

Recent Cases

MORRIS V. ERNST & YOUNG, LLP: THE NLRA’S PHANTOM CONFLICT WITH THE FAA

I. Introduction

“At its heart, this is a labor law case, not an arbitration case.”¹

The Ninth Circuit framed its recent holding in *Morris v. Ernst & Young, LLP* as an interpretation of labor law, rather than a repudiation of the High Court’s seemingly limitless enforcement of agreements to arbitrate. Nonetheless, the opinion provides refuge for those seeking solace from a number of Supreme Court decisions that have proliferated the frequency and scope of arbitration agreements in a wide range of contracts.² The Court’s arbitration jurisprudence has indeed seized upon this congressional mandate as expressing a “federal policy favoring arbitration.”³ Noteworthy cases, such as *Concepcion* and *Italian Colors*, seem to confirm the supremacy of the Federal Arbitration Act (“FAA”), preempting federal procedure and even state law.⁴

The *Morris* court held that the National Labor Relations Act (“NLRA”) creates a substantive right for employees to effect “concerted activity,” including dispute resolution.⁵ Impliedly, this interpretation could create a potential conflict with the FAA where agreements to arbitrate mandate *individual* arbitration. However, the 2-1 majority read the so-called “savings clause” in section 2 of the FAA as allowing the arbitration agreement to retreat in the face of an “illegal” waiver of a substantive right. As *Morris* progresses up the judicial chain,⁶ the Supreme Court will have the

1. *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 989 (9th Cir. 2016), *cert. granted sub. nom.* Ernst & Young, LLP v. Morris, No. 16-300, 2017 WL 125665 (U.S. Jan. 13, 2017).

2. See Robert Gebeloff & Karl Russell, *Removing the Ability to Sue*, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/interactive/2015/10/30/business/dealbook/arbitration-trends.html>.

3. *Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 4762 (1989).

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

5. *Morris*, 834 F.3d at 980 (interpreting NLRA, 29 U.S.C. § 157).

6. See *Ernst & Young*, 2017 WL 125665, at *1 (granting petition for writ of certiorari).

opportunity to revisit its interpretation of the FAA and determine whether employment contracts are subject to different rules in light of the NLRA.⁷

II. Facts

Plaintiffs Stephen Morris and Kelly McDaniel filed a class-action suit in federal court, alleging that the defendant, accounting firm Ernst & Young, LLP, had misclassified them and similarly situated employees as “exempt” for overtime purposes. The defendant filed a motion to compel arbitration, asserting that the employees had agreed in their employment contracts to arbitrate their cases individually. Specifically, as a condition of employment, Morris, McDaniel, and others agreed to “(1) pursue legal claims against Ernst & Young exclusively through arbitration and (2) arbitrate only as individuals and in ‘separate proceedings.’”⁸

The district court granted the defendant’s motion compelling individual arbitration and dismissed the complaint.⁹ Subsequently, the plaintiffs filed their appeal with the U.S. Court of Appeals for the Ninth Circuit.¹⁰

III. History

This legal debate has centered upon the correct interpretation of the NLRA’s language in section 7 providing employees with “the right to . . . engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”¹¹ At least four circuit courts have considered whether this section of the NLRA guarantees employees the right to bring collective claims against an employer, whether in court, arbitration, or some other forum. These courts have produced two distinctly different answers.¹²

This debate first arose in 2012 when the National Labor Relations Board (“NLRB”) decided *In re D.R. Horton, Inc.*¹³ In that case, the Board held that class-action lawsuits are the type of concerted activity “at the core of what Congress intended to protect by adopting the broad language of section 7.”¹⁴

7. 29 U.S.C. §§ 151–169 (2012).

8. *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), cert. granted, No. 16-300, 2017 WL 125665 (U.S. Jan. 13, 2017).

9. *Morris*, 834 F.3d at 979.

10. Notice of Appeal, *Morris v. Ernst & Young, LLP*, 2013 WL 3460052 (No. 5:12-cv-04964-RMW).

11. 29 U.S.C. § 157.

