted activities cannot pursue objectives contrary to the purposes of federal labor law.[175] It makes no difference whether employees act concertedly to bargain for higher wages, demand safer working conditions, or sue to enforce their statutory rights to be paid overtime wages. Permitting an arbitration agreement to waive the ability to bring a collective legal claim would be equivalent to permitting an arbitration agreement to require employees to individually arbitrate their wages, forgoing their right to join with other employees to negotiate collectively for a pay increase. Each waiver would "reduce[] [the NLRA] to a futility."[176]

The NLRB's interpretation that section 7 creates a substantive right to bring a collective legal claim as a form of concerted activity for mutual aid or protection is a reasonable construction of the NLRA. As such, it should be upheld by the courts under *Chevron*.

IV. CONCLUSION

This Note has closely examined a crucial portion of the NLRB's decision in *D.R. Horton* and has argued that it merits *Chevron* deference. Ultimately, the courts are responsible for determining the proper interpretation and application of the FAA, which is outside the NLRB's administrative authority. But a fundamental principle of the FAA is that parties may not use arbitration clauses to waive substantive federal statutory rights. The NLRB interpreted the NLRA and its statutory scheme to determine that the section 7 right to engage in concerted activities for mutual aid or protection is a substantive right. Courts should defer to the Board's analysis and uphold it as a reasonable interpretation of the NLRA. As a result, they should also conclude, as the NLRB did, that class waivers in arbitration agreements imposed on individual employees as a condition of employment are unlawful under the NLRA and unenforceable under the FAA.

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174 29 U.S.C. § 151 (2012).

175 *See* ARCHIBALD COX ET AL., LABOR LAW 488–89 (15th ed. 2011) (using as an example an employee strike to pressure their employer to fire an employee who is a dissident voice within the union).

176 D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012 WL 36274, at *6 (Jan. 3, 2012) (quoting J.I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944)); *see also* Sullivan & Glynn, *supra* note 11, at 1051–55 ("This would effectively end the labor laws." *Id.* at 1054.).