EPIC BACKSLIDE: THE SUPREME COURT ENDORSES MANDATORY INDIVIDUAL ARBITRATION AGREEMENTS— #TIMESUP ON WORKERS' RIGHTS

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INTRODUCTION

In the 2018 term, the United States Supreme Court dealt a serious blow to workers' rights. In one of the "most important business case[s] of the term,"[1] the Court consolidated three cases, *Epic Systems Corp. v. Lewis*, *Ernst & Young v. Morris*, and *NLRB v. Murphy Oil*, to address the validity of mandatory arbitration provisions with class and collective waivers.[2] Building on precedent consistently favoring business interests,[3] the Supreme Court's five-to-four decision

1. *See* Robert Barnes, *Supreme Court Rules That Companies Can Require Workers to Accept Individual Arbitration*, WASH. POST (May 21, 2018), https://perma.cc/BV3W-P3C9 (archived Jan. 17, 2019).

2. Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017). The Supreme Court consolidated this case with two additional cases: Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016); Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015). The question presented was "[w]hether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act." Petition for Writ of Certiorari, Epic Sys., 137 S. Ct. 809 (No. 16-286). All three of the cases the Court consolidated involved claims brought by employees under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-2 (2017). The FLSA provides for minimum wage and overtime, child labor protections, etc. For an overview of the law, *see* Compliance Assistance—Wages and the Fair Labor Standards Act (FLSA), U.S. DEP'T. OF LAB., https://perma.cc/CTR4-EPXR (archived Jan. 17, 2019) (for an overview of the law). The employees sought relief as a group despite being subject to mandatory individual arbitration provisions.

3. This trend began in 1991. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (upholding compulsory arbitration in cases involving age discrimination claims). The

extended this jurisprudence to the employment sector, giving employers the power to insist that employees arbitrate work-related claims on an individual basis.

The outcome of the case was not surprising to those who have followed this issue, but it is, nevertheless, disappointing in its failure to recognize employees' rights. The three cases decided by the Supreme Court in *Epic Systems* involved wage and hour claims. But the Court's decision impacts all employment disputes—whether claims involve overtime pay, sexual harassment, or discrimination in the workplace. As many as sixty million workers are subject to forced arbitration provisions and nearly twenty-five million workers are subject to employment agreements that require them to arbitrate workplace disputes on an individual basis.[4] The Court's decision is likely to encourage more employers to require individual arbitration as a condition of employment.

While arbitration may be an appropriate method of resolving disputes in many situations, mandatory individual arbitration for employees raises serious issues of fairness, particularly for low-wage employees. Arbitration provisions are presented to employees as a condition of employment, on a take-it-or-leave-it basis. The vast majority of employees are not in a position to negotiate such agreements. The reality is that individual arbitration leaves many employees without a viable forum to bring their small claim. Employees may not choose to bring cases on their own for a variety of reasons, including fear of retaliation and distrust of the decision maker, who is usually selected by the employer.[5] Furthermore, it is difficult to find an attorney to represent individual employees where the amount of recovery is small, especially in wage and hour cases. In addition to these problems, the secrecy of arbitration proceedings allows problems in the workplace, such as certain types of wage theft (as illustrated in the cases consolidated before the Court), sexual harassment, and discrimination, to persist.[6]

trend has accelerated. *See, e.g.*, DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015) (upholding arbitration clause provisions in unilateral consumer service agreement); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013) (same, in context of a merchant agreement); AT&T Mobility, LLC v. Concepcion, 563 U.S. 333 (2011) (same, in context of consumer product and service agreement); *see also* Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 Minn. L. Rev. 1431, 1470-72 (2013) (concluding after studying databases of Supreme Court decisions involving business interests from 1946-2011 that the Roberts Court is much friendlier to business than the Burger or Rehnquist Courts were and that the United States has grown more conservative since the 1960s); Kent Greenfield & Adam Winkler, *Big Business Keeps Winning at the Supreme Court,* Atlantic (July 2, 2018), https://perma.cc/9W39-VTSU (archived Jan. 17, 2019) (discussing streak of Supreme Court decisions where businesses won, including *Epic Systems*).

4. *See* Alexander J. S. Colvin, *The Growing Use of Mandatory Arbitration*, Econ. Pol'y Inst. 5-6 (Sept. 27, 2017), https://perma.cc/8HKU-4AG7 (archived Jan. 17, 2019).

5. *See* Najah Farley, *How the US Supreme Court Could Silence #MeToo*, Guardian (Apr. 18, 2018), https://perma.cc/Q29M-NNHH (archived Jan. 17, 2019); Forced Arbitration, Am. Ass'n for Just., https://perma.cc/L7F4-TTEW (archived Jan. 17, 2019).

6. *See Forced Arbitration Silences Sexually Harassed Workers and Leaves Employees Exposed*, Emp. Rights Advocacy Inst. for Law & Policy, https://perma.cc/FV36-TPZL (archived Jan. 17, 2019); Sharon Florentine, *What the Supreme Court Ruling on Arbitration*

Cases involving sexual harassment have brought attention to the difficulties arbitration agreements create for employees. As a result of the #MeToo movement, some companies have voluntarily agreed to prohibit mandatory arbitration agreements in cases involving sexual harassment in the workplace.[7] In response to public outcry, Congress could (and should) take note and pass legislation that specifically prohibits employers from requiring employees to sign such agreements. Cases involving workers' wage and hour claims involve harm of a very different nature, but the problems associated with forced arbitration in such cases are similar to those in any employment context. And while the harm to individual employees may be meager in terms of dollars, wage theft is a serious issue, amounting to billions of dollars each year.[8] Hopefully, as Congress looks at the difficulties victims of sexual harassment face when required to arbitrate, it will also take note of the plight of low-wage workers who face their own set of challenges as a result of individual arbitration agreements.

Employee advocates had hoped that the *Epic Systems* decision would bring to the forefront the importance of employees' right to band together to confront employers over workplace conditions. Supporters pinned their hopes on language in the National Labor Relations Act (NLRA) guaranteeing employees the right to "concerted activity for their mutual aid and protection."[9] Mandatory individual arbitration, employees argued, infringes on the right to concerted action; consequently, such agreements should be considered illegal. The Court, however, held that nothing in the NLRA overrides the Federal Arbitration Act's (FAA) requirement that arbitration agreements be enforced as written. The Court's decision focuses on how the two federal statutes interact, and the burden that class and collective actions impose on employers. The decision largely avoids any discussion of the impact mandatory individual arbitration has on employees and their ability to enforce workplace protections.

Means for #MeToo, CIO: Diverse-IT (May 25, 2018), https://perma.cc/BXL3-R4AJ (archived Jan. 17, 2019); Ben Schiller, *Companies Steal $15 Billion From Their Employees Every Year*, Fast Company (May 15, 2017), https://perma.cc/9VEN-2YQA (archived Jan. 17, 2019).

7. Recently, a number of companies announced they no longer require arbitration clauses and, further, that they support legislation barring mandatory arbitration in cases involving sexual harassment and discrimination in the workplace. *See* Florentine, *supra* note 6. Google and Facebook both announced that they will no longer require sexual harassment claims to go to arbitration, but those following this phenomenon fear the trend may be limited to the tech world where employees have significant power because of their sought-after talent and the companies' concern about public opinion due to their consumer orientation. *See* Braden Campbell, *Employers May Follow Tech Titans' Lead on Arbitration*, Law360 (Nov. 16, 2018), https://perma.cc/PG97-7KNC (archived Jan. 17, 2019) (citing Professor Charlotte Garden predicting that the "trend may have short legs" and management attorney Michelle Phillips of Jackson Lewis noting that this trend has not spread to the finance industry). Amazon has never used such clauses in its employment contracts.

8. *See* Schiller, *supra* note 6.

9. 29 U.S.C § 102 (2017).

This article considers the repercussions of the Court's decision and what options workers now have to effectively vindicate their rights. Part I explains the rise of mandatory arbitration agreements and how this rise provoked a conflict between the goals of two federal statutes, the FAA and the NLRA. It then summarizes the Court's pro-arbitration decisions and the circuit split that led to the *Epic Systems* decision. Part II summarizes the Court's decision and Justice Ginsburg's passionate dissent. Part III calls attention to the many shortcomings in the Court's decision with the goal of rousing Congress to pass legislation requiring employers to preserve some means of collective action to resolve workplace disputes. Part IV presents the few options still available to employees seeking redress in wage and hour disputes after the Court's decision in *Epic Systems*.

I. SETTING THE STAGE FOR THE COURT'S DECISION

A. The Growth and Impact of Mandatory Individual Arbitration Agreements

Mandatory individual arbitration agreements impact millions of workers in the United States. Professor Alexander Colvin, an expert in labor relations and conflict resolution, authored a recent report for the Economic Policy Institute in which he noted that in the aftermath of the Supreme Court's line of pro-arbitration decisions the number of mandatory arbitration provisions affecting non-union workers rose from just over 2 percent to 55 percent.[10] Such agreements typically require employees to waive their right of access to courts. Slightly more than 30 percent of such agreements require employees to arbitrate individually rather than as a group and thereby to waive any rights to a class action lawsuit or class arbitration.[11] Class action waivers are more prevalent in large companies, where over 40 percent of those subjected to mandatory arbitration are limited to individual process.[12] Large companies fear class action litigation—and labor and employment matters comprise the largest percentage of class action lawsuits.[13] Colvin notes that human resource departments at large companies focus on strategies to avoid liability, such as mandatory arbitration provisions. Smaller companies may be influenced by the success of such strategies and adopt mandatory arbitration provisions.[14] In his report, Professor Colvin estimates that over sixty million private sector, non-union American workers have lost their right to go to

10. Colvin, *supra* note 4, at 1.

11. *Id.* at 2.

12. *Id.*

13. *See* The 2018 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation, CARLTON FIELDS 2, https://perma.cc/LN9R-U5XT (archived Jan. 17, 2019). The annual survey details how much companies spend on class action litigation, which types of suits are most prevalent, and how companies manage the threat of class action litigation. *Id.* In 2017, labor and employment cases comprised 24.7% of class actions. *Id.*

14. Colvin, *supra* note 4, at 5.

court regarding alleged employment rights violations because they are subject to mandatory arbitration provisions.[15]

Similarly, the Employee Rights Advocacy Institute for Law and Policy found that of the largest 100 domestic U.S. companies as ranked by Fortune magazine 80 percent used arbitration agreements for workplace related disputes since 2010 and, of those eighty companies, thirty-nine included class action waivers.[16] The sheer number of workers governed by these provisions makes the issue one of great importance.

Numerous scholars and jurists have questioned the fairness of mandatory individual arbitration agreements.[17] Employees face many disadvantages in arbitration: the employer controls the arbitration process, including selection of the provider; employees lose more frequently in arbitration than in court; and employees who prevail in arbitration collect smaller damage awards than employees who prevail in court.[18]

The agreements the Court upheld in *Epic Systems* involved non-union employees who truly had to bring their claim alone, without the help of similarly situated employees. Employees who are represented by a union bring claims under the union's collective bargaining agreement, where the union and management select the arbitrators.[19] In the non-union context, the employer controls the dispute resolution process. The employer imposes mandatory arbitration on workers and maintains numerous advantages for itself, creating due process concerns.[20] Without the benefit of co-workers to join with him in a claim, an individual worker may lack both the resources and the ability to find legal representation.[21]

15. *Id.*

16. Imre S. Szalai, *The Widespread Use of Workplace Arbitration Among America's Top 100 Companies*, Emp. Rights Advocacy Inst. for Law & Policy 4 (Sept. 27, 2017), https://perma.cc/KJH4-N6UY (archived Jan. 17, 2019). Inclusion on this list was determined by total company revenue, and the author noted that the top 100 companies represent more than 40 percent of the Gross Domestic Product of the United States. *Id.* at 12 n.ii.

17. *See generally* Michael H. LeRoy, *Misguided Fairness?—Regulating Arbitration by Statute: Empirical Evidence of Declining Award Finality*, 83 Notre Dame L. Rev. 551 (2008); James P. Nehf, *The Impact of Mandatory Arbitration on the Common Law Regulation of Standard Terms in Consumer Contracts*, 85 Geo. Wash. L. Rev. 1692 (2017); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 Stan. L. Rev. 1631 (2005).

18. Colvin, *supra* note 4, at 3; *see also* Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Briefing Paper No. 414*, Econ. Pol'y Inst. 10-14, 18-23 (Dec. 7, 2015), https://perma.cc/88XX-PH82 (archived Jan. 17, 2019) (detailing the many ways mandatory arbitration deprives workers of their rights).

19. Colvin, *supra* note 4, at 3. The Court has long recognized arbitration as a method for resolving employment disputes in the union context. In *Textile Workers Union v. Lincoln Mills*, the Supreme Court held that courts could enforce arbitration agreements in collective bargaining agreements because such provisions are negotiated by the union and management. 353 U.S. 448, 457-58 (1957).

