

***EPIC SYSTEMS CORP. V. LEWIS: AMERICAN  
EMPLOYEES SUFFER AN EPIC LOSS IN THE  
ONGOING ARBITRATION CONFLICT***

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**I. INTRODUCTION**

Imagine you arrive to work one morning to find an email from your employer in your inbox. The email contains an agreement. The agreement consists of legal language concerning mandatory individual arbitration and a prohibition of class representation in any forum that you don’t quite understand. You do understand, however, the last line of the agreement. This line provides that if you continue to work, you will be deemed to have accepted the agreement. The agreement instructs you to click two buttons to agree and provides no alternative options. This is effectively the

unilateral contractual process that the Supreme Court sanctioned in its May 2018 decision, *Epic Systems v. Lewis*.<sup>1</sup>

For decades, the Supreme Court has encountered conflicts concerning the scope of the Federal Arbitration Act (FAA) and its application to consumer and employment contracts.<sup>2</sup> This closely divided decision is the most recent installment in what has developed into an epic saga of contention among the circuit courts, the Supreme Court, and Congress. With *Epic*, the Court has expanded the FAA from a statute that is narrowly focused on commercial contracts between equally positioned parties to an all-encompassing monstrosity that trumps state law, legislative intent, and thus far, any federal statute that it has faced. Eighty of America's largest corporations subject their employees to arbitration clauses for work-related disputes,<sup>3</sup> effectively blocking access to the public court system.

This Note is divided into four main parts. Section II discusses the facts of the dispute and the lower court's holding. Section III provides the background of the enactment of the FAA, as well as an overview of the recent judicial developments pertaining to arbitration agreements in employment contracts. Section IV examines the Supreme Court's decision in *Epic* that arbitration clauses that preclude class actions in employment contracts are permissible. Finally, this Note concludes in Part V with an analysis of the Court's decision and *Epic's* future impact.

## II. FACTS AND HOLDING

On April 2, 2014, Epic Systems (Epic), a healthcare software company, emailed arbitration agreements to its employees that required wage and hour claims to be resolved through individual arbitration.<sup>4</sup> The agreement included a clause prohibiting collective action in any other forum, stating that employees waived "the right to participate in or receive money or any other relief from

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1. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

2. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"); see generally Imre S. Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115 (2016).

3. Imre S. Szalai, *The Widespread Use of Workplace Arbitration Among America's Top 100 Companies*, EMP. RIGHTS ADVOC. INST. FOR L. AND POLY 3 (March 2018), <http://employeeerightsadvocacy.org/wp-content/uploads/2018/03/NELA-Institute-Report-Widespread-Use-of-Workplace-Arbitration-March-2018.pdf>.

4. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1151 (7th Cir. 2016), *rev'd*, 138 S. Ct. 1612 (2018).

any class, collective, or representative proceeding.”<sup>5</sup> The agreement specifically stipulated that

No party [could] bring a claim on behalf of other individuals, and any arbitrator hearing [a] claim [could] not: (i) combine more than one individual’s claim or claims into a single case; (ii) participate in or facilitate notification of others of potential claims; or (iii) arbitrate any form of a class, collective or representative proceeding.<sup>6</sup>

The agreement defined “covered claims” as any “claimed violation of wage-and-hour practices or procedures under local, state, or federal statutory or common law.”<sup>7</sup> In sum, the agreement stipulated two clear-cut rules: (1) an employee had to resolve any wage-and-hour disputes through arbitration and not in court; and (2) regardless of where the employee brought the claim, the employee could not avail himself of any collective action procedures available in that forum.

The agreement provided that if the employees continued to work, the company would assume their acceptance of the agreement.<sup>8</sup> The email asked that the employees review the agreement and “click[] two buttons” to acknowledge their acceptance.<sup>9</sup> The agreement did not provide an option for refusal.<sup>10</sup> Mr. Jacob Lewis, a “technical writer” at Epic and Plaintiff to this suit, followed the instructions and assented to the agreement.<sup>11</sup>

Mr. Lewis later had a dispute with his employer and brought suit in federal court in the Western District of Wisconsin.<sup>12</sup> Mr. Lewis and his fellow employees brought a collective action, arguing that Epic violated the Fair Labor Standards Act (FLSA)<sup>13</sup> and Wisconsin law because it incorrectly categorized him and his fellow technical writers and robbed them of their overtime pay as a result.<sup>14</sup> Epic filed a motion to dismiss the employees’ claim and

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5. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1151 (7th Cir. 2016), *rev’d*, 138 S. Ct. 1612 (2018).

6. *Id.*

7. *Id.* at 1155.

8. *Id.* at 1151.

9. *Id.*

10. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1151 (7th Cir. 2016), *rev’d*, 138 S. Ct. 1612 (2018).

11. *Id.*

12. *Id.*

13. *Id.*; *see also* Fair Labor Standards Act, 29 U.S.C. § 201 (2012).