12. The Second, Fifth, Seventh, Eighth, and Ninth Circuits have all weighed in on this question. The Second Circuit’s opinion in *Sutherland v. Ernst & Young*, 726 F.3d 290 (2d Cir. 2013), is omitted from this discussion because the key issue in that case—whether class procedures are required to make possible the vindication of negative value claims—was resolved by the Supreme Court in *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

13. *In re D. R. Horton, Inc.*, 357 NLRB 2277 (2012).

14. *Id.* at 2279.

The Board noted that the NLRB and the courts have long “recognized that collective enforcement of legal rights in court or arbitration serves [the] congressional purpose” of the NLRA.¹⁵ Furthermore, according to the Board, “[w]herever private contracts conflict with [the Board’s] functions of preventing unfair labor practices, they obviously must yield or the Act would be reduced to a futility.”¹⁶ Because class-action waivers violate the substantive rights guaranteed by section 7 of the NLRA, they constitute an “unfair labor practice”,¹⁷ and therefore a contract containing such a waiver must yield to the NLRA’s protections of workers’ rights to act collectively.¹⁸

The first appeals court to weigh in on the issue was in *D.R. Horton, Inc. v. NLRB*, where the Fifth Circuit overturned the Board’s interpretation of an arbitration clause as violating the NLRA.¹⁹ In that case, the direct appeal from the above NLRB decision, a panel of the Fifth Circuit held that in a conflict between section 7 of the NLRA and section 2 of the FAA, the NLRA’s protections must give way.²⁰ The court first acknowledged that, although there is a “federal policy favoring arbitration,”²¹ arbitration cannot be used to deny a party any substantive right.²² However, the Fifth Circuit decided that the use of class-action procedures “is not a substantive right.”²³

Furthermore, in the Fifth Circuit’s view, the use of class procedures does not implicate either of the two exceptions to the FAA: (1) its savings clause, which allows arbitration agreements to be defeated by standard contract defenses, or (2) a conflicting congressional command indicating intent to supersede the FAA. First, the use of class procedures would add additional procedural requirements to any arbitration, and therefore “[r]equiring a class mechanism is an actual impediment to arbitration and violates the FAA.”²⁴ As a result, “the savings clause is not a basis for invalidating the waiver of class procedures in the arbitration agreement.”²⁵ Second, the NLRA’s promise of concerted activity does not constitute a clear contrary congressional command against arbitration because “statutory references to causes of action, filings in court, or allowing suits all have been found

15. *Id.*

16. *Id.* at 2281.

17. See National Labor Relations Act § 8, 29 U.S.C. § 158 (2012) (“It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [Section 7] of this [Act].”)

18. *Id.*

19. 737 F.3d 344 (5th Cir. 2013).

20. *Id.* at 357. FAA § 2 provides that all arbitration contracts are enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (2012).

21. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1742 (2011).

22. *D.R. Horton*, 737 F.3d at 357.

23. *Id.*

24. *Id.* at 360.

25. *Id.*

insufficient to infer a congressional command against application of the FAA.”²⁶ For these reasons, the Fifth Circuit overturned the NLRB’s decision to invalidate the class waiver in *D.R. Horton*’s arbitration agreement.

The Eighth Circuit weighed in on the question that same year in *Owen v. Bristol Care Inc.*²⁷ The court briefly addressed the issue presented by section 7 of the NLRA—specifically, whether the NLRA constitutes a congressional command to override the FAA.²⁸ That court held that although the NLRA was passed after the FAA’s original enactment, the fact that the FAA was reenacted twelve years after the NLRA’s passage indicates “that Congress intended its arbitration protections to remain intact.”²⁹ The court therefore concluded that the NLRA does not provide a clear contrary Congressional command to supersede the FAA.³⁰

Two years later, in 2015, this same issue came again before the Fifth Circuit, this time in *Murphy Oil v. NLRB*.³¹ Like *D.R. Horton*, *Murphy Oil* involved a direct appeal from an NLRB decision. The Fifth Circuit used this opportunity to admonish the NLRB for failing to follow the Circuit’s decision in *D.R. Horton*, and, relying substantially on its opinion in that case, the Fifth Circuit reached the same holding that the NLRA’s concerted activity protections do not apply to class-arbitration waivers.³²

