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### ISSUE PRECLUSION IN EMPLOYMENT ARBITRATION AFTER *EPIC SYSTEMS V. LEWIS*\*

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## INTRODUCTION

In its 5-4 decision in *Epic Systems v. Lewis*,<sup>1</sup> the Supreme Court held that, absent “a clear and manifest congressional command to displace” the Federal Arbitration Act (“FAA”)’s requirement that arbitration agreements be enforced as written, class action waivers in employment agreements are generally enforceable.<sup>2</sup> Specifically, the Court rejected the argument that Section 7 of the National Labor Relations Act’s protection of “concerted activity”<sup>3</sup> constituted a sufficiently “clear and manifest congressional command” to displace the FAA.<sup>4</sup> Dissenting with three other justices, Justice Ginsburg cautioned that the Court’s ruling could lead to “anomalous results” because of the operation of provisions in arbitration agreements requiring confidentiality or barring arbitrators from giving prior proceedings precedential effect. As a result, the dissent noted, “arbitrators may render conflicting awards in cases involving similarly situated employees—even employees working for the same employer. Arbitrators may resolve differently such questions as whether certain jobs are exempt from overtime laws . . . With confidentiality and no-precedential value provisions operative, irreconcilable answers would remain unchecked.”<sup>5</sup>

Whether or not one agrees with the Court’s holding in *Epic Systems*, Justice Ginsburg’s dissent raises the important question whether there are means other than class or collective actions to avoid duplicative or inconsistent litigation of employment claims in arbitration. In this article, we urge greater use of such device—the doctrine of collateral estoppel or issue preclusion<sup>6</sup>—to spare employees from having to separately relitigate against their employer an

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<sup>1</sup> *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1624 (2018).

<sup>2</sup> Under the Court’s FAA precedents, arbitration agreements are generally valid and enforceable absent a “contrary congressional command” in a separate statute. *See, e.g.* *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012). “The party opposing arbitration carries the burden of showing that Congress intended in a separate statute to preclude a waiver of judicial remedies, or that such a waiver of judicial remedies inherently conflicts with the underlying purposes of that other statute.” *Shearson/American Exp., Inc.*, 490 U.S. 477, 483 (1989).

<sup>3</sup> Section 7 of the National Labor Relations Act guarantees the right of workers “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157 (1935).

<sup>4</sup> *Epic Sys. Corp.*, 138 S.Ct. at 1624.

<sup>5</sup> *Id.* at 1648 (Ginsburg, J., dissenting) (internal citations omitted).

<sup>6</sup> Throughout this Essay, we use the terms “collateral estoppel” and “issue preclusion” interchangeably according to the taxonomy recommended by the RESTATEMENT (SECOND) OF JUDGMENTS, § 31 (1982); the concept of issue preclusion is distinguished from *claim* preclusion, which was traditionally called “res judicata.”

issue that has already been resolved in favor of other employees of the same employer in previous arbitrations. We argue below that, with certain modifications to the American Arbitration Association (“AAA”)’s *Employment Arbitration Rules and Mediation Procedures* as well as its *Employment Due Process Protocol*,<sup>7</sup> consistent resolution of similar claims or issues in multiple arbitration proceedings can be promoted while retaining the core benefits of arbitration.<sup>8</sup>

## I. ISSUE PRECLUSION IN COURTS AND ARBITRATION

It is well-established, as recognized by the Restatement (Second) of Judgments, that under the doctrine of collateral estoppel or issue preclusion, “[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action.”<sup>9</sup> While the doctrine was traditionally limited to parties involved in previous litigation, the Supreme Court relaxed this requirement in *Blonger-Tongue Laboratories, Inc. v. University of Illinois Foundation*,<sup>10</sup> holding that a defendant may invoke *non*-mutual issue preclusion defensively against a plaintiff that had lost on the same dispositive issue in an earlier suit. The Court further relaxed the mutuality requirement in *Parklane Hosiery Co. v. Shore*,<sup>11</sup> permitting, as a matter of federal common law, the offensive use of *non*-mutual issue preclusion. As a result of this decision, federal courts have “broad discretion” to permit a plaintiff who had not been a

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<sup>7</sup> AM. ARBITRATION ASS’N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES (effective Nov. 1, 2009), <https://www.adr.org/sites/default/files/employment%20rules.pdf> [hereinafter AAA, EMPLOYMENT ARBITRATION RULES]; AM. ARBITRATION ASS’N, EMPLOYMENT DUE PROCESS PROTOCOL (effective May. 9, 1995), [https://www.adr.org/sites/default/files/document\\_repository/employment%20due%20process%20protocol\\_0.pdf](https://www.adr.org/sites/default/files/document_repository/employment%20due%20process%20protocol_0.pdf) [hereinafter AAA, DUE PROCESS PROTOCOL].