14. *Lewis*, 823 F.3d at 1151.

requested the court to compel individual arbitration.<sup>15</sup> In their opposing brief, the employees alleged that the arbitration clause was unenforceable because it violated the National Labor Relations Act (NLRA) in its preclusion of the employees' ability to engage in "concerted activities" for their mutual aid and protection.<sup>16</sup>

The district court agreed with the employees' argument and denied Epic's motion.<sup>17</sup> In reaching its conclusion, the court deferred to the National Labor Relations Board's (NLRB) interpretation of the NLRA.<sup>18</sup> The NLRB explained that Section 7's "concerted activities" includes the right to participate in class and collective actions.<sup>19</sup> Section 8 then enforces Section 7 by prohibiting employers from "interfer[ing] with [or] restrain[ing]" employees' Section 7 rights.<sup>20</sup> Therefore, according to the NLRB's interpretation, a collective action waiver like Epic's arbitration agreement violated Section 7 of the NLRA.

The Seventh Circuit Court of Appeals for the United States agreed with the district court.<sup>21</sup> The appellate court denied Epic's argument that the FAA trumped the NLRA.<sup>22</sup> Instead, the court found that the two statutes could be read harmoniously because of the FAA's savings clause.<sup>23</sup> The savings clause provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for

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15. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1151 (7th Cir. 2016), *rev'd*, 138 S. Ct. 1612 (2018).

16. Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss and Compel Arbitration at 34, *Lewis v. Epic Sys. Corp.*, No. 15-cv-82-bbc, 2015 WL 5330300, (W.D. Wis. Sept. 10, 2015), 2015 WL 11439252; *see also* *Lewis v. Epic Sys. Corp.*, No. 15-cv-82-bbc, 2015 U.S. Dist. LEXIS 121137, at \*1 (W.D. Wis. Sept. 10, 2015), *aff'd*, 823 F.3d 1147 (7th Cir. 2016), *rev'd*, 138 S. Ct. 1612 (2018).

17. *Lewis v. Epic Sys. Corp.*, No. 15-cv-82-bbc, 2015 U.S. Dist. LEXIS 121137, at \*6 (W.D. Wis. Sept. 10, 2015).

18. *Id.*

19. *Brady v. Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under § 7 of the National Labor Relations Act."); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) ("[T]he filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7, unless the employees acted in bad faith.").

20. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1151 (7th Cir. 2016), *rev'd*, 138 S. Ct. 1612 (2018).

21. *Id.* at 1161.

22. *See id.* at 1156-57.

23. *See id.* at 1157.

the revocation of any contract.”<sup>24</sup> The agreement’s violation of the NLRA rendered it illegal, thus allowing it to fit under the FAA’s savings clause.<sup>25</sup>

Epic Systems appealed. The Supreme Court granted certiorari and consolidated the factually similar cases of *Epic Systems Corp. v. Lewis*, *Ernst & Young LLP v. Morris*, and *National Labor Relations Board v. Murphy Oil USA, Inc.* to determine whether employment agreements could mandate individual arbitration under the FAA without being in clear violation of the NLRA.<sup>26</sup>

Finally, on May 21, 2018, the Supreme Court concluded that arbitration agreements containing class and collective action waivers for wage and hour disputes are enforceable.<sup>27</sup> Specifically, the majority held that (1) the FAA requires the general enforcement of arbitration agreements, and (2) the right to pursue class or collective relief is not a “concerted activity” under Section 7 of the NLRA.<sup>28</sup>

### III. BACKGROUND

Until *Epic Systems*, the enforceability of arbitration clauses containing class action waivers remained uncertain.<sup>29</sup> A series of faulty Supreme Court decisions led to wide disparity among the appellate circuits.<sup>30</sup> But first, it is helpful to understand the breadth of the Supreme Court’s egregious expansion of the statute through a historical evaluation of the FAA’s purpose.

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24. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1156 (7th Cir. 2016), *rev’d*, 138 S. Ct. 1612 (2018).

25. *Id.* at 1159.

26. *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1619-20 (2018).

The three cases before us differ in detail but not in substance. Take *Ernst & Young LLP v. Morris*. There, Ernst & Young and one of its junior accountants, Stephen Morris, entered into an agreement providing that they would arbitrate any disputes that might arise between them. The agreement stated that the employee could choose the arbitration provider and that the arbitrator could “grant any relief that could be granted by . . . a court” in the relevant jurisdiction. The agreement also specified individualized arbitration, with claims “pertaining to different [e]mployees [to] be heard in separate proceedings.”

*Id.*

27. *See generally Epic Systems Corp.*, 138 S. Ct. 1612.

28. *See id.*

29. *See infra* Section III.B.

30. *See infra* Section III.C.

### A. THE PURPOSE OF THE FAA

When Congress enacted the FAA, it intended the Act to have limited application to disputes between equally bargaining parties to commercial contracts.<sup>31</sup> Over the last several decades, however, it mutated into an “edifice of the [Supreme Court’s] own creation.”<sup>32</sup> Before the drafting of the Federal Rules of Civil Procedure in 1938, the court system suffered from numerous ailments.<sup>33</sup> Varying state and federal procedures often confused attorneys and dockets were full.<sup>34</sup> Businessmen sought an alternative forum for resolving their simple commercial disputes that allowed them to avoid the chaos of the court system.<sup>35</sup> To facilitate this need, procedural reformers developed the FAA as a system in which commercial parties with fully-informed consent could resolve issues under the guidance of a neutral expert of the same industry to produce a faster, better-informed result.<sup>36</sup>

When Congress enacted the FAA, it was well-settled that it would not apply to employment contracts.<sup>37</sup> The drafters specifically included language stating that the FAA did not apply to “contracts of employment.”<sup>38</sup> As a point of emphasis during Congressional hearings, one of the drafters stressed that “[i]t was

31. See Imre S. Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115, 132 (2016) (“[M]erchants desired to take commercial disputes to a system of arbitration. As observed by one judge in New York, the commercial center of the United States, business interests ‘were willing to do almost anything’ to avoid submitting a controversy to the broken court system.”).

32. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O’Connor, J., concurring).

33. Jeremy Buchman, *Judicial Lobbying and the Politics of Judicial Structure: An Examination of the Judiciary Act of 1925*, 24 JUST. SYS. J. 1, 1 (2003) (noting overcrowded federal dockets as a result of a higher degree government regulations, contract disputes related to World War I, and an increase in cases stemming from Prohibition violations).

34. Imre S. Szalai, *An Obituary for the Federal Arbitration Act: An Older Cousin to Modern Civil Procedure*, 2010 J. DISP. RESOL. 391, 405 n.110 (2018) (citing CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1002 (3rd. ed. 1998) (Stating that “the procedural law continued to operate in an atmosphere of uncertainty and confusion.”)).

35. William L. Ransom, *The Organization of the Courts for the Better Administration of Justice*, 2 CORNELL L.Q. 186, 200-01 (1917) (“[T]he average court is the most indirect, inexact, inefficient, uneconomical and unintegrated instrumentality in the modern state . . . . Business men go to arbitration to avoid legal procedure . . . .”).

36. See Imre S. Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115, 135 (2016).

37. Imre S. Szalai, *A New Legal Framework for Employee and Consumer Arbitration Agreements*, 19 CARDOZO J. CONFLICT RESOL. 653, 659 (2018).

38. 9 U.S.C. § 1 (2012).

not the intention of this bill to make an industrial arbitration in any sense,” nor was it “intended that this [should] be an act referring to labor disputes, at all.”<sup>39</sup> Additionally, correspondence between the FAA’s drafters emphasized that Section 1 pointedly did not include workers involved in interstate commerce; this was done to exclude coverage of labor disputes.<sup>40</sup> Therefore, the FAA did not apply to employment disputes when Congress enacted it.

### B. *SOUTHLAND* AND ITS PROGENY

The purpose behind the FAA, however, gradually started to deteriorate in the 1980s when the Supreme Court began to uphold arbitration agreements in situations that did not involve two consenting parties of equal power.<sup>41</sup> The first of these overtly pro-arbitration cases was *Southland Corporation v. Keating*, in which the Court held that the FAA trumped state substantive law, manufacturing a “national policy favoring arbitration.”<sup>42</sup> Next, in 2001, the Court in *Circuit City, Inc. v. Adams* ignored the FAA’s exclusion of employment contracts discussed in the previous Section, and held that the exclusion only applied to employment contracts of transportation workers.<sup>43</sup> The final blow came in *AT&T v. Concepcion*, a case in which the Court applied the FAA to take-it-or-leave-it consumer contracts.<sup>44</sup>

In examining the Court’s bulldozing pattern over the last several decades, the instant decision does not come as a surprise. Congress, however, did not create the FAA for situations in which a stronger party has absolute power to require arbitration in any context through the inclusion of a fine print clause.<sup>45</sup> Unfortunately, as a result of the Court’s judicial expansion,

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39. Szalai, *supra* note 37, at 660 (internal quotations omitted).

40. Szalai, *supra* note 37.

41. *Perry v. Thomas*, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting) (“It is only in the last few years that the Court has effectively rewritten the [FAA] to give it a preemptive scope that Congress certainly did not intend.”); *see generally* *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (applying the FAA to statutory antitrust claims).

42. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (“In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration, and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”).

43. *See generally* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

44. *See generally* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

45. *See* Imre S. Szalai, *A New Legal Framework for Employee and Consumer Arbitration Agreements*, 19 *CARDOZO J. CONFLICT RESOL.* 653, 660 (2018); *see also* *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220 (1987) (holding that the FAA covers statutory securities law claims).

arbitration clauses appear in practically all employment and consumer contracts.<sup>46</sup>

#### IV. THE COURT'S DECISION

Beginning with the NLRB's 2012 decision that individual employment arbitration agreements violated the NLRA,<sup>47</sup> disparity began developing between the appellate courts.<sup>48</sup> The Sixth, Seventh, and Ninth Circuits held that arbitration agreements containing provisions that restrict employees' rights to pursue class and collective actions were in clear violation of Section 7 of the NLRA.<sup>49</sup> The Second, Fifth, and Eighth Circuits held that such provisions were enforceable under the FAA.<sup>50</sup> In May 2018, the Supreme Court granted certiorari to sew together the seams of the circuit split.

