# IN THE UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

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No. 16-60186

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SF MARKETS, L.L.C., doing business as Sprouts Farmers Market,

Petitioner Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent Cross-Petitioner


**A True Copy**
**Certified order issued Jul 26, 2016**

Tyke W. Cayce

**Clerk, U.S. Court of Appeals, Fifth Circuit**

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Petitions for Review of an Order of the
National Labor Relations Board

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Before JOLLY, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the opposed renewed motion of the petitioner cross-respondent for summary disposition is GRANTED.

JAMES L. DENNIS, Circuit Judge, concurring.

I must concur with my colleagues to the extent *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), and *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), control this panel's disposition. *See, e.g., Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) ("[O]ne panel of our court may not overturn another panel's decision, absent an intervening change in the law . . . ." (citation omitted)). However, I write separately to urge the full court to reconsider the question presented by this case in light of the Seventh Circuit's recent opinion in *Lewis v. Epic Systems Corp.*, ___ F.3d ___, No. 15-2997, 2016 WL 3029464 (7th Cir. May 26, 2016).

A panel of this court has held that the National Labor Relations Board did not give "proper weight" to the Federal Arbitration Act ("FAA") in determining that employment contracts prohibiting collective actions in any arbitral or judicial forum violate the National Labor Relations Act ("NLRA"). *D.R. Horton*, 737 F.3d at 348. In so doing, the panel relied heavily on the Supreme Court's holding in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). *See D.R. Horton*, 737 F.3d at 359. *Concepcion*, however, held that the FAA preempts state laws that interfere with arbitration agreements. 563 U.S. at 352. As the inquiry here involves two potentially conflicting federal statutes, extensive reliance on

*Concepcion* was unwarranted. I believe that Chief Judge Wood's opinion in *Lewis* frames the issue more appropriately by analyzing the FAA and the NLRA pursuant to a strong presumption of reconcilability. 2016 WL 3029464, at *7; *accord In re Mirant Corp.*, 378 F.3d 511, 517 (5th Cir. 2004) ("When faced with a conflict between two statutes, courts must attempt to interpret them so as to give effect to both statutes." (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974))). In light of this presumption, the saving clause of the FAA, 9 U.S.C. § 2, which states an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract[,]" should more than suffice to reconcile the FAA with the Board's interpretation of the NLRA. *See Lewis*, 2016 WL 3029464, at *6.

Given the inter-circuit conflict generated by the well-reasoned opinion in *Lewis*, I urge our court to reconsider this issue en banc.