A circuit split on the question did not manifest until 2016 when the issue reached the Seventh Circuit in *Lewis v. Epic Systems Corp.*³³ In that case, the Seventh Circuit became the first court of appeals to find that section 7’s protections for concerted activity do guarantee the right to bring claims in arbitration as a class, and that class waivers satisfy the exception to the FAA granted by its savings clause without causing a conflict between statutes. The court found that section 7 is not ambiguous—its plain language protects the rights of employees to “band together in confronting an employer regarding the terms and conditions of their employment. Congress gave no indication that [it] intended to limit this protection to situations in which an employee’s activity and that of his fellow employees combine with one another in any particular way.”³⁴ Even if the statute were ambiguous, the court reasoned that it should defer to the NLRB’s interpretation because the Supreme Court has directed that Chevron deference applies to NLRB decisions,³⁵ and the

26. *Id.* at 361.

27. 702 F.3d 1050 (8th Cir. 2013).

28. *Id.* at 1053.

29. *Id.*

30. *Id.*

31. 808 F.3d 1013 (5th Cir. 2015).

32. *Id.* at 1018.

33. 823 F.3d 1147 (7th Cir. 2016).

34. *Id.* at 1153 (internal quotations and citations omitted).

35. See *Chevron v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (establishing a two part test for determining whether agency interpretation of a statute is owed judicial deference: (1) where the statute

Board's decision in *D.R. Horton* was a reasonable interpretation of the statute.³⁶

Furthermore, the court found that there is no conflict between the NLRA and the FAA. The court applied the canon of statutory construction that “when two statutes are capable of co-existence . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”³⁷ Here, the court found the two statutes can coexist because the FAA’s “savings clause” bars the enforcement of an agreement to arbitrate if the agreement itself is invalidated by any standard contract defense, such as illegality.³⁸ “Because the provision at issue is unlawful under Section 7 of the NLRA,” the court held, “it is illegal, and meets the criteria of the FAA’s savings clause for nonenforcement. Here, the NLRA and FAA work hand in glove.”³⁹

Today, the Ninth Circuit decision is pending review by the Supreme Court.⁴⁰ In its petition for certiorari, petitioner Ernst & Young cites unique facts rendering this case ideal for review—namely, the successful defense of its arbitration agreement within the Second Circuit,⁴¹ and the opposite result on the same clause reached by the Ninth Circuit.⁴²

IV. Ninth Circuit Decision

In its *Morris* opinion, the Ninth Circuit adopted much of the same reasoning as that advanced by the Seventh Circuit in *Lewis*, and framed some portions of its opinion in more forceful terms. In its opinion, the court first upheld the NLRB’s interpretation under *Chevron*. Second, the majority explained how the FAA can co-exist with the NLRA, interpreting the right to concerted activity as a substantive right. Finally, the court relied upon this substantive right (as opposed to procedural rights) to distinguish precedent.

First, Chief Judge Sidney Thomas began his opinion for the majority by noting that Supreme Court precedent dictates that NLRB decisions be evaluated under the *Chevron* deference framework.⁴³ The first step in this analysis requires the court to determine whether the statute is ambiguous or

is unambiguous, the agency must follow the clear intent of Congress, and (2) where the statute is ambiguous, courts must defer to reasonable agency interpretations of the statutory language).

36. *Lewis*, 823 F.3d at 1153.

37. *Id.* at 1157.

38. *Id.*

39. *Id.*

40. *Ernst & Young*, 2017 WL 125665, at *1 (granting petition for writ of certiorari).

41. See *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290 (2d Cir. 2013). While the Second Circuit reversed the district court’s decision to deny a motion to compel arbitration, it did so on other grounds. *Id.*

42. Petition for Writ of Certiorari at 11, *Ernst & Young LLP v. Morris*, No. 16-300, 2017 WL 125665 (U.S. Jan. 13, 2017).