In *Epic*, the majority relied on the Supreme Court's recent track history expanding the FAA, the Court's interpretation of the FAA in *Concepcion*, and the presumption in favor of arbitration agreements as developed in *Southland* and its progeny.<sup>51</sup> In a 5-4 decision, the Court held that no part of the NLRA rebutted Congress's pro-arbitration policy in enacting the FAA; therefore, employees could not seek "refuge" in Section 7 of the NLRA to enforce their right to band together for their mutual benefit.<sup>52</sup> Justice Gorsuch authored the majority opinion, while Justice Ginsburg filed a lengthy dissent, in which Justices Breyer, Sotomayor, and Kagan joined.<sup>53</sup> Justice Gorsuch authored the

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46. Imre S. Szalai, *A New Legal Framework for Employee and Consumer Arbitration Agreements*, 19 CARDOZO J. CONFLICT RESOL. 653, 661 (2018).

47. See generally *D.R. Horton, Inc., and Michael Cuda*, 357 N.L.R.B. 2277 (2012) (striking down arbitration agreements imposed on employees as a condition of employment that prohibit both class actions in court and class-wide arbitration as a violation of Section 7 of the National Labor relations Act).

48. Compare *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1016 (5th Cir. 2015) (upholding class and collective action waivers in employment arbitration agreements), *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013), *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 299 (2d Cir. 2013), and *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013), with *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1151, 1155 (7th Cir. 2016) (NLRA rendered class and collective action waivers in employment arbitration agreements unenforceable) and *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 983 (9th Cir. 2016) (also holding class action waivers in employment arbitration agreements in violation of the NLRA).

49. See, e.g., *Morris*, 834 F.3d at 975.

50. See, e.g., *Murphy Oil USA, Inc.*, 808 F.3d at 1013.

51. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623, 1627 (2018).

52. See *id.* at 1622.

53. See generally *id.* at 1612.

majority opinion (A), while Justice Ginsburg filed a lengthy dissent (B).

### A. THE MAJORITY OPINION

The Court began its analysis by framing the issue as a question of contracting rights between two parties of equal bargaining power: employer and employee.<sup>54</sup> It posed the question of whether employees should *always* be able to bring class actions in spite of an earlier agreement to the contrary.<sup>55</sup> The Court opined that, although policy implications may be ambiguous, “the law is clear.”<sup>56</sup> The Court sided with the district court’s dissenting opinion and declined to support the “new” idea that the NLRA and the FAA were in conflict with each other.<sup>57</sup> The Court explained that the NLRB’s introduction of this novel idea made some circuit courts feel obliged to follow it, causing the circuit split.<sup>58</sup>

#### 1. THE FAA’S SAVINGS CLAUSE

First, the Court, relying on its reasoning in *Concepcion*, denied the employees’ argument that the FAA’s savings clause created an exception for situations like the instant case.<sup>59</sup> The Court explained that the savings clause covers only contract defenses and does not cover any argument that specifically attacks an attribute of arbitration.<sup>60</sup> The employees argued that the contracts were illegal because they violated the NLRA.<sup>61</sup> The Court stated that, while illegality is a normal contract defense such as fraud, duress, or unconscionability, and is typically covered under the FAA’s savings clause, the employees’ illegality argument here actually focused on the fact that the arbitration agreement required them to proceed as individuals.<sup>62</sup> The Court explained

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54. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623, 1619 (2018).

55. *Id.*

56. *See id.*

57. *Id.* at 1620 (citing *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *D. R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344 (5th Cir. 2013)).

58. *Id.* at 1619-20 (citing *D. R. Horton, Inc.*, 737 F.3d at 355-62).

59. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) (“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’”) (citing Section 2 of the FAA).

60. *Id.* (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)).

61. *Id.*

62. *Id.* (“[The employees] object to their agreements precisely because they require individualized arbitration proceedings instead of class or collective ones. And by attacking (only) the individualized nature of the arbitration proceedings, the

that individualism of the parties is a “fundamental attribute” of arbitration.<sup>63</sup> Individuality—the Court argued—is necessary to allow arbitration to serve its purpose.<sup>64</sup> Thus, the employees’ argument specifically attacked an attribute of arbitration and could not be covered under the FAA’s savings clause.

## 2. ILLEGALITY AS SYNONYMOUS TO UNCONSCIONABILITY

The Court opined that the instant case was similar to *Concepcion*.<sup>65</sup> The plaintiffs in *Concepcion* raised an argument of unconscionability, but the Court found that this argument was not covered under the FAA’s savings clause because it specifically attacked arbitration.<sup>66</sup> The Court stated that an unconscionability argument that attacked arbitration was synonymous to an illegality argument that attacked arbitration.<sup>67</sup> Similar cases must be decided similarly.<sup>68</sup> Accordingly, this case needed to follow precedent in that the savings clause does not cover general contract defenses if they attack the nature of arbitration.<sup>69</sup>

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employees’ argument seeks to interfere with one of arbitration’s fundamental attributes.”).

63. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622-23 (2018).

[A]rbitrators would have to decide whether the named class representatives are sufficiently representative and typical of the class; what kind of notice, opportunity to be heard, and right to opt out absent class members should enjoy; and how discovery should be altered in light of the classwide nature of the proceedings. All of which would take much time and effort, and introduce new risks and costs for both sides. In the Court’s judgment, the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace.

*Id.* (internal citations omitted).

64. *Id.* at 1623.

65. *See id.* at 1622.