20. Colvin, *supra* note 4, at 7.

21. Colvin, *supra* note 4, at 5-6; *see also* Stone & Colvin, *supra* note 18, at 22.

While mandatory arbitration agreements with class waivers impact claims under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Family Medical Leave Act, such agreements have a particularly strong impact on wage and hour claims brought under the Fair Labor Standards Act. Perhaps the most disturbing repercussion of the increasingly widespread use of mandatory individual arbitration agreements is that employers require them precisely because they know that employees are unlikely to bring individual claims. Empirical research confirms that few employees are likely to pursue individual claims.[22] Employees are more likely to decline to file claims to vindicate rights they are entitled to by law, which emboldens employers to flout the law, confident that they will not face penalties and may profit from wage theft or other violations.[23] Professor Cynthia Estlund's study of mandatory arbitration agreements concluded that "a large share of all legal disputes between individuals (consumers and employees) and corporations—simply evaporate before they are even filed."[24] Estlund terms this evaporation of claims the "black hole of mandatory arbitration," a title that captures the reality that very few cases involving individual employees are brought to arbitration.[25] Estlund notes that employees are particularly unlikely to pursue wage and hour claims because they involve "incremental pay disparities over a few years" and "the cost of litigating them as an individual often exceeds the expected returns."[26]

Potential damages in wage and hour claims are small from both an individual employee's perspective as well as an attorney's perspective. But wage theft is a serious problem. In 2017, the Economic Policy Institute Report showed that employers steal billions from workers' paychecks each year and that wage exploitation is often a business model for some employers.[27] Penalties for noncompliance are insufficient to deter the behavior.[28] Thus, without the ability to take legal

22. Colvin, *supra* note 4, at 5-6; *see also* Stone & Colvin, *supra* note 18, at 22. For an excellent discussion of how the current legal system fails those who are "most vulnerable to workplace rights violations," see Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1071 (2014).

23. Colvin, *supra* note 4, at 7.

24. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 682 (2018).

25. Estlund, *supra* note 24, at 699-700.

26. *Id.* at 695 (citing Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 427-29 (2006)).

27. *See* Brief for National Academy of Arbitrators as Amicus Curiae Supporting Respondents at 25, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) [hereinafter Academy of Arbitrators Brief] (quoting MARC DOUSSARD, DEGRADED WORK: THE STRUGGLE AT THE BOTTOM OF THE LABOR MARKET 233 (2013)).

28. *See* Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1111 (2012). Ruan notes that the FLSA allows for only liquidated (double) damages and does not allow for punitive damages. *Id.* Underenforcement of wage and hour claims is also a problem

action as a group, employees are often without recourse and employers have a free pass to exploit wage earners.

Despite the numerous disadvantages of mandatory individual arbitration for employees, including that such provisions discourage the vast majority of claims from being pursued at all, the Court's decision in *Epic Systems* makes no mention of the impact that mandatory individual arbitration has on workers, or of how their inability or reluctance to bring claims will diminish enforcement of employment laws overall. Congress passed legislation to protect workers' rights, in recognition of the importance of equality of bargaining power. The Court was unwilling to acknowledge this fundamental concern in its decision, focusing instead on the importance of upholding arbitration agreements. The next section explains how the rise in individual mandatory arbitration sparked a conflict between the goals of the FAA and the NLRA.

B. A Tale of Two Statutes: The Federal Arbitration Act and The National Labor Relations Act

Congress enacted The Federal Arbitration Act in 1925 with a charge to "reverse the longstanding judicial hostility to arbitration agreements" and put such agreements on the "same footing as other contracts."[29] Section 2, the Act's primary substantive provision, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[30]

The clear language of Section 2 indicates that the FAA was intended to address commercial transactions and contracts; it makes no mention of employment agreements. The legislative history of the FAA indicates that the Act was to "enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate commercial disputes."[31] Moreover, Section 1 of the FAA clearly evidenced congressional intent to limit the FAA's application to contracts of employment. Section 1 provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of

because government agencies lack the resources to pursue many meritorious claims. *Id*. at 1112.

29. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991). As Justice Ginsburg states in her dissenting opinion to the *Epic Systems* decision, "courts routinely declined to order specific performance of arbitration agreements" before the FAA was passed, leading the business community to seek legislation to make arbitration agreements between merchants more binding. *See Epic Sys.*, 138 S. Ct. at 1642 (Ginsburg, J., dissenting).

30. 9 U.S.C. § 2 (2017).

31. *Epic Sys.*, 138 S. Ct. at 1643 (Ginsburg, J., dissenting).

workers engaged in interstate commerce."[32] This language was added precisely to address concerns raised by Herbert Hoover, then Secretary of Commerce, that workers' contracts should not be subject to the FAA.[33] Thus, in passing the FAA, Congress envisioned enforcing arbitration agreements that were negotiated voluntarily between parties of equal bargaining power. Congress did not envision foisting arbitration agreements on employees who have no bargaining power to negotiate such terms. In *Circuit City Stores, Inc. v. Adams*, however, the Supreme Court interpreted Section 1 of the FAA to exempt only employment contracts for transportation workers rather than for all employees engaged in interstate commerce.[34]

Section 2 of the FAA contains a saving clause that recognizes that some arbitration provisions might be revocable for traditional contract reasons. The clause allows a court to sever any part of the contract that is deemed unenforceable, and allow the rest of the contract to remain enforceable. As discussed in Subpart I.D of this Article, several courts of appeal, as well as the NLRB, have found that the saving clause could be used to reconcile a conflict between the NLRA and the FAA. As discussed in the next Subpart, the Supreme Court has interpreted the FAA broadly and its exemptions narrowly, and has ultimately found the FAA's saving clause inapplicable to preserving the NLRA's substantive employment rights. Had the Court refused to extend the FAA to employment contracts, or had it interpreted the saving clause to apply more broadly, the conflict between the FAA and the NLRA would have been avoided.

The National Labor Relations Act—also known as the Wagner Act after its proponent, New York Senator Robert Wagner—was passed by Congress and signed into law by President Franklin D. Roosevelt in 1935.[35] In the context of labor disputes that resulted in strikes and violence, the statute was enacted to promote labor peace and redress the imbalance of power between employees and their employer.[36] The heart of the NLRA is embodied in Section 7 which guarantees that "[e]mployees shall have the right to self-organization, to form, join,

32. 9 U.S.C. § 1 (2017).

33. *Epic Sys.*, 138 S. Ct. at 1643 (Ginsburg, J., dissenting) (quoting *Hearing on S. 4213 and S. 4214 Before the Subcommittee of the Senate Committee on the Judiciar*y, 67th Cong., 4th Sess. 14 (1923)).

34. 532 U.S. 105, 119 (2001) (providing narrow interpretation of 9 U.S.C. §1 (2017)); *see also* Charles A. Sullivan & Timothy P. Glynn, Horton *Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013, 1035 & n.119 (discussing Supreme Court interpretation of FAA in employment context).

35. National Labor Relations Act (1935), OUR DOCUMENTS, https://perma.cc/M489-BPED (archived Jan. 17, 2019).

36. *See* 29 U.S.C. § 151 (2017) ("The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries. . . . It is hereby declared to be the policy of the United States to eliminate the causes

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."[37] Employees' right to engage in concerted activities and collective bargaining were outlined as the centerpiece of the statute—to provide more equality in bargaining power between employers and employees. In a footnote of a 1945 case, *Brooklyn Savings Bank v. O'Neil*, the Supreme Court stated that "the legislative debates indicate that the prime purpose of the legislation was to aid the unprotected, unorganized, and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage."[38] Thus, when employers require employees to surrender their right to collective action guaranteed by Section 7, they interfere directly with the very purpose of the NLRA.

No conflict between the FAA and the NLRA was apparent until employers began to use arbitration provisions that required class action waivers more frequently. The NLRB and some courts, cognizant of the trend to use mandatory arbitration provisions with class waivers and the resulting challenges that employees faced, believed that the FAA should yield to employees' rights under the NLRA. Some courts, however, found the FAA's language requiring enforcement of arbitration agreements was clear.[39] As demonstrated below, Supreme Court decisions that strongly favored arbitration contributed to the conflict between employees' Section 7 rights to act together and employers' purported right to require class waivers under the FAA.

C. The Supreme Court's Pro-Arbitration/Pro-Employer Precedent

In a series of cases beginning in 1991, the Supreme Court struck down a variety of challenges to arbitration clauses in both consumer and employment contracts. The Court's decisions are unwaveringly pro-arbitration and pro-employer. This section briefly highlights the Court's insistence on upholding arbitration clauses and its interpretation of arbitration as a process that mandates individual arbitration.

In *Gilmer v. Interstate/Johnson Lane Corp*., the Court opened the door to mandatory individual arbitration of employment claims.[40] The plaintiff brought a case under the Age Discrimination in Employment Act, a federal statute that

of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of aid or protection.").

37. 29 U.S.C. § 157 (2017).

38. 324 U.S. 697, 707 n.18 (1945) (citations omitted).

39. *See infra* Part I.D, describing the split among the circuit courts of appeal.

40. 500 U.S. 20 (1991).

specifically permits collective actions.[41] Maintaining that arbitration provides an alternative forum for adjudicating statutory rights, the Court held that even though the statute permits collective action, it does not prohibit an agreement to arbitrate claims individually.[42]

In 2001, the Court further expanded the reach of the FAA in the employment context. In *Circuit City Stores*, the Court read the FAA exemption narrowly, holding that only transportation workers are exempted from FAA coverage.[43] The FAA states that "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" are excluded from coverage.[44]

In 2011, the Court held that consumer contracts with mandatory individual arbitration provisions are also enforceable.[45] The Court's decision in *AT&T Mobility v. Concepcion* emphasized that states may not pass laws that prohibit the arbitration of certain claims.[46] According to the Court, class arbitration interferes with "the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate the procedural morass than final judgment."[47]

In *American Express v. Italian Colors Restaurant,* the Court held that a contract prohibiting class actions or class arbitration was valid, even though it was economically infeasible for the plaintiffs to pursue their claims individually.[48] The plaintiffs involved in the case were merchants seeking antitrust damages from American Express. The costs involved in the antitrust case were substantial, leading the plaintiffs to seek consolidation of their claims. The Court, however, stated that "antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."[49] The Court found nothing in the antitrust laws that indicated class actions could not be waived.[50]

The Court's decisions over the past two decades encouraged employers to require class action waivers as a condition of employment. As more and more employees became bound by mandatory individual arbitration agreements, it was only a matter of time before a conflict between employers and employees erupted over emerging contradictions between the rights guaranteed by the NLRA and the Court's pro-employer interpretation of the FAA. Employees argued that agreements requiring waivers of class or collective action were illegal because

41. *Id.* at 30-32.
42. *Id*. at 32.
43. 532 U.S. 105, 109 (2001).
44. 9 U.S.C. § 1 (2017).
45. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).
46. *Id.* at 341.
47. *Id.* at 348.
48. 570 U.S. 228 (2013).
49. *Id.* at 233.
50. *Id*. at 234.

Section 7's guarantee of "concerted activity" included the right to class or collective legal action, while employers argued that the FAA and the Court's interpretation of the FAA allowed individual arbitration provisions to be enforced as written. The varying resolutions of the perceived conflict or harmonization of the FAA and the NLRA resulted in a circuit split, which is summarized in the following section.

D. The Circuit Court Split

The Supreme Court's decision in *Epic Systems* resolved a circuit split that developed over the last several years. The NLRB, as well as the Seventh and Ninth Circuits, maintained that mandatory individual arbitration agreements violate the NLRA because such agreements illegally interfere with employees' rights to concerted activity.[51] The Fifth Circuit, as well as the Second and Eighth Circuits, maintained that the FAA requires courts to uphold such agreements as written.[52] The major arguments for the two approaches are summarized below.

1. The Fifth and Eighth Circuits Uphold the Validity of Mandatory Individual Arbitration Agreements—Overruling the NLRB and Setting the Stage for a Circuit Split

The circuit split on the issue of the legality of individual arbitration requirements in employment agreements began with the NLRB's 2012 *D.R. Horton* ruling that agreements that prospectively waive the right to pursue class or collective actions are unlawful in light of Section 7 of the NLRA.[53] In its 2014 *Murphy Oil* decision, the NLRB reaffirmed its *D.R. Horton* rule on the rights of employees to engage in collective action by invalidating an employer-imposed agreement requiring employees to waive the right to bring class or collective actions.[54] In *Murphy Oil*, the charging party on the unfair labor practice was Sheila Hobson.[55] Ironically, when Ms. Hobson was hired by Murphy Oil, she was faced with

51. Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016); Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016); Murphy Oil USA, Inc., 361 N.L.R.B. 774 (2014).

52. Cellular Sales, LLC v. NLRB, 824 F.3d 772 (8th Cir. 2016); Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015), *aff'd* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018)); D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013); Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013) (per curiam).

53. 357 N.L.R.B. 277 (2012), *enf. denied in relevant part sub nom.* D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013); *see also* Stephanie 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. 75 (2015) (discussing the NLRB's *Horton* rule and selected federal court decisions on the *Horton* rule).