<sup>8</sup> As one of us has written, “[p]rivate arbitration will never, and should not, entirely supplant agency or court jurisdiction. But if properly designed, private arbitration can complement public enforcement and, at the same time, satisfy the public interest objectives of the various statutes governing the employment relationship.” Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1349 (1997).

<sup>9</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). The Second Circuit, for example, distills the doctrine in the following manner: collateral estoppel bars litigation of an issue when “(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits.” *Boguslavsky v. Kaplan*, 159 F.3d 715, 720 (2d Cir. 1998).

<sup>10</sup> 402 U.S. 313, 350 (1971).

<sup>11</sup> 439 U.S. 322, 331 (1979).

party to the previous lawsuit to “estop a defendant from re-litigating the issues which the defendant previously litigated and lost against another plaintiff.”<sup>12</sup> The *Parklane* Court cautioned, however, that “[t]he general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.”<sup>13</sup> In the Court’s view, it would be unfair to allow non-mutual issue preclusion: (1) if the defendant in the first action was “sued for small or nominal damages” and thus had “little incentive to defend vigorously, particularly if future suits [were] not foreseeable”; (2) if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant; or (3) “where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.”<sup>14</sup>

It is now also well-established that “final arbitral awards are afforded the same preclusive effects as are prior court judgments.”<sup>15</sup> That is because of a long-standing presumption, as stated in the Restatement (Second) of

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<sup>12</sup> *Id.* at 329.

<sup>13</sup> *Id.* at 330.

<sup>14</sup> *Id.* at 330-31.

<sup>15</sup> *Manganella v. Evanston Ins. Co.*, 700 F.3d 585, 591 (1st Cir. 2012) (affirming district court’s order giving preclusive effect to arbitral determination that former company president seeking indemnification in a sexual harassment suit had willfully violated anti-harassment policy). See also *Boguslavsky v. Kaplan*, 159 F.3d 715, 720 (2d Cir. 1998) (affirming the district court’s application of defensive issue preclusion to arbitral determination of claims arising under the Securities Exchange Act). The Fifth Circuit in 1991 upheld the use of non-mutual issue preclusion with respect to issues decided in arbitration, but limited preclusion to cases “not directly involving federal statutory or constitutional rights.” *Universal Am. Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1136 (5th Cir. 1991). That exception was based on the Supreme Court’s holding in *McDonald v. City of West Branch, Mich.* that “in a § 1983 action, a federal court should not afford res judicata or collateral-estoppel effect to an award in an arbitration proceeding brought pursuant to the terms of a collective-bargaining agreement.” 466 U.S. 284, 292 (1984). *McDonald* may no longer be good law in light of *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 264 (2009) (holding that the line of cases culminating with *McDonald* does not “control the outcome where . . . the collective-bargaining agreement’s arbitration provision expressly covers both statutory and contractual discrimination claims.”). In any event, the Fifth Circuit appears to have reversed itself in *Grimes v. BNSF Ry. Co.* 746 F.3d 184, 188 (5th Cir. 2014) (“As a general matter, arbitral proceedings can have preclusive effect even in litigation involving federal statutory and constitutional rights”). The Supreme Court, it should be noted, expressly declined to rule on the question in *Dean Witter Reynolds, Inc. v. Byrd*. 470 U.S. 213, 223 (1985). Professor Christopher Drahozal suggests that *McDonald* stands for the considerably more limited exception that courts should not give preclusive effect to issues decided in arbitration when adjudicating *nonarbitrable* statutory claims. Christopher Drahozal, *The Issue Preclusive Effect of Arbitration Awards*, in PROCEEDINGS OF THE NYU 69TH ANNUAL CONFERENCE ON LABOR: MEDIATION AND ARBITRATION OF EMPLOYMENT AND CONSUMER DISPUTES 10 (Elizabeth C. Tippet ed., 2018).