66. *Id.* at 1622-23 (“[I]t did so by effectively permitting any party in arbitration to demand classwide proceedings despite the traditionally individualized and informal nature of arbitration.”).

67. *Id.* at 1623.

Illegality, like unconscionability, may be a traditional, generally applicable contract defense in many cases, including arbitration cases. But an argument that a contract is unenforceable just because it requires bilateral arbitration is a different creature. A defense of that kind, *Concepcion* tells us, is one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability.

*Id.* (emphasis omitted).

68. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018) (“The law of precedent teaches that like cases should generally be treated alike, and appropriate respect for that principle means the Arbitration Act’s saving clause can no more save the defense at issue in these cases than it did the defense at issue in *Concepcion*.”).

69. *See id.*

### 3. *EJUSDEM GENERIS* AND THE MEANING OF “OTHER CONCERTED ACTIVITIES”

Next, the Court looked to the construction of the NLRA. The employees argued that “other concerted activities”<sup>70</sup> in Section 7 of the NLRA showed a clear and manifest congressional intent to encompass employees’ right to engage in class action arbitration.<sup>71</sup> The Court explained that the language of Section 7 does not state or even “hint” at the intent to include arbitration or class actions.<sup>72</sup> First, the Court stated that the intent to include class actions “seem[ed] pretty unlikely” because class actions were “hardly known when the NLRA was adopted in 1935,” and the Federal Rules of Civil Procedure did not mention class actions until 1966.<sup>73</sup> Second, the Court looked to the doctrine of *ejusdem generis*.<sup>74</sup> The Court argued that “other concerted activities” could only encompass activities pertaining to collective bargaining and unionizing because those were the more specific topics of those listed in Section 7.<sup>75</sup> The Court additionally pointed out that the NLRA provides specific procedures for many other concerted activities, but nowhere does the text of the statute touch on class actions in court or in arbitration.<sup>76</sup> Absent some guidance in this area, the Court stated it could not read these topics into the text of the NLRA.<sup>77</sup>

### 4. THE FAIR LABOR STANDARDS ACT AS A MORE APPROPRIATE STATUTE

The Court then determined that the FLSA was the more appropriate statute for employees’ argument.<sup>78</sup> However, the

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70. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1617 (2018). The employees sought remedy in the language of Section 7 of the NLRA, which provides that workers have “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” *Id.* (internal quotation marks omitted).

71. *Id.* at 1624.

72. *Id.* at 1625.

73. *Id.* at 1624.

74. *Id.* (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (describing *ejusdem generis* canon as “a statutory cannon which means, ‘[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.’”)).

75. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1625 (2018) (citing 29 U.S.C. §157 (2012)).

76. *See id.* at 1626.

77. *See id.*

78. *Id.* (“The FLSA allows employees to sue on behalf of ‘themselves and other

Court had already determined that the FLSA does not displace the FAA in similar cases.<sup>79</sup> The Court made a similar determination against the Norris-LaGuardia Act, which outlawed “yellow-dog” contracts prohibiting laborers from forming unions, saying that its protection of employees’ concerted activities did not trump Congress’s statutory schemes to enforce arbitration.<sup>80</sup>

Finally, the Court declined to give *Chevron* deference to the Board’s interpretation of the NLRA.<sup>81</sup> The Court posited that the prerequisites for applying *Chevron*—an agency seeking to interpret its own statute and ambiguity after the application of statutory construction—were missing here.<sup>82</sup> According to the majority, this case did not involve an agency seeking a favorable interpretation of a statute which it administers, but instead was an instance of an agency seeking to use its own statute (the NLRA) to outweigh a separate statute (the Arbitration Act) in which it did not specialize or administer. The majority also declined to defer to the Executive Branch where the Executive spoke “from both sides of its mouth articulating no single position” on how to interpret the statute.<sup>83</sup> Lastly, the Court opined that *Chevron* was only needed where traditional canons of statutory interpretation were unhelpful in resolving ambiguity, and that was not the case here.<sup>84</sup>

## B. THE DISSENT

The dissent responded with vehement opposition to the majority’s “subordinat[ion] [of] employee-protective labor legislation to the Arbitration Act.”<sup>85</sup> The dissent lamented that the Supreme Court no longer felt as it once did that workers’ rights were equal to employers’ rights.<sup>86</sup>

The dissent first outlined the history of congressional efforts to provide workers with protection against such devices as the

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employees similarly situated . . . .” (quoting 29 U.S.C. § 216(b) (2012))).

79. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1626 (2018) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991)).

80. *Id.* at 1627 (citing *Boys Mkts., Inc. v. Retail Clerks*, 90 S. Ct. 1583 (1970) (holding that the Norris-LaGuardia Act’s anti-injunction provisions do not bar enforcement of arbitration agreements)).

81. *Id.* at 1629.

82. *Id.* at 1630.

83. *Id.* (explaining that the Court had received conflicting briefs from the Board and the Solicitor General).

84. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018).

85. *Id.* at 1633 (Ginsburg, J., dissenting).

86. *Id.* at 1645.