54. Murphy Oil USA, Inc., 361 N.L.R.B. 774 (2014), *enf. denied in relevant part sub nom*. *Murphy Oil,* 808 F.3d 1013.

55. *Murphy Oil*, 808 F.3d at 1015.

a classic Hobson's choice—a take-it-or-leave-it employment arbitration agreement.[56] After repeated FLSA violations, Ms. Hobson filed a wage and hour lawsuit, along with other similarly affected employees, in federal district court in Alabama.[57] The district court stayed the employees' claim, sending the employees to individual arbitration.[58] Despite the NLRB's conclusion that the *Murphy Oil* arbitration agreement was invalid under the NLRA because it barred collective action in all forums, the Fifth Circuit ruled in 2015 that such agreements were valid as long as they made clear that employees retained the right to file unfair labor practice complaints at the NLRB.[59] The Fifth Circuit's broad reading of the FAA upheld the right of employers to craft private arbitration agreements that ban resolution of claims in court and bar all collective action.[60]

The Fifth Circuit reaffirmed its earlier rule from *D.R. Horton v. NLRB* that the NLRA does not override the FAA and that the use of class procedures is not a substantive right under the NLRA.[61] The appellate court found that D.R. Horton did not commit an unfair labor practice by using its arbitration provision.[62] In *Murphy Oil*, the Fifth Circuit once again followed that rule, and found no need to repeat its reasoning.[63] However, the appellate court did uphold the NLRB's requirement that Murphy Oil revise the provision to provide employees notice that they retained their right to file complaints at the NLRB. Finally, the Fifth Circuit denied the NLRB's petition for an en banc rehearing of the case.[64]

One week after the Seventh Circuit created a circuit split with its *Lewis v. Epic Systems* decision,[65] the Court of Appeals for the Eighth Circuit decided *Cellular Sales of Missouri v. NLRB*, ruling, as the Fifth Circuit did in *D. R. Horton* and *Murphy Oil*, that a collective action waiver in an employment arbitration agreement did not violate the NLRA.[66] The employee filed an unfair labor practice charge and the NLRB ruled that the arbitration agreement violated the NLRA, but the Eighth Circuit found the agreement lawful except for its failure to clarify that employees retained the right to file unfair labor practice charges at the NLRB.[67]

56. "Hobson's choice" is widely understood shorthand for no choice at all. It is defined as "1) an apparently free choice where there is no real alternative, 2) the necessity of accepting one of two or more equally objectionable alternatives." *Hobson's Choice*, MERRIAM-WEBSTER DICTIONARY, https://perma.cc/TV5V-BMCR (archived Jan. 17, 2019).

57. *Murphy Oil*, 808 F.3d at 1015.

58. *Id.* at 1016.

59. *Id.* at 1016-17.

60. *See Murphy Oil*, 808 F. 3d 1013.

61. *Id.* at 1016 (citing *D.R. Horton*, 737 F.3d at 357, 360-62).

62. *D.R. Horton*, 737 F.3d at 362.

63. *Murphy Oil*, 808 F.3d at 1018.

64. Murphy Oil USA, Inc. v. NLRB, No. 14-60800, 2016 U.S. App. Lexis 20037 (5th Cir. May 13, 2015) (denying en banc review).

65. *See infra* Part I.D.2.

66. Cellular Sales, LLC v. NLRB, 824 F.3d 772, 776 (8th Cir. 2016).

67. *Id.* at 777-78. *See also* Christine Neylon O'Brien, *Will the Supreme Court Agree*

The ink was barely dry on the *Lewis* and *Cellular Sales* decisions when the Ninth Circuit lent its support to the NLRB in its decision in *Morris*.[68] While the *Murphy, Epic Systems*, and *Morris* cases were pending before the Supreme Court, the Sixth Circuit decided *NLRB v. Alternative Entertainment*, following the Seventh and Ninth Circuits by lending its support to the NLRB.

2. The Seventh, Ninth, and Sixth Circuits Find Mandatory Individual Arbitration Violates the NLRA, Creating a Circuit Split

Although the Fifth Circuit was clear in rejecting the NLRB's interpretation of the FAA and the NLRA, other appellate courts were persuaded that the NLRB had properly focused on employees' rights under the NLRA in resolving any conflict with the FAA. In *Lewis v. Epic Systems*, the Seventh Circuit affirmed a federal district court decision that upheld the NLRB's view in its *D.R. Horton* and *Murphy Oil* decisions.[69] Lewis filed a collective action in federal court alleging Epic Systems violated FLSA and state law by misclassifying him and similarly situated co-workers in order to avoid paying them overtime. Epic Systems moved to compel arbitration and dismiss the lawsuit. Lewis asserted the collective action waiver violated the NLRA, rendering the agreement unenforceable because it negatively impacted his NLRA rights to collective action, thus triggering an exception to FAA rules of enforceability. Deferring to Board precedent, the district court ruled that the class action waiver was unenforceable because the NLRA prohibits employers from interfering with or restraining employees' substantive rights to concerted activities such as engaging in class and collective actions.[70]

The appellate court deemed contractual provisions requiring employees to waive their right to collective action to be a direct violation of the plain language of Sections 7 and 8 of the NLRA, and thus unenforceable.[71] The Seventh Circuit adopted much of the NLRB's reasoning in *D.R. Horton*, concluding that the FAA's saving clause provided an apt conciliation of the NLRA and the FAA.[72] According to the court, the FAA's saving clause is triggered when a contractual provision violates another federal statute such as the NLRA.[73] Consequently, because Epic Systems' arbitration agreement banned collective action, it conflicted

With the NLRB That Pre-Dispute Employment Arbitration Provisions Containing Class and Collective Action Waivers in Both Judicial and Arbitral Forums Violate the National Labor Relations Act—Whether There is an Opt-Out or Not?, 19 U. PA. J. BUS. L. 515, 517, 524-31 (2017) (discussing *Cellular Sales* decision).

68. *See infra* Part I.D.2.

69. Lewis v. Epic Systems, 823 F.3d 1147, 1161 (7th Cir. 2016), *rev'd* 138 S. Ct. (2018).

70. *Id.* at 1151.

71. *Id.* at 1154-55.

72. *Id.* at 1157 (discussing FAA savings clause).

73. *Id.*

with a substantive right under the NLRA.[74] Because the saving clause was triggered, enforcement of the agreement prohibiting collective arbitration was not protected by the FAA.[75] The court concluded that prospective waivers of substantive statutory rights are not enforceable and that pre-dispute employment arbitration agreements that prevent all employee collective processes must fail.[76]

The Seventh Circuit made a powerful comparison between the right to collective action in Section 7 of the NLRA and the fundamental associational rights protected by the First Amendment.[77] Of course, the former right is statutory and of less weight, while the latter is constitutional. Yet these two foundational rights are both so core to what we believe to be a fair and just workplace and world that the imposition of a prior restraint on either of these rights must be subjected to heightened, if not strict, scrutiny by the federal courts.[78] The analogy is that Section 7 of the NLRA is a workplace bill of rights, and should be entitled to similar, if somewhat lesser deference, as the Bill of Rights. The NLRB has long held that allowing employers to require employees to sign away their Section 7 rights defeats the purpose of the NLRA and the Supreme Court agreed with the NLRB on this point in *J.I. Case Co. v. NLRB*,[79] as did the Seventh Circuit in *Lewis*.[80]

In *Morris v. Ernst & Young*, the Ninth Circuit overturned the district court and followed the reasoning of the NLRB and the Seventh Circuit, finding that Ernst & Young's mandatory individual arbitration agreement was unenforceable because it violated the substantive right to collective action protected by Section 7 of the NLRA.[81] Once again, the appellate court's focus was on the employer's imposition of a contractual waiver of employees' substantive statutory right to act in concert because the arbitration agreement prevented group action in the sole forum to which employees were allowed legal redress.[82] Similar to the other cases, the employees in *Morris* sought class relief for alleged violations of federal and state wage and hour laws, claiming that Ernst & Young misclassified the employees in order to avoid payment of overtime wages.[83] The Ninth Circuit recognized that if an employer could require waiver of the substantive right to

74. *Id.*

75. *Id.* at 1157-58; *see also* O'Brien, *supra* note 67, at 540 (discussing Seventh Circuit's *Lewis v. Epic Systems* decision).

76. *Lewis*, 823 F.3d at 1160.

77. *Id.* at 1161.

78. The court noted that "[i]t would be odd indeed to consider associational rights, such as the one guaranteed by the First Amendment to the U.S. Constitution, non-substantive." *Id.*

79. J.I. Case Co. v. NLRB, 321 U.S. 332, 340-41 (1944).

80. *Lewis*, 823 F.3d at 1160.

81. Morris v. Ernst & Young, LLP, 834 F.3d 975, 980 (9th Cir. 2016)*; see also* O'Brien, *supra* note 67, at 544-45 (discussing the Ninth Circuit's decision in *Morris*).

82. *Morris*, 834 F.3d at 983-84. The Ninth Circuit clarified that the use of arbitration was not the issue, for the problem would be the same if the sole avenue for remedy were judicial. The relevant issue in Ernst & Young's arbitration agreement was the class waiver, due to its 'separate proceeding' provision. *Id.* at 984, 989.

83. *Id*. at 979.

engage in protected concerted activity in all forums, the right would not amount to much.[84] The court noted further that an employer may not condition employment on signing a contract that restricts all workplace related disputes to individual resolution.[85] Through use of the saving clause in the FAA, the court reconciled the two federal statutes.[86]

In applying the Supreme Court's standard from *Chevron, Inc. v. National Resources Defense Council, Inc.*, the Ninth Circuit found that congressional intent to protect workers' rights to act together was clear in Section 7, and the NLRA did not permit a total waiver of collective action.[87] According to the Ninth Circuit, there was no need to assess whether the NLRB's interpretation of Section 7 was reasonable because the statutory language itself was clear.[88] After dismissing the arguments by Ernst & Young and the dissent, the majority noted that neither federal statute need trump the other, and that in its essence or "[a]t its heart, this is a labor law case, not an arbitration case."[89]

The Sixth Circuit weighed in on the issue of class action waivers in employment agreements in *NLRB v. Alternative Entertainment, Inc.*, and upheld the NLRB's order that the employer must rescind or revise its arbitration policy because the requirement of individual arbitration violates the NLRA's protection of the right to engage in concerted activity including collective action.[90] In *Alternative Entertainment*, the NLRB found the individual arbitration agreement violated the NLRA, and therefore the employer committed an unfair labor practice when terminating an employee for discussing compensation changes with other employees and complaining to management about the changes, all protected concerted activity under the Act.[91] When the NLRB sought enforcement of its order, the Sixth Circuit deferred to the NLRB's reasonable interpretation of the NLRA.[92] The court found reasonable the NLRB's conclusion that the employer's bar on collective legal action violated the NLRA, and that such contractual provisions illegally restrained employees' rights under the Act, thus rendering the provisions unenforceable.[93] The court noted that the Fifth Circuit started with the wrong question in *D.R. Horton* and *Murphy Oil,* in that the circuit court asked, "which statute trumps the other," the NLRA or the Federal Arbitration Act?[94] The Sixth Circuit agreed with the Seventh Circuit that the Fifth Circuit's

84. *Id.* at 983 (discussing *J.H. Stone & Sons*, 125 F.2d 752 (7th Cir. 1942)).

85. *Id.* at 990. The Ninth Circuit remanded the case directing the trial court to ascertain if the separate proceedings clause was severable. *Id.*

86. *Id.* at 984.

87. *Id.* at 981 (referencing *Chevron, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

88. *Id.*

89. *Id.* at 989.

90. NLRB v. Alt. Entm't, Inc., 858 F.3d 396, 408 (6th Cir. 2017).

91. *Id.* at 405, 411.

92. *Id.* at 396, 400.

93. *Id.* at 408.

94. *Id.* at 402.

approach was "*looking* for trouble."[95] According to the Sixth Circuit's analysis, the first question should be whether the two statutes conflict. Proper application of the saving clause, the court reasoned, allows the two statutes to "work in harmony."[96]

The Sixth Circuit made clear that the problem with mandatory individual arbitration provisions is not that they require arbitration, but that they prevent protected concerted activity, a legal right established by the NLRA and accorded to all workers.[97] The court noted the difference between Federal Rule of Civil Procedure 23, a procedural mechanism for class actions in federal courts, and NLRA Section 7 rights, which are substantive in nature and prevent contractual provisions that cut off collective access in any forum.[98] The Sixth Circuit agreed with the Seventh Circuit that Section 7 of the NLRA is the "*only* substantive provision" of the NLRA and that the other sections of the statute merely provide procedures to protect that right.[99] The court relied on Supreme Court precedent that the right to engage in protected concerted activity is fundamental and that contractual provisions that attempt to discourage or prevent exercise of Section 7 rights violate the Act.[100]

The Sixth Circuit in *Alternative Entertainment* was not persuaded by the reasoning put forth by the Fifth Circuit that Supreme Court decisions on the enforceability of arbitration provisions govern the matter, because none of those cases involved employment arbitration.[101] The court noted that the NLRA sets out a policy that favors arbitration, whether of individual claims through collective bargaining agreements, or collective resolution of agreements regarding terms and conditions of employment, unlike state laws at issue in the Supreme Court cases that illustrated judicial hostility to arbitration.[102] The Sixth Circuit emphasized that the issue was not about arbitration but about labor law, and both federal statutes can be given full effect.[103] Unlike cases involving the Age Discrimination in Employment Act or consumer rights, a case involving the NLRA guarantees that employees have the right to act in concert in one forum, and forcing an employee to waive that right would violate Section 8 of the Act.[104]

95. *Id.* at 402 (quoting Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1158 (7th Cir. 2016), *rev'd* 138 S. Ct. 1612 (2018)).

96. *Id.*

97. *Id.* at 406.

98. *Id.* at 403.

99. *Id.* (quoting *Lewis*, 823 F.3d at 1160).

100. *Id.* at 404 (citing, *inter alia*, *Chevron, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

101. *Id.* at 405.

102. *Id*.

103. *Id.* at 406.

104. *Id.* at 407.