Judgments, that a “valid and final award by arbitration has the same effects under the rules of *res judicata*, subject to the same exceptions and qualifications, as a judgment of a court.”<sup>16</sup> The same principle is at least implicitly codified in the FAA: when a party obtains judicial confirmation of an arbitration award pursuant to Section 9 of the statute, Section 13 provides that the confirming judgment “shall have the same force and [thus preclusive] effect” as a judgment in an action.<sup>17</sup>

As Gary Born, a leading commentator, has observed,<sup>18</sup> under federal common law, courts have broad discretion to give arbitral rulings preclusive effect even for *unconfirmed* awards.<sup>19</sup> As noted by the Fifth Circuit, relevant factors include whether: (1) “arbitral pleadings state issues clearly”; (2) “arbitrators set out and explain their findings in a detailed written opinion”; (3) “procedural differences between arbitration and the district court proceeding might prejudice the party challenging the use of” offensive, non-mutual preclusion; (4) procedural differences “might be likely to cause a different result”; (5) the findings of the arbitral panel “are within the panel’s authority and expertise”; and (6) “the arbitration proceeding affords basic elements of adjudicatory procedure, such as an opportunity for presentation of evidence.”<sup>20</sup>

<sup>16</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 83(1) (1982). The Restatement provision identifies two exceptions: (1) if giving the award preclusive effect “would be incompatible with a legal policy or contractual provision that the tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question, or with a purpose of the arbitration agreement that the arbitration be specially expeditious”; and (2) the procedure leading to the award lacked [certain formal] elements of adjudicatory procedure.” RESTATEMENT (SECOND) OF JUDGMENTS § 84 (1982). Such elements include, for instance, the opportunity to present and rebut evidence. *Id.*, at § 84, cmt. c.

<sup>17</sup> 9 U.S.C. §§ 9, 13; GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3747-3748 (2d ed. 2014) (collecting cases); Drahozal, *supra* note 15, at 6.

<sup>18</sup> See BORN, *supra* note 17, at 3749 (“Despite the absence of express statutory authority, U.S. courts have exercised common law powers to develop a series of rules of preclusion applicable to unconfirmed awards.”).

<sup>19</sup> See *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008) (“The preclusive effect of a federal-court judgment is determined by federal common law.”); *Jacobson v. Fireman’s Fund Ins. Co.*, 111 F.3d 261, 267-68 (2d Cir. 1997) (holding that, under New York state law, “*res judicata* and collateral estoppel apply to issues resolved by arbitration where there has been a final determination on the merits, notwithstanding a lack of confirmation of the award”) (quotations and citations omitted); *Val-U Const. Co. of S.D. v. Rosebud Sioux Tribe*, 146 F.3d 573, 581 (8th Cir. 1998) (“The fact that the award in the present case was not confirmed by a court . . . does not vitiate the finality of the award.”) (quotations and citations omitted).

<sup>20</sup> *Grimes v. BNSF Ry. Co.*, 746 F.3d 184, 188-89 (5th Cir. 2014). See also *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1361 (2d Cir. 1985) (identifying as relevant factors the “federal interests in insuring a federal court determination of the federal claim, the expertise of the arbitrator and his scope of authority under the arbitration agreement, and the procedural adequacy of the arbitration proceeding”).

A number of federal courts of appeals have ruled, moreover, that arbitrators enjoy the same broad discretion as do courts to give preclusive effect to prior *arbitration* awards.<sup>21</sup> When they do, the weight of lower court authority establishes that the “rules for unconfirmed domestic awards are based upon the applicable state law standards for judicial judgments.”<sup>22</sup> And the prevailing view among state courts is that arbitration awards can have preclusive force in subsequent arbitrations, though California is one notable exception.<sup>23</sup> Finally, “there is broad agreement” among the federal courts of appeals that when the question arises whether a prior arbitration award has preclusive force, it is the *arbitrator* rather than the court that gets to decide whether to give preclusive effect to a prior arbitral determination.<sup>24</sup> And that means that individual arbitration proceedings are also governed by default rules set by private arbitration service providers.

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<sup>21</sup> See *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 880 (9th Cir. 2007) (holding that “(1) [a]rbitrators are not free to ignore the preclusive effect of prior judgments under the doctrines of res judicata and collateral estoppel . . . [;] (2) arbitrators are entitled to determine in the first instance whether the prerequisites for collateral estoppel are satisfied . . . [;]. and (3) arbitrators possess broad discretion to determine when they should apply offensive non-mutual collateral estoppel”) (internal quotation marks and citations omitted); *Bear, Stearns & Co., Inc., v. 1109580 Ontario, Inc.*, 409 F.3d 87, 90-91 (2d Cir. 2005) (holding that arbitration panel had discretion to decide whether Bear Stearns was collaterally estopped from denying liability based on a prior arbitration proceeding and that the panel had not shown a “manifest disregard of the law” in deciding that estoppel was not appropriate).