“yellow-dog contract,” which prohibited concerted activities of any kind among employees.<sup>87</sup> The dissent explained that while Congress did not “directly prohibit coercive employer practices” with the enactment of the Norris-LaGuardia Act, it deliberately did so with the NLRA.<sup>88</sup> The dissent pointed out that the Court upheld the NLRA in *Jones & Laughlin Steel* as bestowing a “fundamental right” on employees to band together for their common interests.<sup>89</sup>

The dissent then delved into the breadth and scope of “concerted activities,” citing seventy-five years of case law holding that the NLRA encompassed employee class action litigation.<sup>90</sup> It responded to the majority’s application of *ejusdem generis* by arguing that the canon should only be used to narrow the scope of legislation where it is clear that Congress intended for a tight reading of a statute, and that this was not the case with the NLRA.<sup>91</sup>

The dissent went on to chastise the majority for its conflagration of the FAA in recent decades and its abandonment of true congressional intent.<sup>92</sup> The dissent stated that, because of this faulty line of Supreme Court cases, employers took complete advantage of contracts containing class action waivers.<sup>93</sup>

In its final argument, the dissent used traditional tools of statutory analysis to demonstrate why the NLRA should trump the FAA.<sup>94</sup> First, it argued that the NLRA, as the more recent statute, should act as a repeal of the earlier statute.<sup>95</sup> Next, it stated that

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87. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1634 (2018) (Ginsburg, J., dissenting) (citing H. MILLIS & E. BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS* 7-8 (1950)).

88. *Id.* at 1635 (citing Matthew W. Finkin, *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act*, 93 NEB. L. REV. 6, 16 (2014)).

89. *Id.* (dissent discussing *NLRB v. Jones & Laughlin Steel Corp.*, 57 S. Ct. 615 (1937)).

90. *Id.* at 1637-38 (citing precedent which established that the NLRA encompasses employee class action litigation).

91. *Id.* at 1639.

92. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1643-44 (2018) (citing Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U.L.Q. 637, 644-674 (1996) (tracing the Court’s evolving interpretation of the FAA’s scope)).

93. *Id.* at 1644-45 (Ginsburg, J., dissenting) (citing Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL’Y INST., 1-2, 4 (Sept. 27, 2017), <https://www.epi.org/files/pdf/135056.pdf>).

94. *Id.* at 1646.

95. *Id.*

the NLRA is the more specific statute as it targets group actions of employees.<sup>96</sup> The dissent finally countered the majority's argument that, had the drafters of the NLRA intended to include the right to class actions, they would have done so expressly by pointing out that the FAA and the NLRA were enacted at a time when legislation was of a much more general breed compared to modern legislation.<sup>97</sup>

The dissent ended with a long list of predictions of unfortunate consequences that will inevitably stem from the Court's decision. The dissent opined that employers would quickly supplement their arbitration clauses with class action waivers, resulting in workers' significant loss of wages from their reluctance to bring individual claims.<sup>98</sup> The dissent also predicted that workers would be less likely to pursue solo claims for fear of retaliation.<sup>99</sup> The dissent closed with a final damnation of the majority's opinion, observing that the deprivation of workers' rights to class actions was curated not by Congress in the FAA, but only by the Court's own making.<sup>100</sup>

## V. ANALYSIS

The first, most fundamental principle of arbitration law is that arbitration is a matter of contract between the parties.<sup>101</sup> When arbitration agreements are entered into, parties have the right to create their own procedure. This ceases to be a positive tool, however, when a more powerful party curates a one-sided procedure for its own advantage. With the Court's decision in *Epic*, consent has ceased to be a meaningful part of the arbitration process. The majority in this case claimed that it was applying the intent of the 1925 Congress; but, in reality, the Supreme Court has

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96. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1646 (2018) (citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (“a specific statute” generally “will not be controlled or nullified by a general one”)).

97. *Id.* (Ginsburg, J., dissenting).

98. *Id.* at 1646-47.

99. *Id.* at 1647.

100. *Id.* at 1648-49.

101. *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (“Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must ‘give effect to the contractual rights and expectations of the parties.’ In this endeavor, ‘as with any other contract, the parties’ intentions control.’ This is because an arbitrator derives his or her powers from the parties’ agreement . . . .”) (citations omitted); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (“[A]rbitration is simply a matter of contract between the parties.”).

been applying a completely different FAA of its own construction since the 1980s.<sup>102</sup>

This Section will analyze the Court's decision in *Epic*. First, Section A will highlight the majority's disregard for congressional intent in enacting the FAA. Then, Section B will discuss an alternative response to class action waiver in arbitration agreements. Next, Section C will explain how the majority's decision could affect current and future employment agreements. And finally, Section D will analyze the push back that has begun to ripple through the appellate circuits in response to the Court's decision in *Epic*.

### A. AN ALTERNATIVE SOLUTION

While the majority was careful to claim that stare decisis required it to give deference to both the NLRA and the FAA, it quickly retreated to its self-made "national policy" favoring arbitration. It claimed to turn an eye to congressional intent, but this inquiry went no further than listing the dates of the enactments of the NLRA, the FAA, and the Federal Rules of Civil Procedure. The majority made a similarly shallow argument, which was thoroughly rebutted in the dissent,<sup>103</sup> that class actions were hardly known at the time the NLRA was drafted.<sup>104</sup> The majority's resolution of *Epic* was largely a reflection of the conservative Court's pro-corporation and anti-labor sentiments.