II. THE SUPREME COURT'S *EPIC SYSTEMS* DECISION

A. The Court's Decision

The cases consolidated by the Court in *Epic Systems Corp. v. Lewis* involved employees suing their employers for overtime pay.[105] The employers sought to compel individual arbitration pursuant to agreements secured as a condition of employment. As discussed in the preceding section, the Ninth and Seventh Circuits found that mandatory individual arbitration agreements violated the NLRA because they barred employees from engaging in "concerted activity," while the Fifth Circuit held that the FAA requires courts to enforce mandatory individual arbitration agreements as written.

The Court's decision, which expanded the use of mandatory arbitration with class and collective waivers to the employment sector, was authored by the most junior member of the Court, Justice Gorsuch, and joined by Chief Justice Roberts, and Associate Justices Kennedy, Thomas and Alito. The Court's approach is scholarly and formalistic, focusing on the language of Section 7 of the NLRA, which guarantees workers a right to "concerted activity for mutual aid and protection," and the language of the FAA, which states that arbitration agreements are "valid, irrevocable, and enforceable."[106] The Court weighed heavily in favor of the FAA, holding that mandatory individual arbitration agreements are enforceable because nothing in Section 7 even "whispers" that group legal action is required.[107]

First, the Court found that the FAA's saving clause provided no exception for cases based on NLRA Section 7 rights.[108] The saving clause allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract."[109] Employees argued that arbitration agreements requiring individual arbitration are illegal because they violate Section 7's guarantee to "concerted activity."[110] The Court stated, however, that the saving clause applies only to "generally applicable contract defenses, such as fraud, duress or unconscionability" and "does not save defenses that target arbitration."[111] The Court faulted the employees for objecting to "individualized arbitration" because individualized arbitration is "one of arbitration's fundamental attributes."[112] The Court based its reasoning on its decision in *AT&T Mobility v. Concepcion*, in which it held that a California law that prohibited class action

105. 138 S. Ct. 1612 (2018); 29 U.S.C. § 157 (2017).
106. 9 U.S.C. § 2 (2017).
107. *Epic Sys.*, 138 S. Ct. at 1635.
108. *Id.* at 1622.
109. 29 U.S.C. § 2 (2017).
110. *Epic Sys.,* 138 S. Ct. at 1622-24.
111. *Id.* at 1622 (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339, 344 (2011)).
112. *Id.*

waivers in consumer contracts on the grounds that such provisions were unconscionable, impermissibly targeted fundamental attributes of arbitration and did not, therefore, qualify for exception status under the saving clause.[113]

The Court insisted in *Epic Systems*, as it had in *Concepcion*, that arbitration is "traditionally individualized and informal," and, consequently, faster, less costly, and less complicated.[114] Although the Court recognized that parties may agree to arbitrate on a class-wide basis, it stated that "courts may not allow a contract defense to reshape traditional individualized arbitration by mandating class-wide arbitration procedures without the parties' consent."[115] The employees' argument that the NLRA's provisions make individual arbitration agreements illegal as a matter of federal statutory law is no different from the argument that state laws mandating arbitration are unconscionable, the Court stated.[116] In short, the Court maintained that a defense cannot disfavor arbitration.

Second, the Court found that nothing in the NLRA commanded the Court to find that mandatory individual arbitration agreements are illegal.[117] According to employees, the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" shows a clear congressional command to override the FAA.[118] The Court, however, held that this language "does not express approval or disapproval of arbitration"; it "does not mention class or collective action procedures"; nor does it "hint at a clear and manifest wish to displace the Arbitration Act."[119] The Court concluded that Section 7 falls far short of the clear contrary congressional command required to override the FAA.

The Court characterized Section 7's protection of workers' rights to "other concerted activities for the purpose of . . . other mutual aid or protection" as a "catchall provision" that refers to "things employees 'just do' for themselves in the course of exercising their right to free association in the workplace, rather than 'the highly regulated, courtroom-bound "activities" of class and joint litigation.'"[120] The Court noted that the NLRA has specific regulatory regimes that apply to several matters mentioned in Section 7, such as rules for exclusive bargaining actions, but that nothing in the regime suggests rules "for class or collective actions in court or arbitration."[121] Thus, the Court concluded that Section 7 does not speak to such actions. Furthermore, the Court noted that Congress has

113. *Id*. at 1621(citing *Concepcion*, 563 U.S. at 338, 341).

114. *Id*. at 1623 (citing *Concepcion*, 563 U.S. at 338, 341).

115. *Id.* (citing *Concepcion*, 563 U.S. at 351; Stolt-Nielsen. v. AnimalFeeds Int'l. Corp., 559 U.S. 662, 684-687 (2010)).

116. *Id.*

117. *Id*. at 1624-30.

118. *Id.* at 1624 (quoting 29 U.S.C. § 157 (2017)).

119. *Id*. at 1618.

120. *Id*. at 1625 (quoting NLRB v. Alt. Entm't, Inc., 858 F.3d 393, 414-15 (6th Cir. 2017)).

121. *Id*. at 1625.

shown that it knows how to override the FAA with specific language when it so chooses. The Court provided several examples demonstrating that Congress has, in some statutes, specifically limited the use of arbitration notwithstanding the FAA.[122] The Court suggested that employees attempted "a sort of triple bank shot," by arguing that claims that arise under the FLSA are protected by language in the NLRA which, in turn, overrides the FAA.[123]

The Court addressed precedent involving both arbitration provisions and Section 7 interpretations. Recapping the many cases in which it has rejected efforts to "conjure conflicts with the Arbitration Act," the Court stated that all of its cases have pointed "strongly in one direction."[124] The Court treated its precedent in Section 7 cases separately, noting that cases endorsing Section 7 rights have involved organizing and collective bargaining in the workplace, "not the treatment of class or collective actions in court or arbitration proceedings."[125]

Finally, the Court considered whether the NLRB's interpretation of Section 7 rights is entitled to *Chevron* deference. According to *Chevron*, the Court owes deference to an administrative agency's interpretation of the law because "a statutory ambiguity represents an 'implicit' delegation to an agency to interpret a 'statute which it administers.'"[126] In *D.R. Horton*, the NLRB had interpreted Section 7 as requiring an employer's arbitration agreement to preserve some method of collective action for employees.[127] The NLRB's interpretation, however, involved not only the NLRA but also the FAA, a statute it does not administer and over which it has no interpretive authority, the Court stated.[128] The Court noted that *Chevron* deference is appropriate only in cases where the Court is confronted with "an unresolved ambiguity"; and it found no ambiguity in interpreting the FAA in this case.[129]

122. *Id*. at 1626. *See generally* 15 U.S.C. § 1226(a)(2) (2017) (for resolution of motor vehicle franchise contract disputes, Congress provided that arbitration is to be used only if both parties consent to such in writing); 7 U.S.C. § 26(n)(2) (2017) (for resolution of commodity exchange disputes following Dodd-Frank reforms, pre-dispute arbitration agreements are barred from being used); 12 U.S.C. § 5567(d)(2) (2017) (for resolution of consumer financial protections disputes following Sarbanes-Oxley reforms, pre-dispute arbitration agreements are barred from being used).

123. *Epic Sys.,* 138 S. Ct. at 1626.

124. *Id*. at 1627.

125. *Id*. at 1628.

126. *Id*. at 1629 (quoting Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 841, 844 (1984)).

127. D.R. Horton, Inc. v. NLRB, 357 N.L.R.B. 2277, 2278-80 (2012). Referencing *D.R. Horton*, the *Epic Systems* Court lamented that the decision was "the first time in the 77 years since the NLRA's adoption. . . [that the Board] asserted the NLRA effectively nullifies the Arbitration Act in cases like ours." *Epic Sys.*, 138 S Ct. at 1620 (citing D.R. Horton, 357 N.L.R.B. 2277).

128. *Epic Sys*., 138 S. Ct. at 1629. The Court rejected the argument that "policy choices" should be left to Executive Branch officials who are more directly accountable to the people because in this case the NLRB and the Solicitor General disagreed on the meaning of the NLRA. *Id.*

129. *Id*. at 1630.

The Court dedicated a substantial portion of its decision to rebutting arguments raised by the dissent.[130] The Court rejected the dissent's arguments that were grounded on the legislative history and policy of the NLRA. "Legislative history is not the law," the Court stated, and in any event, the NLRA's history did not speak to class or consolidated claims.[131] The Court conceded that class actions can enhance enforcement of the law by spreading the costs, but it was unwilling to overstep its role to enter into policymaking that should more properly be left to the legislative branch.[132] In contrast to the Court's textual analysis of the statutes involved, the dissent was more concerned that the cases at issue raise questions about inequality of bargaining power in the workplace, with large corporations exploiting individual workers. Frustrated by the Court's approach, the dissent underscored the immediate need for the legislature to act to overturn the Court's *Epic Systems* decision.[133]

B. The Dissent

Justice Ginsburg authored a strong dissent, joined by Justices Breyer, Sotomayor, and Kagan. The dissent stated that "Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order."[134] The dissent focused on the reality that wage and hours claims are typically small, "scarcely of a size warranting the expense of seeking redress alone."[135] Consequently, joining together with similarly situated employees is a much-needed way to gain "effective redress."[136] The dissent emphasized Congress' purpose in enacting the NLRA—"to place employers and employees on a more equal footing."[137] Congress recognized that employees need strength in numbers to counteract the "clout" of employers who dictate working conditions, wages, and hours.[138]

The dissent provided historical perspective, noting that coercive tactics by employers such as "yellow dog contracts," which prevented employees from joining a union, led Congress to pass the NLRA.[139] According to the dissent,

130. *Id.* at 1630-32.

131. *Id.* at 1631.

132. *See id.* at 1632.

133. *See id.* at 1633.

134. *Id.*

135. *Id.* (citing Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1118-1119).

136. *Id.*

137. *Id.*

138. *Id.* at 1634.

139. *Id.* at 1635.

mandatory individual arbitration agreements are similar tactics that seek to foreclose concerted activity by employees.[140] The dissent also clarified that the employees involved in the suits before the Court did not insist on a right of access to a judicial forum, but rather to a right to act "in concert in any forum."[141]

According to the dissent, "[s]uits to enforce workplace rights collectively fit comfortably under the umbrella 'concerted activities for the purpose of . . . mutual aid or protection.'"[142] Moreover, the dissent referenced NLRB and court decisions (largely ignored by the majority) that have found that civil actions qualify as "concerted activity" under Section 7.[143]

The dissent criticized the Court's use of the canon of *ejusdem generis* to marginalize the meaning of "concerted activity."[144] The dissent maintained that in drafting Section 7, Congress intended "encompassing legislation" that would protect workers' rights.[145] The dissent also found fault with the Court's argument that the lack of specific guidance and rules regarding litigation and arbitration has any significance in determining what "concerted activity" entails.[146] Although the Court made much of the specific guidance and rules related to unionization, collective bargaining, picketing, and strikes, the dissent pointed out that these provisions were added over the years and provide no information on the intended scope of Section 7.[147] The dissent also took issue with the Court's statement that the "the NLRA does not 'even whispe[r]' about the 'rules [that] should govern the adjudication of class or collective actions in court or arbitration.'"[148] According to the dissent, the NLRA is broad enough to encompass access to any procedures that involve concerted activity. The dissent maintained that even though class and collective actions were not fully developed at the time Section 7 was drafted, collective litigation by employees against employers was not unknown and nothing suggests that Congress did not intend employees to avail themselves of collective litigation.[149]

In response to the Court's characterization of the employees' theory as a questionable "triple bank shot," the dissent asserted that collective action waivers

140. *Id.* at 1636.

141. *Id.*

142. *Id.* at 1637 (quoting 29 U.S.C. § 157 (2017)).

143. *Id.* at 1637-38. On the broad scope the NLRA provided for employees, Justice Ginsburg wrote, "[i]t takes no imagination, then, to comprehend that Congress, when it enacted the NLRA, likely meant to protect employees' joining together to engage in collective litigation." *Id.* at 1641; *see also id.* at 1640-41 (citing Guiliano v. Daniel O'Connell's Sons, 105 Conn. 695, 136 A. 677 (1927); Gorley v. Louisville, 23 Ky. 1782, 65 S.W. 844 (1901); Wray Elec. Contracting, Inc., 210 N.L.R.B. 757 (1974)).

144. *Epic Sys.,* 138 S. Ct. at 1638.

145. *Id.* at 1639.

146. *Id.* at 1639-40.

147. *Id.*

148. *Id.* at 1640.

149. *Id.* at 1640-41.

are illegal under the NLRA because Section 8(a) "makes it an 'unfair labor practice' for an employer to interfere with, restrain, or coerce employees in the exercise of their § 7 rights."[150] The dissent explained that employees' rights have no meaning if employers are allowed to require them to sign away those rights as a condition of employment.[151]

The dissent also addressed the interaction of the NLRA and the FAA. The dissent emphasized that the legislative history and purpose of the FAA focused on "voluntary, negotiated agreements," notably commercial agreements where the parties had equal bargaining power. Moreover, the dissent recalled that the FAA's statement that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce," was added to the FAA to address concerns raised by organized labor about the inequality of bargaining power between employers and employees.[152]

The dissent characterized the Court's arbitration decisions as "exorbitant," and "stretching [the FAA] far beyond contractual disputes between merchants."[153] This "exorbitant" stretching encouraged employers to use mandatory individual arbitration agreements, the dissent stated.[154] The dramatic rise in the use of such agreements led the NLRB to confront the consequences of individual arbitration on employees and to conclude that such agreements interfered with Section 7 rights.[155] Thus, the dissent viewed the NLRB's position as a reaction to employers' increased use of mandatory individual arbitration agreements, not the ground-breaking change in interpreting the NLRA suggested by the Court.[156] While the dissent lamented the "many wrong turns" the Court's interpretation of the FAA has taken, it maintained that precedent did not compel "the destructive result" of the *Epic Systems* decision.[157]

The dissent instructed that the FAA and the NLRA could be harmonized because the FAA's saving clause clearly invalidates illegal portions of an agreement, such as mandatory individual arbitration clauses.[158] In *Concepcion*, the Court was clear that the saving clause would not save contract defenses, such as unconscionability, that specifically target arbitration. The Court found in *Epic Systems* that an argument that collective action waivers are illegal is a similar attack on arbitration. The dissent, however, maintained that *Concepcion* does not

150. *Id.* at 1626, 1641 (citing 29 U.S.C. § 158(a)(1) (2017)).