43. *Morris*, 834 F.3d at 980-81; for a brief overview of the *Chevron* test, see *supra* note 35.

if “congress has directly spoken to the precise question at issue.”⁴⁴ The panel held that the “intent of Congress is clear” in enacting section 7 of the NLRA: “Section 7’s mutual aid or protection clause includes the substantive right to collectively ‘seek to improve working conditions through resort to administrative and judicial forums.’”⁴⁵ Section 8 of the NLRA does not allow an employer to “defeat the right by requiring employees to pursue all work-related legal claims individually.”⁴⁶ Because the panel found the statute to be clear on this point, it found no need to determine whether the agency’s interpretation of the statute is reasonable. Instead, it found that the reading given to the statute by the NLRB was the only permissible reading.⁴⁷ Thus, a contractual provision which interferes with the NLRA’s promise that employees may engage in concerted activity is unlawful under section 8 of the NLRA.

Second, the court held that “[t]he Federal Arbitration Act does not dictate a contrary result.”⁴⁸ In accord with the Seventh Circuit’s analysis in *Lewis*, the Ninth Circuit held that the FAA does not conflict with the NLRA because the FAA’s savings clause “recognizes a general contract defense of illegality.”⁴⁹ According to the panel, the right to concerted activity under section 7 of the NLRA is “the central, fundamental protection of the Act,” and is therefore a substantive right that cannot be extinguished by an agreement to arbitrate.⁵⁰

Finally, the majority relied in large part on the distinction between “substantive” rights and “procedural” rights, resting on its interpretation of section 7’s protections as a substantive right to distinguish *Morris* from other cases involving the waiver of mere procedural rights in arbitration agreements.⁵¹ For example, certain cases liberally cited by the Fifth Circuit opinions and the *Morris* dissent, such as *CompuCredit*, *Gilmer*, and *Italian Colors*, involve choice-of-judicial-forum clauses.⁵² The issue in those cases was whether claims could proceed in a judicial forum at all—they engaged the distinction “between a statute’s basic guarantee and the various ways litigants may go about vindicating it.”⁵³ In contrast, the majority

44. *Morris*, 834 F.3d at 981 (quoting *Chevron v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)).

45. *Id.* at 983 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978)).

46. *Id.*

47. *Id.*

48. *Id.* at 984; *see also Lewis v. Epic Systems Corp.*, 823 F.3d 1147, 1157 (7th Cir. 2016).

49. *Morris*, 834 F.3d at 984.

50. *Id.* at 985-86.

51. *Id.*

52. *See, e.g., id.* at 986 (Ikuta, J. dissenting) (citing *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013)); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 360 (5th Cir. 2013) (citing *CompuCredit Corp v. Greenwood*, 132 S. Ct. 665, 669 (2012); *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991)).

53. *Morris*, 834 F.3d at 987.

characterized this case as about whether litigants can waive the chief protections of the NLRA in an arbitration agreement.⁵⁴ The majority in *Morris* also clearly distinguished the case at hand from other past arbitration decisions, and notably from *Concepcion*.⁵⁵ He noted that there are three key differences between this case and other challenges to arbitration agreements that might fail under *Concepcion*.⁵⁶ First, the contract at issue waived a substantive federal right and therefore “it is accurate to characterize its terms as ‘illegal.’”⁵⁷ Second, “the enforcement defense in this case has nothing to do with the adequacy of arbitration proceedings,” but rather the illegality of the contract terms.⁵⁸ Third, “the enforcement defense in this case “does not specially disfavor arbitration.” Instead the court merely confirmed that substantive federal rights “continue to apply” in *any* forum chosen for dispute resolution, whether it be courts, arbitration, or even “rolls of the dice or tarot cards.”⁵⁹

V. Analysis

As the Supreme Court has time and again reinforced the reach and power of the Federal Arbitration Act, resolution of this issue will be an important testing ground to establish what limits, if any, parties to a contract might have in crafting and enforcing agreements to arbitrate. If the Supreme Court agrees with the Seventh and Ninth Circuits, the Court’s decision could breathe life back into employees’ ability to hold their employers accountable in court for illegal business practices. If the Court is instead persuaded by the Fifth and Eighth Circuits, its decision could render arbitration agreements nearly ironclad. Most employees, especially those working for large companies, could be required to individually arbitrate any dispute with their employer, which could in turn make most claims too expensive to bring and effectively insulate those employers from liability for illegal business practices.