Perhaps a better solution to resolving the conflict in *Epic Systems* would have been to uphold the arbitration agreement but sever its condition prohibiting class actions—in effect, a compromise. This solution would allow employees with identical claims to retreat to the court system and join together in litigation, while individual claims could still be pursued through arbitration. Some courts have used this tactic to preserve arbitration agreements while ridding them of their oppressive conditions.<sup>105</sup>

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102. Szalai, *supra* note 37, at 661.

103. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1641 (2018) (Ginsburg, J., dissenting) (citing S. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 38 (1987); Brief for Constitutional Accountability Center as Amicus Curiae at 5-16, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (Nos. 16-285, 16-300, 16-307), 2017 WL 3575761 (describing group litigation's "rich history"); *Gorley v. Louisville*, 65 S.W. 844 (1901)).

104. *Epic Sys. Corp.*, 138 S. Ct. at 1624-25.

105. See, e.g., *Brinkley v. Monterey Fin. Serv., Inc.*, 196 Cal. Rptr. 3d 1 (Cal. Ct. App. 2015) (holding cost-shifting provision in arbitration agreement that required loser to pay winner's costs and fees to be overly burdensome and severed provision, then

In other cases, parties have stipulated to eliminate the oppressive terms but preserve the rest of their arbitration agreement.<sup>106</sup> Admittedly, this approach may suffer from its own defects,<sup>107</sup> but it provides an alternative to the Court's attempt to graft its own meaning onto the FAA, while still allowing the Court to retain its pro-arbitration policy.

### B. EPIC'S FUTURE IMPACT

After the Court's decision, the NLRB issued a statement saying that it "respects the Court's decision, which clearly establishes that arbitration agreements providing for individualized proceedings, and waiving the right to participate in class or collective actions, are lawful and enforceable."<sup>108</sup> The NLRB also published data indicating that, when the Court decided *Epic*, it had fifty-five cases pending containing allegations that employers violated the NLRA with arbitration agreements containing class action waivers.<sup>109</sup> These agreements can no longer be invalidated on the basis of being contrary to public policy. As the dissent prophesied, *Epic* will inevitably lead to an explosion of individual arbitration agreements in employment contracts.

*Epic's* detrimental effects will likely not be limited to class actions. Individual suits may also be negatively impacted. Although arbitration is supposed to be based on the consent of the parties involved, evidence shows that consumers and employees frequently do not understand the meaning of arbitration

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compelled arbitration); *Hackler v. R.T. Moore Co.*, No. 2:17-cv-262-FtM-29MRH, 2017 WL 6535856, at \*12 (M.D. Fla. Dec. 21, 2017) (omitting statute of limitations condition); *Kobren v. A-1 Limousine Inc.*, No. 16-516-BRM-DEA, 2016 WL 6594075, at \*20-21 (D.N.J. Nov. 7, 2016) (severing provisions restricting cost-sharing from arbitration clause in employment agreement); *Galen v. Redfin Corp.*, No. 14cv05229-TEH, 2015 WL 7734137, at \*18-29 (N.D. Cal. Dec. 1, 2015) (deleting fee-shifting, forum selection, and choice of law clauses from arbitration agreement in labor controversy).

106. See *Roberson v. Clear Channel Broad., Inc.*, 144 F. Supp. 2d 1371, 1373-74 (S.D. Fla. 2001) (drafting party waived fee-shifting provision and agreed to pay all of plaintiff's arbitration fees in discrimination suit).

107. *Goodwin v. Branch Banking & Tr. Co.*, 699 F. App'x 274, 276 (4th Cir. 2017) ("[O]ne party cannot unilaterally alter the terms of a contract after it is formed and courts are not authorized to remake a contract.") (citing *State ex rel. Dunlap v. Berger*, 211 S.E.2d 549, 568 (W. Va. 2002) ("[A] court doing equity should not undertake to sanitize any aspect of the unconscionable contractual attempt.")).

108. *Supreme Court Issues Decision in NLRB v. Murphy Oil USA*, NLRB (May 21, 2018), <https://www.nlr.gov/news-outreach/news-story/supreme-court-issues-decision-nlr-v-murphy-oil-usa>.

109. *Id.*

agreements.<sup>110</sup> Further, arbitration poses a threat to access to justice. Evidence indicates that lawyers occasionally turn down clients who are fettered to an arbitration agreement.<sup>111</sup> Additional evidence shows that some plaintiffs fail to pursue their case once a court compels arbitration.<sup>112</sup> In effect, compelling arbitration can put an end to a dispute entirely.