151. *Id*. at 1641.

152. *Id*. at 1642-43.

153. *Id.* at 1644-45.

154. *Id.*

155. *Id.*

156. *Id.* at 1645. The dissent referred to the Court's claim that "the Board broke new ground in 2012 when it concluded that the NLRA prohibits employer-imposed arbitration agreements that mandate individual arbitration." *Id.*

157. *Id.* at 1645.

158. *Id.* at 1645-46

dictate the result in *Epic Systems* because the NLRA is a "pathmarking federal statute," that does not discriminate against arbitration in any way.[159] Assuming the NLRA and the FAA cannot harmoniously co-exist, the dissent would find the NLRA to be the controlling statute, as it was enacted after the FAA and is more "pinpointed" in addressing group action.[160]

The dissent recognized the potentially devastating impact of the Court's decision on workers. The U.S. Department of Labor and state labor departments have limited resources to pursue wage and hour claims, leaving employees with few avenues of recourse even though they lose billions of dollars each year in legally owed wages.[161] Significantly, the dissent pointed to the lack of incentive employees have to pursue individual claims—citing one source that estimated "an employee utilizing Ernst & Young's arbitration program would likely have to spend $200,000 to recover only $1,867.02 in overtime pay and an equivalent amount in liquidated damages."[162] Compounding the lack of financial incentive, the dissent noted, is an individual worker's fear of retaliation when he seeks redress alone.[163] Finally, the dissent maintained that wage and hour claims are similar to employment discrimination claims: they both depend on group action and private litigation to be effectively enforced.[164]

III. THE URGENT NEED FOR LEGISLATION

The *Epic Systems* decision dashed hopes for a correction in the Supreme Court's direction on mandatory arbitration agreements in the workplace. Mandatory arbitration allows employers to conceal a variety of continuing complaints, such as wage theft (as was the issue in *Epic Systems*), and a host of other employment-related complaints with no practical procedural path for resolution, and such abuses will become normative in the workplace. Even though the Court's path on cases involving arbitration has been steadfastly one-directional, the *Epic Systems* decision compounds the many errors already made in arbitration precedent. Justice Ginsburg, in dissent, stated that an urgent response from Congress is required.[165] And the majority conceded that as a matter of policy, questions regarding individual arbitration "are surely debatable."[166] Neverthe-

159. *Id.* at 1646.

160. *Id.*

161. *Id.* at 1647; *see* Alexander & Prasad, *supra* note 22, at 1070 n.2 (introducing statistical evidence showing that private lawsuits to enforce civil rights employment laws were forty-eight times the number of cases filed by the EEOC between 1997 and 2012).

162. *Epic Sys.*, 138 S. Ct. at 1647.

163. *Id.*

164. *Id.* at 1648.

165. *Id.* at 1633 (Ginsburg, J., dissenting) ("Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order.").

166. *Id.* at 1619.

less, the Court misread both the NLRA and the FAA—interpreting rights ensconced in the NLRA too narrowly and the mandate of the FAA too expansively. Congress must take note of errors in the Court's interpretation and explicitly address those errors so that both the NLRA and the FAA can accomplish the policies they were intended to address. This Part calls attention to the most egregious flaws in the Court's decision and suggests congressional action to correct them.

A. Congress Should Amend the FAA to Exempt Claims under Federal Employment Law

The most direct way to address the Court's misguided interpretation of mandatory arbitration provisions is to amend the FAA. The FAA states that "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" are excluded from coverage.[167] Congress should clarify that the phrase "workers engaged in interstate commerce" includes all employees protected by federal labor and employment laws, and that all such workers are exempt from mandatory arbitration provisions under the FAA.[168]

The enabling legislation enforced by federal administrative agencies such as the EEOC generally defines which employers are covered by the statutes. Whether the threshold is employers with fifteen or more employees as in Title VII of the Civil Rights Act of 1964, or twenty or more employees under the Age Discrimination in Employment Act,[169] these standards are clear and provide a ready framework for discerning which employees are engaged in interstate commerce. Similarly, the standards adopted by the NLRB for exerting jurisdiction over primarily private sector employers set clear guidelines as to when employees are protected. [170]

One might argue that the United States Supreme Court missed the boat when it first interpreted Section 1 of the FAA in *Gilmer*, and later in *Circuit City*, because the statutory definition of which employers are engaged in interstate com-

167. 9 U.S.C. § 1 (2017).

168. *Id.*; *see also supra* notes 29-34 and accompanying text (discussing language of Section 1 of the FAA and that the Act intended to place arbitration agreements on the same footing as other contracts but the Act was not intended to apply to employment agreements of workers engaged in interstate commerce). The jurisdictional thresholds from federal labor and employment statutes determine which workers are engaged in interstate commerce. The FAA should clarify that such workers are not covered under the FAA.

169. *See* EEOC, COVERAGE OF BUSINESS/PRIVATE EMPLOYERS, https://perma.cc/TPE7-YW9Q (archived Jan. 17, 2019).

170. *See* NLRB, JURISDICTIONAL STANDARDS, https://perma.cc/PM2N-MSV8 (archived Jan. 17, 2019) (stating, for example, that NLRB protection covers law firms and legal organizations with a minimum $250,000 in gross annual volume).

merce in the later-enacted equal employment opportunity and labor statutes contradicts the Court's interpretation of the FAA in those cases.[171]

In recent years, The Arbitration Fairness Act has been proposed to amend the FAA.[172] The proposed bill would prohibit a pre-dispute arbitration agreement from being valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.[173] The 2018 version of the Senate bill addresses numerous problems with the Supreme Court's decisions including: the FAA was intended to apply to disputes involving commercial entities of similar bargaining power; the Supreme Court has erroneously extended the FAA to cover consumer and employment disputes; and mandatory arbitration lacks transparency and adequate judicial review, thereby undermining the development of public law.[174] Despite having support from thirty-two cosponsors, and being referred to the Judiciary Committee, the bill has not moved forward.[175] Nevertheless, the Supreme Court's *Epic Systems* decision and the negative publicity associated around forced arbitration agreements in light of the #MeToo movement could raise substantial interest in changing the law.[176]

The proposed Arbitration Fairness Act of 2018 would undo the damage Supreme Court decisions have imposed on employees' and consumers' rights.

171. *See supra* notes 40-44 and accompanying text. In *Gilmer*, Justice Stevens dissented, stating that "arbitration clauses contained in employment agreements are specifically exempt from coverage of the FAA . . . ." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 36 (1991) (Stevens, J., dissenting). In *Circuit City*, the four dissenting justices emphasized the history and purpose of the FAA as a vehicle for enforcing commercial contracts and maintained the Court should have found that it did not apply to employment contracts. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 124-29 (2001) (Stevens, J., dissenting). An ordinary reading of the FAA's language in Section 1 would appear to at least raise the question of exempting workers who are working for employers that have an impact on interstate commerce.

172. *See* O'Brien, *supra* note 67, at 548.

173. Arbitration Fairness Act of 2018, S. 2591, 115th Cong. § 3 (2018).

174. *Id.* § 2.

175. *See* Cosponsors, Arbitration Fairness Act of 2018, S.B. 2591, 115th Cong. (2018), https://perma.cc/RHH5-YVDK (archived Jan. 17, 2019) (listing co-sponsors and noting there is no further action on this bill).

176. Commentators and practitioners are calling attention to the connection between mandatory pre-dispute arbitration agreements with class waivers and the issues underlying the #MeToo movement—noting how powerful people and organizations deploy these to silence and destroy rights of the less powerful. *See* Emily Peck, *The Supreme Court Is Helping Companies Get Away With Sexual Harassment*, HUFFINGTON POST (May 21, 2018), https://perma.cc/YA96-X5AA (archived Jan. 17, 2019) (explaining that *Epic Systems* is likely to have substantial impact on women and low-income workers); *see also The Impact of "Epic Systems" on #MeToo*, KATZ, MARSHALL & BANKS, LLP, https://perma.cc/XDF3-FMEG (archived Jan. 17, 2019) (noting in press release that critics fear *Epic Systems* will "perpetuate the culture of secrecy that has allowed sexual harassment to flourish in the workplace"); *Epic Systems vs. #MeToo: What Now?*, MORGAN LEWIS, https://perma.cc/EU5Z-KELG (archived Jan. 17, 2019) (last visited Nov. 1, 2018) (noting the Court's reaffirmation of mandatory arbitration with class waiver has "spurred a public backlash and burgeoning federal and state laws take aim at mandatory arbitration").

However, a more limited amendment to the FAA clarifying which employees are exempted from the FAA's coverage might be less controversial and more likely to gain congressional support.

B. Congress Should Amend Section 7 of the NLRA to Clarify That "Concerted Activity" Includes Group Legal Action

In *Epic Systems*, the Court fundamentally changed the scope of Section 7 rights. Congress must make it clear that Section 7 guarantees employees a substantive right to group action that cannot be waived. The *Epic Systems* Court never directly addressed whether the right to act together to address workplace grievances is a substantive right. Instead, the Court interpreted Section 7 to protect workers' rights to freedom of association in the workplace, including group negotiation and compromise, but not group legal action.[177] According to the Court, Section 7 protects specific activities such as "self-organization" and forming labor organizations and collective bargaining.[178] "Other concerted activities," the Court stated, is merely a catch-all phrase that encompasses activities in the workplace, but that does not reach group legal actions.[179]

The NLRA protects employees whether they are in a union or not.[180] Congress should amend Section 7 to specifically state that workers' substantive rights include the right to group legal action in some forum. The NLRB holding in *D.R. Horton* was actually quite narrow in that the Board simply required that employees retain the right to pursue employment claims collectively, either through litigation or arbitration.[181] Thus, if the employer restricts arbitration to individual claims, it must leave open the opportunity for employees to engage in collective litigation. Alternatively, if the employer restricts access to judicial forums completely, then its arbitration process must be open to collective action.[182]

The Workers' Freedom to Negotiate Act of 2018 was introduced in the House of Representatives shortly after the Supreme Court's decision in *Epic Systems*.[183] The bill spells out in its findings section that the right to engage in concerted activities under the National Labor Relations Act applies broadly to workers who aim to improve terms and conditions of employment or aid each other,

177. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1612 (2018).

178. *Id.*

179. *Id.*

180. *See* NLRB, EMPLOYEE RIGHTS, https://perma.cc/Q8LL-T8FD (archived Jan. 17, 2019) (noting that employees are protected whether in a union or not because the Board protects the rights of employees to engage in concerted activity for their mutual aid or protection regarding terms and conditions of employment).

181. D.R. Horton, Inc. v. NLRB, 357 N.L.R.B. 2277, 2288 (2012).

182. *Id.*

183. Workers' Freedom to Negotiate Act of 2018, H.R. 6080, 115th Cong. (2018). The bill was introduced by Rep. Robert Scott (D. Va.). *Id.* In parallel, a Senate bill was introduced by Sen. Patty Murray (D. Wa.). Workers' Freedom to Negotiate Act of 2018, S. 3064, 115th Cong. (2018).

whether workers are non-union workers or union members.[184] The proposed bill would amend the National Labor Relations Act to strengthen protections for employees, clarify who is an employee, and increase job security for strikers. It also specifies that despite the Federal Arbitration Act, it shall be an unfair labor practice for an employer to enter into agreements where employees give up their right to collective legal claims regarding employment, and such agreements are declared "unenforceable and void" in the absence of a collective bargaining agreement negotiated by a labor organization.[185] The Workers' Freedom to Negotiate Act would clarify Congress' intent that the substantive right to engage in concerted activities under Section 7 of the NLRA is not preempted by the FAA, and that the NLRA protects more than just the right to form unions and to engage in collective bargaining with a labor representative.

C. Congress Should Recognize that Provisions Requiring Mandatory Individual Arbitration in the Workplace are Premised on Inequality of Bargaining Power Between Employers and Employees

In addressing mandatory individual arbitration agreements, Congress must make it clear that arbitration provisions cannot violate the NLRA's goal of leveling the playing field between employers and employees. Consequently, Congress should require employers to preserve a forum for group legal action. Alternatively, Congress should require that arbitration agreements have provisions that ensure fairness to low-wage workers who have no ability to influence the terms of the arbitration agreement.[186]

A fundamental error in the Court's decision is its persistent referral to "agreements" and its assumption that mandatory individual arbitration agreements indicate an employee's consent. The Court posed the question to be decided thus, "[s]hould employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?"[187] In evaluating the agreements in question, the Court made no reference to the inequality of bargaining power between employers and employees and the fact that arbitration clauses are

184. Workers' Freedom to Negotiate Act of 2018, H.R. 6080, 115th Cong. § 2(4) (2018).

185. *See id.* § 3(1) (clarifying who is a covered employee); *see also id.* § 3(7) (increasing job security for strikers); *id.* § 101(c)(4)(e) (outlawing waivers of class or collective legal claims in employment matters). The bill contains other amendments favoring employees including: expedited representation procedures. *See id.* § 3(6) (employer posting of employee rights under the Act pursuant to Board regulations); § 101(c)(5)(h)(1) (availability of remedies despite unlawful immigration status); § 101(e)(1) (direct access to civil remedies in federal district court for violations—including penalties and punitive damages assessed against those who commit unfair labor practices or do not comply with Board orders); § 12(e)(1)(2).