Importantly, under *CompuCredit*, once the arbitration agreement is enforceable, the agreement must be enforced “according to [its] terms,”⁶⁰ which presumably includes terms that mandate individual, rather than group dispute resolution. Only if one of two exceptions are met will an arbitration term potentially give way: “(1) an arbitration agreement may be invalidated on any ground that would invalidate a contract under the FAA’s ‘savings

54. *Id.*

55. *Id.* at 988-89.

56. *Id.*

57. *Id.* at 988.

58. *Id.* at 988-89.

59. *Id.* at 989.

60. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012).

clause,’ . . . and (2) application of the FAA may be precluded by another statute’s contrary congressional command.”⁶¹

In other words, the key question here is whether the NLRA and the FAA may coexist; that is, whether an arbitration agreement that mandates individual resolution may be stricken as violating the NLRA’s right to concerted activity, without simultaneously overriding the purpose and effect of the FAA. If the Board is correct that the right to concerted activity is, in fact, “the central, fundamental protection of the [NLRA],”⁶² then any contract term that abridges that right is illegal under section 8, which deems interference with those rights to be an “unfair labor practice.”⁶³ As a defense against contract enforcement at common law, illegality would similarly “invalidate a contract under the FAA’s ‘savings clause,’” thereby allowing both statutes to coexist perfectly. If, however, the right to concerted activity is procedural, then one of the statutes must give way, and the Fifth Circuit is correct in finding clear Supreme Court precedent upholding an agreement to arbitrate against a merely procedural guarantee.

The Supreme Court has the option to issue a narrow holding by affirming the Seventh and Ninth Circuits’ deference under *Chevron* to the NLRB’s interpretation of the National Labor Relations Act.⁶⁴ The Fifth Circuit is undoubtedly correct that the NLRB is not owed deference in its interpretation of the FAA or reading of statutory conflicts therewith. Nonetheless, the ultimate finding in the Board’s *D.R. Horton* decision that section 7 of the NLRA creates a *substantive* right to concerted activity is a reasonable interpretation of the statute it is charged with interpreting and thus an important starting point for analysis.⁶⁵ Accordingly, the Fifth Circuit errs by failing to engage with the argument that arbitration agreements waiving concerted activity would be illegal and thus unenforceable under the FAA’s savings clause. Once the Court reaches the seemingly inevitable conclusion that the NLRA creates a substantive right (either as deference under *Chevron*

61. *D.R. Horton*, 737 F.3d at 358 (citations omitted).

62. *Morris*, 834 F.3d at 986.

63. National Labor Relations Act, 29 U.S.C. § 158 (2012).

64. See *Morris*, 834 F.3d at 982-83; *Lewis v. Epic Systems Corp.*, 823 F.3d 1147, 1153-54 (7th Cir. 2016). As of this writing, Judge Neil Gorsuch has been confirmed to the United States Supreme Court. His record suggests an aversion to *Chevron* deference, and thus his participation in this case will be a wildcard in the Court’s ultimate process interpreting the NLRA. Joseph Crusham, *A World Without Chevron: Implications of Gorsuch’s Likely Confirmation*, CALIF. L. REV. ONLINE BLOG (Mar. 23, 2017), <http://www.californialawreview.org/a-world-without-chevron>.

65. Section 7 of the NLRA grants workers the right “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157 (2012). This provision of the act could be reasonably interpreted to grant the right to file class actions against employers because class actions are, by their nature, a concerted activity. *Cf.* Fed. R. Civ. P. 23(a)(1) (requiring a class to be “so numerous that joinder of all members is impracticable”). Such suits often require many employees to join together in order to enforce their rights under statutes, the common law, contract, or the Constitution. By doing so, the employees clearly engage in “mutual aid or protection.”

to the NLRB's reasonable interpretation of the statute or through its own conclusion that the NLRA is unambiguous), the savings clause of the FAA would then allow the Court to avoid any further broad-reaching jurisprudence on the FAA. In essence, the court would thus vindicate the plaintiffs' right to concerted activity, be it in courtroom litigation or arbitration, and would then remand to the district court to determine whether the individual action clause is severable from the arbitration agreement.