### C. CIRCUIT COURTS PUSH BACK

Since *Epic's* publication, there have been a number of interesting developments among the circuit courts. In the first case decided post-*Epic*, employees who brought their claims in court received a favorable decision from the Fifth Circuit.<sup>113</sup> The court overturned a lower court's decision to compel arbitration because the employer did not sign their own arbitration agreement.<sup>114</sup> The contract in that case stipulated that each party must sign the agreement in order for it to be effective.<sup>115</sup> The Fifth Circuit based its reasoning on this language.<sup>116</sup> The court went on to explain that the employee's continuation of work did not obligate her to arbitrate because her employment did not nullify the parties' intent to require a signature to effectuate the agreement.<sup>117</sup> The Fifth Circuit declined to employ the Supreme Court's presumption in favor of the FAA, stating that it did not apply where a court is considering the formation of a contract.<sup>118</sup>

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110. Imre S. Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115, 116 n.7 (2016) (citing *Consumer Financial Protection Bureau, Arbitration Study, Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, at § 1.4.2. (March 2015) (“Consumers are generally unaware of whether their credit card contracts include arbitration clauses. Consumers with such clauses in their agreements generally either do not know whether they can sue in court or wrongly believe that they can do so.”)).

111. *Id.* at 116 n.8 (citing *Consumer Financial Protection Bureau, Arbitration Study, Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, at § 6.1 n.8 (March 2015) (noting “instances of counsel rejecting representations because of arbitration clauses”)).

112. *Id.* (citing *Consumer Financial Protection Bureau, Arbitration Study, Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, at § 6.7.1 (March 2015) (out of 52 cases dismissed from court pursuant to a motion to compel arbitration, only 12 cases, or a little less than a quarter, about 23%, were refiled in arbitration)).

113. *See Huckaba v. Ref-Chem, L.P.*, 892 F.3d 686 (5th Cir. 2018).

114. *See id.* at 686.

115. *Id.*

116. *See id.*

117. *See id.* at 690.

118. *Huckaba v. Ref-Chem, L.P.*, 892 F.3d 686, 688 (5th Cir. 2018).

The Eleventh Circuit, in *Gamble v. New England Auto Finance, Inc.*, similarly found against the Supreme Court's heavy presumption in favor of arbitration.<sup>119</sup> The Eleventh Circuit upheld the lower court's denial of a finance company's motion to compel arbitration.<sup>120</sup> The consumer in that case received text messages from the finance company to whom she had paid her auto loan in its entirety.<sup>121</sup> She filed a class action claiming that the company violated a federal statute, the Telephone Consumer Protection Act (TCPA).<sup>122</sup> Her loan agreement contained an arbitration provision regarding all disputes related to her loan.<sup>123</sup> The Eleventh Circuit held that these statutory claims did not arise out of the loan agreement, but instead arose from a congressionally-mandated statutory right.<sup>124</sup> Thus, her claims did not arise out of the arbitration contract.

In its analysis, the Eleventh Circuit focused its attention on the text of the arbitration clause. This textual analysis regarding the scope of the arbitration clause is an essential approach to undermining decades of Supreme Court precedent.<sup>125</sup> Section 2 of the FAA provides for the enforceability of provisions in an arbitration contract "to settle by arbitration a controversy thereafter arising out of such contract."<sup>126</sup> As discussed *supra*, the FAA's scope ballooned in the 1980s when the Supreme Court held that it covered statutory claims.<sup>127</sup> Statutory claims were never supposed to be covered by the FAA. Even after *Epic*, the Eleventh Circuit in *Gamble* effectively analyzed arbitration agreements as they were intended.

Congress may also, as it has done before,<sup>128</sup> heed Justice

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119. *Gamble v. New Eng. Auto Fin., Inc.*, 735 Fed. App'x. 664, 664 (11th Cir. 2018).

120. *Id.* at 665.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Gamble v. New Eng. Auto Fin., Inc.*, 735 Fed. App'x. 664, 666 (11th Cir. 2018).

125. Imre S. Szalai, *11th Circuit's Opinion Reveals Tension in Arbitration Law*, OUTSOURCING JUST. (June 4, 2018), <http://www.outsourcingjustice.com/11th-circuits-opinion-reveals-tension-in-arbitration-law/> (discussing the Eleventh Circuit's textual analysis of the arbitration agreement in *Gamble*, 735 Fed. App'x. 664.).

126. 9 U.S.C. § 2 (2009).

127. *See supra* Section III.B.

128. Congress took such action after the Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (holding that the statute of limitations for presenting equal-pay discrimination claims began on the date the employer first made an illegal payment decision, not on the date of the last paycheck).

Ginsburg's call to action.<sup>129</sup> In December 2017, for example, Congress introduced a bill that prohibits arbitration clauses in employment agreements that require arbitration in claims involving sexual harassment or discrimination.<sup>130</sup> Thus, there is hope that Congress could enact legislation that would reverse the Court's decision in *Epic*.

## VI. CONCLUSION

In sum, the NLRA likely could have been held to encompass employees' rights to partake in class actions, if not for the judicial manufacturing of a blind and biased policy favoring arbitration. The Supreme Court's disregard for congressional intent in drafting the FAA resulted in an unfortunate disadvantage for vulnerable and unsuspecting consumers and employees. Post-*Epic*, Congress will hopefully react to the extremes the Court has gone to in its inflation of the FAA. If recent circuit court decisions are any indication of how the public and the lower judiciary feel, a renovation of the FAA is on the horizon.

Mary Kate Fernandez

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129. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1633 (2018) (Ginsburg, J., dissenting) (“Congressional correction of the Court’s elevation of the FAA over workers’ rights to act in concert is urgently in order.”).

130. S. 2203, 115th Cong. § 401-02 (2017).