186. *See infra* notes 191-207 and accompanying text (discussing a model for fairness in arbitration, and options for collective arbitration.

187. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018).

presented to employees as a condition of employment.

The Court's failure to confront the realities of "agreement" to individual arbitration in its *Epic Systems* decision is curious because the Court has been so adamant about requiring agreement between the parties when collective arbitration is the issue. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp*., the Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."[188] But in deciding the *Epic Systems* cases, the Court never questioned whether employees—who were presented with mandatory agreements as a condition of employment—agreed to individual arbitration. Apparently convinced that individual arbitration is always the best way to resolve workplace disputes, the Court has been careful to avoid foisting collective arbitration on employers, but has failed to consider that individual arbitration agreements are routinely thrust upon employees as a condition of employment, without any meaningful consent.

If Congress does not specifically preserve a forum for group legal action, it must ensure that arbitration provisions are fair to employees who lack bargaining power in devising the arbitration agreement. Congress should be explicit about what kinds of provisions must be included in a fair arbitration provision. In *Concepcion*, the Court's decision was controversial because it allowed arbitration in consumer agreements.[189] Nevertheless, the Court showed concern for the fairness of the agreement, but found it had sufficient incentives for individuals to bring their claims and "to be made whole."[190]

Professor Nantiya Ruan, Director of the Workplace Law Program at the University of Denver, Sturm College of Law, has suggested that the arbitration clause in *Concepcion* can "ironically" be used as a model for fair arbitration in cases involving low-wage workers.[191] Using the provisions of the consumer arbitration agreement in *Concepcion*, Ruan suggests that a model arbitration clause should include the following provisions:

1. The employer will pay all costs of nonfrivolous claims;
2. The claimant chooses whether to arbitrate locally in person, over the phone, or by written submission;
3. Small claims court could be available instead of arbitration;
4. Arbitrators may award individual relief, including injunctions, not limited to compensatory damages;
5. The employer may not receive attorneys' fees but must pay the complainant twice his attorneys' fees plus a minimum recovery of

188. Stolt-Nielsen S.A. v. AnimalFeeds Int'l, Corp., 559 U.S. 662, 684 (2010).

189. *See* Richard Frankel, *Concepcion and Mis-Concepcion: Why Unconscionability Survives the Supreme Court's Arbitration Jurisprudence*, 2014 J. Disp. Resol. 225, 226 (2014) (noting use of mandatory arbitration in consumer agreements is "enormously controversial").

190. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011).

191. Ruan, *supra* note 28, at 1141.

> $7500 if the arbitrator awarded more than the employer's last settlement offer.[192]

D. Congress Should Devise a Viable Process for Class or Collective Arbitration

A third fundamental error in the Court's decision is its assumption that only two options exist for workplace dispute resolution: class action litigation or individual arbitration proceedings. The Court contemplates no middle ground, even though group arbitration in employment might involve large or small numbers of similarly situated employees. Furthermore, the Court assumes that class or collective arbitration necessarily involves the same "procedural morass" that characterizes Rule 23 class actions.[193] Congress should approve a method of class or collective arbitration that allows employees to bring their claims together in a manner that does not involve the complexities of class action litigation.

The Court's assumption that employees must bring employment claims in individual arbitration or in class actions rests on several false premises. First, the Court mischaracterized the NLRB's position and the position of many employees who challenge individual arbitration provisions. The NLRB and many employees do not insist on class action litigation as an alternative to individual arbitration. Furthermore, the NLRB's position is not that a class action option must be available, but rather that an agreement must preserve some forum for collective action—either arbitral or judicial.[194]

The NLRB's position, however, did not resonate with the Court because the Court has consistently viewed class or collective arbitration as indistinguishable from Rule 23 class actions. At least since its decision in *Concepcion*, the Court has construed the FAA to require individual arbitration as opposed to any kind of class or collective arbitration, even though the statute never mentions individual arbitration. In *Concepcion*, the Court stated: "[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[195] Dissenting in *Concepcion*, Justice Breyer asked: "Where does the majority get its contrary idea—that individual, rather than class, arbitration is a 'fundamental attribut[e]' of arbitration?"[196]

Significantly, the Court never considers the possibility that collective arbitration could be substantially more efficient than a Rule 23 class action. The National Academy of Arbitrators, a group with seventy years of labor arbitration experience, has proposed a workable model of group arbitration, emphasizing

192. *Id.* at 1141-42 (citing *Concepcion*, 563 U.S. at 337).

193. *Epic Sys*., 138 S. Ct. at 1623.

194. D.R. Horton, Inc. v. NLRB, 357 N.L.R.B. 2277, 2288 (2012).

195. *Concepcion*, 563 U.S. at 348; *see also* American Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).

196. *Concepcion*, 563 U.S. at 362 (Breyer, J., dissenting).

the feasibility of collective employment arbitration.[197] The Academy distinguishes collective or class arbitration from Rule 23 class actions and demonstrates that such actions can be conducted without losing the essential elements of arbitration that the Court identifies—simplicity, flexibility, expedition, and informality.[198] In short, the Academy suggests that collective employment arbitration is not only a fairer method of resolving disputes for employees but also avoids burdensome individual claims for employers.

The Academy points out that class arbitration does not involve the same procedures as Rule 23 class actions, including "listing adequate representation of absent class members, notice, opportunity to be heard, and right to opt-out."[199] The grievance-arbitration procedure used in the union context is readily adaptable to non-union employment arbitration, the Academy insists. Joining multiple complaints on similar issues has been recognized as "an expeditious, efficient, and inexpensive" method of resolution.[200] The Academy envisions a collective employment arbitration procedure that would proceed as expeditiously and efficiently as the union's collective arbitration procedure, as the procedures would be "comparable in terms of scope of discovery, nature of the evidence, control of the process by the arbitrator, [and] authority to award statutory remedies."[201] Responding to Justice Ginsburg's call for congressional action, Congress should consider a middle ground for class arbitration, one that avoids the dreaded morass of class litigation while still preserving the rights of workers to join together to address common workplace grievances.

Compounding its polarization of the individual arbitration versus class action options, the Court suggested that the NLRB's disapproval of individual arbitration is a novel stance. The Court stated, "[t]his Court has never read a right to class actions into the NLRA—and for three quarters of a century neither did the National Labor Relations Board."[202] This statement ignores the impact that the Court's interpretation of the FAA has had on the prevalence of mandatory arbitration agreements. The Court's decisions in *Gilmer*, *Concepcion*, and *Italian Colors* led to an explosion in employers' use of individual arbitration agreements. Since *Italian Colors*, employers have more than doubled their use of class action waivers.[203] Before the Court's expansive interpretation of the FAA, the

197. National Academy of Arbitrators' Brief, *supra* note 27, at 3.

198. *Id.* at 7.

199. *Id.* at 6 (quoting *D.R. Horton*, 737 F.3d at 359-60).

200. *Id.* at 12 (quoting NAT'L ACAD. OF ARBITRATORS, THE COMMON LAW OF THE WORKPLACE: THE VIEWS OF ARBITRATORS 395-96 (Theodore St. Antoine ed., 2d ed. 2005)).

201. *Id.* at 16. The Academy explains that the only difference between employment class arbitrations and grievance-arbitration procedures would be the choice of representation. In the union context, the union selects its representative; in the non-union setting, the group of affected employees would select legal counsel of its own choosing. *Id*. at 19-20.

202. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018).

203. *See* Estlund, *supra* note 24, at 706-07 (citing a law firm survey that found mandatory arbitration provisions rose from 16 percent in 2012 to nearly 43 percent in 2014). According to the Government Accountability Office, only 7.6 percent of employers used mandatory

NLRB had little reason to concern itself with arguments for preserving group legal action.[204] Congress should recognize the relationship between the Court's interpretation of the FAA in the employment context and the explosive increase in mandatory arbitration agreements, and act to correct the negative impact the Court's decisions have had on employees' rights.

Unfortunately, the Court's pro-arbitration decision in *Epic Systems* reflects the current political climate of protecting business interests.[205] A Republican-dominated Senate, intent on providing a climate favorable to business interests, is unlikely to heed Justice Ginsburg's call for urgent legislation to address workers' right to engage in concerted activity.[206]

IV. WITHOUT CONGRESSIONAL ACTION, EMPLOYEES HAVE LITTLE RECOURSE IN WORKPLACE DISPUTES

Epic Systems leaves employees at a severe disadvantage. Employers may bar them from proceeding as a group and, for a host of reasons, employees are unlikely to proceed individually. In the current term, the Court has decided one case involving collective action and will soon decide another. The following Subpart projects the Court's decisions in those cases and then explores the possible mechanisms available to protect employees' rights.

A. The Supreme Court On Whether the FAA Covers Independent Contractors and Agreements That are Silent on Collective Action

Despite the Court's clear message that individual arbitration agreements must be enforced in workplace disputes, several questions regarding arbitration in the workplace remain. The Supreme Court granted certiorari in two cases involving arbitration provisions in workplace disputes. The first case involved whether a contract with an independent contractor is an employment contract within the meaning of the FAA. In *Oliveira v. New Prime, Inc*., a trucking com-

employment agreements in 1995; today 53.9 percent of nonunion companies require employees to sign mandatory arbitration agreements. Alan S. Blinder*, What to Do When the Labor Market Stops Working for Workers,* WALL ST. J., June 12, 2018, at A17.

204. Justice Ginsberg explains that it was "this Court's exorbitant application of the FAA—stretching it far beyond contractual disputes between merchants—that led the NLRB to confront, for the first time in 2012, the precise question whether employers can use arbitration agreements to insulate themselves from collective employment litigation." *Epic Sys*., 138 S. Ct. at 1644-45 (Ginsberg, J. dissenting).

205. *See* Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1354, n.283 (2015).

206. *Epic Sys*., 138 S. Ct. at 1633 (Ginsburg, J., dissenting).

pany sought to enforce an arbitration clause in its independent contractor agreement with its driver. [207] The agreement signed by New Prime's independent contractors requires arbitration of all disputes between the parties.[208] Driver Oliveira argued that the independent contractor agreement is a "contract for employment" and thus he was immunized from being forced to arbitrate disputes according to the FAA.[209] Further, Section 1 of the FAA provides: "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[210] Over-the-road truck drivers, as transportation workers, are clearly engaged in "interstate commerce."[211] The First Circuit found that a plain reading of the FAA term "contracts of employment" included independent contractor agreements.[212] The Supreme Court upheld the First Circuit's decision, finding that the trucker's contract for work as an independent contractor fell within the Section 1 exemption of the FAA and, consequently, that the trial court lacked authority to order arbitration.[213]

In *Verela v. Lamps Plus*, another case the Court will hear in the current term, the Court will decide whether workers can arbitrate on a class-wide basis when the agreement is silent on class arbitration.[214] The district court ruled that the arbitration agreement was a contract of adhesion and ambiguous as to whether class arbitration was intended.[215] The trial court held further that the ambiguity should be construed against the drafter of the provision, namely the employer, Lamps Plus, thus allowing for class arbitration.[216] In an unpublished decision, the Ninth Circuit agreed that the contract was ambiguous because it did not mention class arbitration.[217] A panel of the Ninth Circuit that included noted labor scholar Judge Stephen Reinhardt[218] agreed with the district court, finding that a

207. Oliveira v. New Prime, Inc., 857 F.3d 7, 9-11 (1st Cir. 2017).

208. *Id.* at 10.

209. *Id.* at 11.

210. 9 U.S.C § 1 (2017).

211. *Oliveira,* 857 F.3d. at 17.

212. *Id.* at 20.

213. New Prime, Inc. v. Oliveira, No. 17-340, 2019 U.S. LEXIS 724, at *23 (Jan. 15, 2019).

214. Varela v. Lamps Plus, Inc., 701 F. App'x. 670, 672 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 1697 (2018). The actual question presented: "Whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements." *Lamps Plus Inc. v. Varela*, SCOTUSBLOG, https://perma.cc/2PE6-JM3K (archived Jan. 17, 2019).

215. *Id.* at 671.

216. *Id.*

217. *Id.*; *see also* Alden L. Atkins & Caroline Colpoys, Vinson & Elkins, *Reviewing Silence: SCOTUS Grants Certiorari to a 9th Circuit Case on State-Law Interpretation of Arbitration Clauses*, LEXOLOGY (May 22, 2018), https://perma.cc/7P94-J4PC (archived Jan. 17, 2019).

218. Judge Reinhardt passed away on March 29, 2018. Appointed by President Jimmy

reasonable interpretation of the language was that it authorized class arbitration.[219] If the Supreme Court allows the opinion of the Ninth Circuit to stand, this would allow state-law interpretation of arbitration agreements,[220] something that the current Supreme Court seems unlikely to do in light of its strong stance on the primacy of the FAA. Of course, after the *Epic Systems* decision, employers are likely to avoid this concern about ambiguity or choice of law provisions by using clear language to include a class waiver in arbitration agreements.