However, if the Court were to follow the Fifth Circuit's lead, ignoring the seemingly clear *Chevron* implications of the question presented and instead finding that any right to group dispute resolution is a procedural right, the Court could cement the FAA's supremacy. The distinction whether the NLRA's protection of concerted activity is a substantive right or a procedural right is key because the FAA does not require a party to forego substantive statutory rights. As the Supreme Court has put it "[by] 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."⁶⁶ So, if the Court avoids the *Chevron* question (or decides that the NLRB's decision in *D.R. Horton*⁶⁷ interprets the FAA instead of the NLRA and is thus not owed deference) it would be free to decide on its own that the right at issue is procedural. If it so decides, then the FAA necessarily trumps the NLRA because the parties have agreed, by contract, to submit their dispute to an arbitral forum, which, by its nature, has procedures different from those available in court.

However the Court comes out on this issue, the implications are vast for employment law. If the Court finds that employees can waive their right to concerted proceedings in an arbitration agreement, it would make it significantly harder for employees (and especially for low-wage workers who have little bargaining power with their employer) to bring claims in court against their employer. Other than defenses like procedural unconscionability or lack of mutual assent, almost any arbitration agreement would be enforceable. This will continue the "rendition" of public law litigation out of the light and into a "black site of quasi-adjudication."⁶⁸

If, however, the Court finds that class waivers are illegal waivers of substantive rights guaranteed by the NLRA, employees could again be free to enforce their rights against their employers in court. Although employers would still be able to rely on the FAA to compel class arbitration over class litigation, if employers find that the predictability and appealability of class actions are preferable to class arbitration, they may themselves opt to proceed

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

67. *In re D. R. Horton, Inc.*, 357 NLRB 2277 (2012).

68. Linda Krieger, "The Limits of Title VII and Equal Protection Doctrine" at the Berkeley Journal of Employment and Labor Law Symposium: The Future of Discrimination Law: Frameworks, Theory, Practice, and People (Mar. 10, 2017).

in court. For example, class arbitration could expose employers to massive liability without recourse to appeal an unfavorable decision. In addition, class arbitration lacks the clear procedural protections promised by Rule 23, which serve to guarantee that any decision rendered in such a proceeding will have a preclusive effect on certain absent parties.⁶⁹ Analogously, plaintiffs' attorneys may prefer to bring their claims in court because Rule 23 offers predictable, well-established standards for class certification and offers attorneys' fees to prevailing plaintiffs that may not be available in arbitration.⁷⁰ Thus, a plausible effect of a Supreme Court ruling in favor of the plaintiff in this case is that employers will only enforce arbitration agreements in cases involving individual claims and choose to litigate class claims in court.

VI. Conclusion

Unlike other areas of contract law, employment contracts may finally prove to be a crack in the seemingly invincible body of FAA jurisprudence promulgated by the Supreme Court. The National Labor Relations Act here provides this opening by creating a right for employees to pursue their employment disputes together, and the Supreme Court should follow the Board's interpretation that the Act creates a substantive right to collective dispute resolution that cannot be waived by contract.

Morris v. Ernst & Young demonstrates the potential impact of this reading of the NLRA—the underlying claims are for overtime wages (and associated penalties), which individually may be relatively minor and unlikely to be enough that an attorney would take the case. While the Supreme Court has turned its back on this class of small claims—characterized by the dissent in *Italian Colors* as retorting “Too darn bad”⁷¹—this interpretation of the NLRA reinvigorates the ability of employees to work together to vindicate their rights. Thus, the Ninth Circuit was astute to recognize that the case is not really about arbitration. Rather, it is at its core a question of labor rights and the ability of workers to join together to hold their employers accountable in a court of law: a distinction the Supreme Court should take to heart.

Adam Koshkin, J.D. 2017 (U.C. Berkeley)

Kiet Lam, J.D. 2018 (U.C. Berkeley)

69. See Fed. R. Civ. P. 23(b)(3) (requiring that plaintiffs in class actions seeking monetary relief show that common questions predominate, that the class action device would be superior to other forms of adjudication, and that all absent parties be notified and have an opportunity to opt out).

70. Fed. R. Civ. P. 23(h).

71. *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2313 (2013) (Kagan, J., dissenting).