B. Employees Could Discourage Employers by Filing Many Individual Claims

In cases where many employees seek to challenge an employer's actions or policies, the impact of the *Epic Systems* decision may be mitigated by filing a multitude of individual arbitration claims. Employers might then decide that the cost of defending individual claims is not an economically sound policy.[221]

A lawsuit against Buffalo Wild Wings, Inc. involving a wage dispute used the strategy of filing 400 individual arbitrations in order to counter the impact of the *Epic Systems* decision.[222] Employers, faced with the cost of paying for each arbitration and the time involved in addressing each case, chose to engage in settlement agreements.[223] Unfortunately, this serial arbitration strategy is not often easy to employ. The Buffalo Wings case began as a class action, thereby allowing attorneys to use the list of class action plaintiffs to shift to mass arbitration, following the Court's decision in *Epic Systems*.[224] In most cases, it will be more difficult to identify enough workers to make mass arbitration feasible.

When possible, individual arbitration by many employees can provide employees with the representation needed and the equality of bargaining power required to assert their rights. But without an opportunity to coordinate, employees cannot appreciate the potential success of such a strategy.

C. Ordinary Contract Defenses

Even after the Supreme Court's decision in *Epic Systems*, employees retain

Carter, Judge Reinhardt was noted for his liberal bent as well as his knowledge and experience in the field of labor law. *See* Sam Roberts, *Stephen Reinhart, Liberal Lion of Federal Court, Dies at 87*, N.Y. TIMES, Apr. 2, 2012, at B13.

219. *Lamps Plus*, 701 F. App'x. at 672-73. The dissenting judge found that the arbitration language was unambiguous. *Id.*

220. *See* Atkins & Colpoys, *supra* note 217, at 1.

221. *See* Ruan, *supra* note 28, at 1136. As Ruan and other commentators have noted, the Supreme Court's decision in *Concepcion* gave businesses a "free pass" to draft mandatory arbitration agreements and the trend for corporations has been in that direction. *Id.*

222. Ben Penn, *Buffalo Wild Wings Case Tests Future of Class Action Waivers*, BLOOMBERG LAW (Jul. 12, 2018), https://perma.cc/Y64K-GMH3 (archived Jan. 17, 2019).

223. *Id*.

224. *Id*.

the right to challenge arbitration agreements on the basis of ordinary contract defenses including fraud, duress, and unconscionability.[225] While the *Epic Systems* Court did not agree with the employees' argument that the FAA's saving clause was triggered by individual arbitration agreements that interfere with employee-protected concerted activity, the Court was not faced with a specific claim of fraud or other such contract defense with respect to the facts of the cases. Such common law contract defenses can still undermine an arbitration agreement even after the Court's *Epic Systems* decision as long as the defense is not aimed at arbitration agreements only. Thus, a claim of fraud could entail a misrepresentation as to the substance of what the employee was signing. Duress could be forcing the employee to sign the agreement or else face losing his job or a promotion. Duress could also include threatening the employee or an employee's family member or friend with bodily harm or adverse employment consequences if that person is also employed by the employer.[226] Unconscionability could be another successful defense as it could include anything that a court deems to be so one-sided as to be against public policy. This holds true as long as the court is treating arbitration agreements as it would any contract, and not contradicting the Court's ruling that the NLRA is no defense to enforcement of a mandatory individual arbitration agreement.

D. The Continuing Power of Agencies: The NLRB, the EEOC, and the DOL

Government agencies may afford some relief to employees as a group. Courts have made it clear that employees have a right to seek relief from the NLRB. In *Epic Systems,* the Court affirmed the Fifth Circuit's decision in *Murphy Oil*, which reinforced the primacy of employee access to the NLRB to file an unfair labor practice claim. While mandatory individual arbitration provisions were upheld by the Fifth Circuit, the NLRB insisted that the language of the provision be revised to ensure that employees were clear about their right to go to the NLRB for relief.[227] This is an avenue that *Murphy Oil,* as affirmed by *Epic Systems*, leaves open to employees, and an employee or employees could file an unfair labor practice complaint at the NLRB as an individual or as a group. So while employees may not be able to go to court or act jointly in court or in arbitration, they can still seek relief at the NLRB, which is not a party to the arbitra-

225. *See* Brendan G. Dolan & Joseph K. Mulherin, *Arbitration Agreements and the Supreme Court's Recent Decision: An Epic Change for Employers?*, VEDDERPRICE (May 31, 2018), perma.cc/ZXZ4-LU6V; *see also Epic Sys.*, 138 S. Ct. at 1622 (writing for the majority, Justice Gorsuch noted that agreements to arbitrate may be invalidated by generally applicable contract defenses that apply to "any" contract and do not only apply to arbitration agreements).

226. *See Thompson v. North American Stainless, L.P.*, 562 U.S. 170, 170-71 (2011) (finding unlawful retaliation in violation of Title VII of the Civil Rights Act when fiancée and co-worker of employee who filed a complaint of sexual harassment at EEOC was fired because this was within her zone of interest.).

227. *Epic Sys.*, 138 S. Ct. at 1620.

tion agreement and would thus be free to represent employees as a group in pursuit of their NLRA rights. For example, imagine an employee very publicly refused to sign the mandatory arbitration agreement because she felt it was negative for employees, and at the same time announced that she was seeking the help of a union to organize the employees, and the employer then terminated the employee. The employee could file an unfair labor practice charge at the NLRB and obtain reinstatement and back pay if 'but for' the employee's protected concerted activity, she would not have been fired.[228]

There are challenges to pursuing this strategy, the first being that many employees are not aware of the option to file a charge at the NLRB. Employees who sign these mandatory individual arbitration provisions are usually not in a union and thus may not have access to this information. Employers are not required to post information about employee rights under the NLRA or the NLRB's role in workplaces unless ordered to do so as a remedy for employer unfair labor practices or in the course of a pending union representation election.[229] Another restriction on the ability of employees to utilize the NLRB as a resource for a remedy is that the employees must do so within the 180-day statute of limitations, which runs from the date of the employer violation.[230] Failure to meet this deadline results in the charge being dismissed as time-barred. Finally, budgetary constraints may limit the ability of NLRB agents to pursue weaker cases.

In addition to the NLRB, there are avenues for other agencies to seek relief on behalf of employees who are subjected to discrimination that violates statutes under those agencies' jurisdiction. For example, the EEOC can investigate and prosecute pattern or practice cases or individual cases that fit within the agency's priorities for litigation despite the presence of mandatory individual arbitration agreements binding employees to individual (or, more rarely, group) arbitration. The agency is not bound by the employment contract and its individual arbitration provision because it is not a party to the agreement; the agency is thus free to exercise its authority to enforce the antidiscrimination laws.

The EEOC was successful in a recent disability discrimination case. In *Bayer v. Neiman Marcus Grp., Inc*., the Northern District of California refused to grant summary judgment in a case where a worker returning from medical leave was

228. The General Counsel for the NLRB must show that the employer's action was motivated by the employee's protected concerted activity and the burden then shifts to the employer to prove that the employee would have been terminated anyway for legitimate business reasons. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983). *See* NLRB, https://perma.cc/REY6-W4QB (archived Jan. 17, 2019) (for complete information on the NLRBs authority and protections the agency offers); *see also* NLRB, PROTECTING EMPLOYEE RIGHTS, https://perma.cc/Z58H-3FYG (archived Jan. 17, 2019) (detailing more specific information on protecting employee rights).

229. *See* NLRB, THE NLRB'S POSTING RULE (Jan. 6, 2014), https://perma.cc/J7AA-QWJP (archived Jan. 17, 2019).

230. *See* NLRB, PROTECTING EMPLOYEE RIGHTS, https://perma.cc/4SMV-ZLG2 (archived Jan. 17, 2019).

forced to sign a mandatory arbitration provision.[231] Bayer alleged that the pressure he was placed under to sign the agreement violated his rights under the Americans with Disabilities Act (ADA). His lawyers noted that the employer's interference with Bayer's ADA rights allowed for "one of the few remaining" challenges to forced arbitration provisions after the Supreme Court's *Epic Systems* decision.[232] The Neiman Marcus provision included a class waiver and a shortened statute of limitations of one year.[233] Bayer maintained that the shortened statute of limitations was a "per se violation" of the ADA.[234] Bayer claimed that the company imposed the arbitration requirement on employees in retaliation for his request for reasonable accommodation of his disability.[235]

For workers bringing wage and hour claims, the Department of Labor (DOL) and state wage and hour agencies remain a potential source of protection. These agencies are free to investigate and prosecute violations of the Fair Labor Standards Act and analogous state wage and hour laws irrespective of agreements that bar employees from bringing class actions in court. The DOL's Strategic Plan for 2018-2022,[236] states its mission as follows: "To foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights."[237] More specifically, the Plan seeks to "[s]ecure lawful wages and working conditions for America's workers."[238] The Wage and Hour Division (WHD) enforces minimum wage, overtime, and anti-retaliatory provisions of the FLSA. These provisions cover more than 135 million Americans. The FLSA protects employees and also seeks to create a level playing field among employers. The WHD can enforce its laws through investigations and litigation to collect back wages and assess civil monetary penalties.

According to the Strategic Plan, the WHD seeks out the most serious violations in order to best allocate its resources and impact compliance and deterrence.[239] The problem with the WHD's commitment to protect workers is that it is like sending a mouse to kill an elephant. The resources of the agencies are so limited that the agencies are simply unable to fulfill the same role as the private bar in seeking redress of violations.

231. *See* Patrick Dorrian, *Neiman Marcus Can't Skirt Worker's Arbitration Coercion Claim (1)*, BLOOMBERG LAW NEWS, (May 31, 2018) (referencing *Bayer v. Neiman Marcus Grp., Inc.*, 2018 BL 191345 (N.D. Cal.) (May 30, 2018) (No. 13-CV-04487) (denying cross motions for summary judgment)).

232. *See id*.

233. *Id.* The arbitration provision also required that arbitrators be members of the Texas state bar. *Id.*

234. *Id.*

235. *See id.*

236. U.S. DEP'T OF LABOR, FY 2018-2022, STRATEGIC PLAN (2018). The plan can be found at https://perma.cc/GK6L-RF6A (archived Jan. 17, 2019) [hereinafter Strategic Plan].

237. *Id*. at 6.

238. *Id.*

239. *Id*. at 23.

Despite the DOL's rhetoric about assisting employees to recover owed wages, a recent DOL pilot program appears to be more helpful to employers than to employees. In March 2018, the WHD announced a six-month pilot program, the Payroll Audit Independent Determination (PAID) program. The program seeks to improve employers' compliance with overtime and minimum wage obligations.[240] Employers who voluntarily audit their practices and report non-compliance issues to the WHD under the PAID program are not subject to the penalties or liquidated damages they would otherwise incur if they were found to violate the FLSA.[241]

According to the DOL, the PAID program will help workers recover wages more quickly and without the time and expense involved in investigations and litigation. The efficacy of the program is suspect; employers are unlikely to self-report because they fear the information will lead to federal investigation and employee lawsuits.

E. State Representative Suits May Restore Employee Rights

Some states have taken an active role in combatting mandatory arbitration provisions. States must be wary, however, that attempts to preserve employees' rights do not unduly interfere with federal law, as state laws that directly conflict with federal laws are clearly preempted.[242] California has taken a strong stance in fighting for employees' and consumers' rights.[243] The Ninth Circuit held that a consumer contract prohibiting class arbitration was unconscionable; but in *AT&T Mobility v. Concepcion*, the Supreme Court held that the FAA preempted California state law.[244] Despite its defeat in combatting mandatory individual arbitration provisions, California has sought to find effective ways for employees

240. News Release, U.S. Dep't of Labor, U.S. Department of Labor Announces New Program to Expedite Payment to American Workers (Mar. 6, 2018), https://perma.cc/CBN5-PAWU (archived Jan. 17, 2019).

241. *Id*. Employers who are under investigation by the WHD or who have previously reported non-compliance are not eligible for the PAID program.

242. *See* U.S. CONST., art. VI. The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

243. After the Supreme Court's decision in *Epic Systems*, the California legislature proposed Assembly Bill 3080, a bill that would have barred employers from requiring employees to sign arbitration agreements as a condition of employment. Governor Jerry Brown vetoed the bill on September 30, 2018, stating that the bill would violate the FAA and the Supreme Court's decision. *See* Sherry L. Swieca et al., *California Governor Vetoes Bill Prohibiting Mandatory Arbitration Provisions in Employment Contracts*, JACKSON LEWIS (Oct. 1, 2018), https://perma.cc/F5QE-2JZ9 (archived Jan. 17, 2019).

244. 563 U.S. at 352. The Ninth Circuit had held that mandatory arbitration was an unconscionable contract provision under general contract principles. Laster v. AT&T Mobility, LLC, 584 F.3d 849, 853-56 (9th Cir. 2009). Moreover, the Ninth Circuit added that the

to assert their rights collectively in cases involving labor violations.

The Labor Code Private Attorneys General Act of 2004 (PAGA) authorizes aggrieved employees to file lawsuits to recover civil penalties on behalf of themselves, other employees, and the State of California for Labor Code violations.[245] PAGA is a type of qui tam action that allows an employee to step into the shoes of the state labor agency, the Labor and Workforce Development Agency (LWDA), and act as a private attorney general to seek statutory damages for labor code violations.[246] Damages under such suits are shared between the LWDA (75 percent) and the aggrieved employees (25 percent).[247] PAGA also provides for attorney's fees and costs to the employee who brings the suit.[248] PAGA is a representative action, but it does not require certification as a class action would. Most importantly, the Ninth Circuit held that a mandatory arbitration agreement does not waive an employee's right to bring a PAGA claim.[249]

PAGA may be viewed as a "work-around" of Supreme Court precedent upholding mandatory arbitration provisions.[250] The law is imperfect, as statutory damages may fall short of the actual damages owed to employees.[251] In addition, employers have raised issues about the fairness of PAGA. For example, although PAGA suits are not class actions, aggrieved employees have sought class-wide discovery, burdening employers.[252] Furthermore, the California Court of Appeals recently expanded the impact of PAGA, holding that an aggrieved employee who is affected by at least one Labor Code violation can sue an employer for all Labor Code violations that affect other employees.[253]

But PAGA restores rights to the individual to protect himself while simultaneously discouraging employers from violating labor laws. PAGA assists the

FAA did not preempt California unconscionability law. *Id*. at 857.

245. Kevin R. Allen, *What You Should Know About the Private Attorneys General Act in 2017*, Contra Costa Law. (July 1, 2017), https://perma.cc/CL8P-R4W7 (archived Jan. 17, 2019).

246. *Id*.

247. *Id*.

248. *Id*.

249. Sakkab v. Luxxotica Retail N. Am. Inc., 803 F.3d 425, 430 (9th Cir. 2015) (upholding the rule articulated in Iskanian v. CLS Transp., LLC, 59 Cal. 4th 348, 383-84 (2014)).

250. Josh Eidelson, *California Helps Workers Sue Their Bosses. New York Has Noticed*, Bloomberg (Sept. 29, 2017), https://perma.cc/P5CW-7CAD (archived Jan. 17, 2019).

251. *See* Charlotte Garden, *Improving Work Law Enforcement in States: California's Private Attorneys General Act*, On Labor (July 19, 2017), https://perma.cc/6S4N-H3AS (archived Jan. 17, 2019).

252. In *Williams v. Superior Court*, 3 Cal. 5th 531 (2017), the Supreme Court of California allowed broad discovery by a PAGA plaintiff. The court stated that the right to discover in California is "a broad one," and "[n]othing in the characteristics of a PAGA suit . . . affords a basis for restricting discovery more narrowly." *Id*. at 538; *see also* Yen P. Chau, *The Increasing Punch of a PAGA Suit*, Archer Norris, (Feb. 2, 2018), https://perma.cc/FP8X-CTFM (archived Jan. 17, 2019).

253. Wesley Shelton & Thomas Kaufman, *Court Expands Reach of California PAGA Representative Actions*, Lab. & Emp. Law Blog (June 5, 2018), https://perma.cc/Z5JG-6T75 (archived Jan. 17, 2019).

LWDA, an agency with limited resources, in enforcing the state's labor code.[254] PAGA solves many of the problems associated with mandatory arbitration provisions: it preserves a forum for collective action; it makes an employer's record of labor violations public and transparent; and it allows effective representation for employees involving small amounts because it provides for attorneys' fees. One attorney stated that "[t]he possibility of a PAGA case changes the calculus for a company, so that they would invest more in compliance and not be as cavalier about the labor standards."[255]

The impact of *Epic Systems* on PAGA is uncertain.[256] Both the California Supreme Court and the Ninth Circuit have held that an employee cannot waive a future PAGA claim through an arbitration agreement or class action waiver.[257] Some attorneys have opined that, despite the Supreme Court's decision in *Epic Systems*, PAGA claims remain exempt from class action waiver provisions.[258] This theory recognizes that PAGA claims are brought on behalf of the State which is not a party to the arbitration agreement and consequently cannot be bound by it.[259]

PAGA could provide a model for other states that lack resources to effectively police state labor laws.[260] New York has considered a law similar to PAGA; other states, determined to restore rights to employees, could follow.[261] If such representative suits become popular, the Supreme Court will likely consider whether state laws prohibiting class waivers are preempted by the FAA.

F. The Momentum of the #MeToo Movement

Despite studies and articles explaining how laws designed to protect workers are unenforced and how mandatory arbitration provisions with class waivers leave workers with little or no recourse, the cause for worker rights has not captured the imagination of Congress, much less the business community.[262] The

254. *See* Garden, *supra* note 251, at 1.

255. Eidelson, *supra* note 250.

256. *See* Sabrina A. Beldner et al., *Supreme Court Scratches "Triple Bank Shot" Attempt to Invalidate Class/Collective Action Waivers*, MCGUIREWOODS (May 22, 2018), https://perma.cc/Q4YS-B8K3 (archived Jan. 17, 2019) (finding that while *Epic Systems* didn't address the PAGA issue, it spoke in broadest terms of the FAA's preemptive effect and set the stage for the Supreme Court to resolve the issue).

257. *See* Iskanian v. CLS Transp., LLC, 59 Cal. 4th 348, 383-84 (2014); Valdez v. Terminix Int'l Co., 681 Fed. Appx. 592, 593-94 (9th Cir. March 31, 2017) (unpublished opinion).

258. Hazel U. Poei & Zoe Yuzna, *Class Action Waivers Remain Inapplicable to PAGA Claims*, JACKSON LEWIS PC (May 29, 2018), https://perma.cc/3XMY-BJTK (archived Jan. 17, 2019).

259. *Id.*

260. Eidelson, *supra* note 250.

261. *Id.*

262. *See, e.g.*, Ruan, *supra* note 28, at 1106-15 (detailing wage theft as a national epidemic and the underenforcement of wage protection laws); Sternlight, *supra* note 17, at 1328-

#MeToo Movement, however, resonates with both politicians and business. The movement has strong support in Congress, in state legislatures, and in the business community. The prejudicial effects of mandatory arbitration with class waivers aligns labor and employment with the #MeToo movement. The #MeToo movement broadly covers the movement against sexual harassment, assault, and violence, especially in the workplace.[263] After the Supreme Court's *Epic Systems* decision, leaders of the #MeToo movement referred to forced arbitration as "a sexual harasser's best friend."[264] But the Court's decision is not likely to impact sexual harassment cases. The impact of the *Epic Systems* decision on sexual harassment cases is likely to be mitigated by congressional action as well as by employers' initiative to carve out exceptions for mandatory arbitration in cases involving sexual harassment.[265] Labor advocates should seize the moment to make a broader case against mandatory arbitration in the workplace. Forced arbitration in the workplace raises issues for all employees who do not have the power to negotiate their agreements. Forced arbitration in sexual harassment cases raises issues of secrecy and retaliation, and permits illegal conduct to continue in the workplace. Employees who are forced to arbitrate claims about wage and hours are concerned about these issues too. And although sexual harassment claims would rarely require collective action, other forms of gender discrimination, such as pay inequality, certainly benefit from employees' ability to bring their claims together.

52 (explaining how mandatory arbitration provisions deter employees from filing claims); Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in American Cities* (2009), https://perma.cc/ABN8-DQ8A (archived Jan. 17, 2019) (surveying over 4,000 workers in low-wage industries and finding that many employment and labor laws are systematically violated). *See generally* Alexander & Prasad, *supra* note 22 (explaining why laws designed to protect workers are not enforced and why workers do not seek enforcement).

263. *See* Alix Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements—And How They're Alike*, TIME (March 22, 2018), https://perma.cc/8MHX-4U9D. #MeToo is also related to the #TimesUp movement. Time's 2017 "Person of the Year" was not dedicated to one person; rather it was dedicated to "The Silence Breakers: The Voices That Launched a Movement." *See* Stephanie Zacharek, et al., *Time Person of the Year 2017: The Silence Breakers*, TIME (Dec. 18, 2017), https://perma.cc/J8LH-R2VC (archived Jan. 17, 2019) ("This reckoning appears to have sprung up overnight. But it has actually been simmering for years, decades, centuries. Women have had it with bosses and co-workers who not only cross boundaries but don't even seem to know that boundaries exist. They've had it with the fear of retaliation, of being blackballed, of being fired from a job they can't afford to lose. They've had it with the code of going along to get along. They've had it with men who use their power to take what they want from women.").

264. Gretchen Carlson, *The Supreme Court Tried to End #MeToo. Here's How We're Fighting Back*, FORTUNE (May 31, 2018), https://perma.cc/ZA2S-SVJ8 (archived Jan. 17, 2019).

265. *See* Vin Gurrieri, *3 Reasons the Epic System's Ruling Won't Sink #MeToo*, LAW360 (May 22, 2018), https://perma.cc/L9XL-Q8UV (archived Jan. 17, 2019); *see also* Campbell, *supra* note 7 (discussing recent trend of tech titans carving out exception to mandatory arbitration for sexual harassment claims).

The #MeToo movement has spawned a bipartisan bill with seventeen co-sponsors.[266] The Ending Forced Arbitration of Sexual Harassment Act would prevent employers from depriving employees of their Seventh Amendment right to a jury trial when they are victims of sexual harassment.[267] Legislation that would halt arbitration for sexual harassment is supported by every attorney general in the United States and its territories.[268] Attorneys general have criticized arbitration as fostering the "culture of silence that protects perpetrators at the cost of their victims."[269]

Some employers have opted to carve out exceptions from mandatory arbitration provisions for sexual harassment claims. Microsoft, Uber, and Lyft have announced that they will not require mandatory arbitration for sexual harassment claims.[270] Other companies, concerned with the reputational harm associated with forced arbitration in sexual harassment cases, will likely follow suit. But these companies will respond to headlines, not to the mundane problems of low wage workers.

The #MeToo movement has brought attention to the issue of forced arbitration and employee advocates should capitalize on the momentum. While legislation prohibiting forced arbitration of sexual harassment claims is needed, it should be part of a broader effort to address forced arbitration in employment. Despite hopes that the Arbitration Fairness Act would gain traction after the Supreme Court's decision in *Epic Systems*, the prospect of the Act or a similar act gaining Congress' attention in the near future is bleak.

CONCLUSION

Former NLRB Member Craig Becker predicted that a Supreme Court decision upholding mandatory arbitration agreements would hinder "enforcement of all federal and state minimum standards legislation that depend on private enforcement, including the Fair Labor Standards Act, Title VII (prohibiting employment discrimination), the Age Discrimination in Employment Act, and the Americans with Disabilities Act, etc."[271] In the wake of the Supreme Court's

266. Carlson, *supra* note 264. Additionally, the House and the Senate each passed a bill designed to hold lawmakers personally accountable for harassment and to curtail mandatory arbitration. Nevertheless, the bill has stalled as lawmakers attempt to reconcile the two versions of the bill. Elana Schor & Heather Caygle, *Congress Dawdles as #MeToo Scandals Rage On*, POLITICO (Aug. 11, 2018), https://perma.cc/B22L-HMAZ (archived Jan. 17, 2019).

267. Gurrieri, *supra* note 265. The bill may also prohibit mandatory arbitration of gender discrimination cases. *Id.*

268. Jaqueline Thomsen, *AGs Demand Congress End Mandatory Arbitration in Sexual Harassment Cases*, HILL (Feb. 13, 2018), https://perma.cc/YC5Z-YW56 (archived Jan. 17, 2019).

269. *Id*.

270. *See* Gurrieri, *supra* note 265.

271. Garrett Epps, *How the Supreme Court Could Reshape Employment Law*, ATLANTIC (Feb. 25, 2018), https://perma.cc/YW9Z-J5A3 (archived Jan. 17, 2019).

decision in *Epic Systems*, numerous cases nationwide will be dismissed.[272] Thousands of plaintiffs claiming they are owed wages for "off-the-clock" hours from Chipotle will likely be required to go to arbitration.[273] In a race discrimination suit against Morgan Stanley, plaintiffs who claimed they were allowed to go to court because the class action waiver violated the NLRA will likely be required to arbitrate their claims.[274] The repercussions of the Court's decision will be felt by businesses and workers alike, with businesses pushing for individual arbitration, and workers losing their right to resort to a class or judicial forum for all manner of wage and hour and discrimination claims.[275]

Advocates for employees' rights had hoped that, in deciding *Epic Systems*, the Supreme Court would recognize that employees have a right to collective action in suits against their employers. The Supreme Court certainly could have found that Section 7 rights—concerted action for mutual aid or protection—are substantive rights and that agreements that interfere with such rights are illegal. But with this hope dashed, employees must look to other methods to seek redress for wage and hour claims. Legislation, as Justice Ginsburg stated, is urgently required.

In *Epic Systems*, the Court stated that "Congress has . . . shown that it knows how to override the Arbitration Act when it wishes . . . ."[276] Congress should take note of the many errors in the Court's decisions on arbitration and the impact that these decisions have not only on cases involving sexual harassment and gender discrimination, but also on cases involving employees whose claims are unlikely to make headlines.

272. *See* Ben Penn, *Supreme Court Warms Up 'Thousands' of Frozen Worker Claims*, BLOOMBERG LAW (May 21, 2018) (noting most paused lawsuits likely to be resolved by individual arbitration).

273. *See* Vin Gurrieri, *High Court's Class Waiver Ruling Cited in Multiple Cases*, LAW360, https://perma.cc/FS3T-4KTD (archived Jan. 17, 2019) (citing *Turner v. Chipotle Mexican Grill, Inc.*, No. 1:14-cv-02612 (D. Colo. 2018); Frazier v. Morgan Stanley & Co. LLC, No. 1:15-cv-00804 (S.D.N.Y. 2018)).

274. *Id.*

275. *Id.*

276. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1626 (2018).