<sup>22</sup> BORN, *supra* note 18, at 3749. See also Drahozal, *supra* note 15, at 9-10 (discussing uncertainty arising from the Supreme Court’s decision in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 222 (1985)).

<sup>23</sup> Compare *Riverdale Dev. Co. v. Ruffin Building Sys. Inc.* 146 S.W. 3d 852, 860 (Ark. 2004) (holding that “a party not involved in a prior arbitration may use the award in that arbitration to bind his opponent if the party to be bound, or a privy, was before the arbitrator, had a full and fair opportunity to litigate the issue, and the issue was actually decided by the arbitrator or was necessary to his decision”) and *Bailey v. Metro Prop. & Liability. Ins. Co.* 505 N.E. 2d 908, 910 (Mass. App. 1987) (“An arbitration decision can have preclusive effect in the sense described.”) with *Buckner v. Kennard*, 99 P.3d 842, 850 (Utah 2004) (holding that in Utah “third parties will only be permitted to invoke collateral estoppel in subsequent litigation if provided for by the parties to the original arbitration proceeding”) and *Vanderberg v. Superior Court*, 982 P.2d 229, 241-42 (Cal. 1999) (holding that under California’s private arbitration statutes, an arbitrator may not give issue preclusive effect to a previous award unless the parties agree). See also *Jacobson*, 111 F.3d at 265 (discussing the doctrine under New York state law).

<sup>24</sup> *Employers Ins. Co. of Wausau v. OneBeacon Am. Ins. Co.*, 744 F.3d 25, 27 (1st Cir. 2014) (collecting cases). See also Drahozal, *supra* note 15, at 10 (“The U.S. courts of appeals that have addressed the issue have consistently held that issue preclusion is a question for the arbitrator rather than the court to decide.”).

Veteran employment law litigator Zachary Fasman notes that “arbitrators are far more skeptical than most courts about giving preclusive effect to prior awards.”<sup>25</sup> It is not clear, however, that arbitrators will ignore the fact that the proceeding in front of them raises similar, if not identical, issues to those resolved in a prior proceeding—whether the arbitrators formally invoke issue preclusion or simply ask the employer who lost on the issue in the prior proceeding why that determination should be departed from in the instant proceeding.<sup>26</sup> At present the AAA’s *Employment Arbitration Rules and Mediation Procedures* is entirely silent on the question.<sup>27</sup> Given the prevalence of the AAA in the employment arbitration field, a modification of the rules to facilitate reference to prior awards involving the same employer and similar, if not identical, issues would help promote consistency in arbitral determinations and discourage fruitless relitigation.

Likewise, while labor arbitrators have traditionally also been resistant to the publication of awards—on the ground that the practice promotes greater reliance on “precedent” and thereby sacrifices “one of the great advantages of arbitration – its high degree of informality”<sup>28</sup>—the AAA’s employment rules now expressly require the publication of redacted awards

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<sup>25</sup> Zachary Fasman, *Offensive, Non-Mutual Collateral Estoppel in Arbitration: The Rush to Arbitration’s Ruin?*, in PROCEEDINGS OF NEW YORK UNIVERSITY 71ST ANNUAL CONFERENCE ON LABOR: LABOR AND EMPLOYMENT LAW INITIATIVES, PROPOSALS, AND DEVELOPMENTS DURING THE TRUMP ADMINISTRATION 20 (Charlotte Alexander ed.; forthcoming, 2019). Fasman notes that “the mechanical application of res judicata and collateral estoppel has been fiercely resisted by labor arbitrators.” *Id.* Labor arbitrators are indeed reluctant to treat awards in other cases as binding precedent, but as a leading labor arbitration treatise notes:

Any well-reasoned and well-written prior arbitration opinion has persuasive qualities where it is “on point” with the subject matter of a current grievance. . . . [T]o be given preclusive effect it must be between the same parties, must involve the same fact situation, must pertain to the same contractual provisions, must be supported by the same evidence, and must concern an interpretation of the specific agreement before the arbitrator.”

Elkouri & Elkouri, *HOW ARBITRATION WORKS* 11-9 to 11-10 (Kenneth May et al., 7<sup>th</sup> ed. 2006).

<sup>26</sup> *See also id.* at 11-7. (Whereas some arbitrators “take the approach that they should not look beyond the arguments of the parties” other arbitrators invite parties to cite any prior awards they consider relevant, give one party the chance to respond when the other party has cited arbitral awards to support its position, and, when neither party had cited any awards, “may search for relevant awards on their own”).

<sup>27</sup> By contrast, the Financial Industry Regulatory Authority (“FINRA”) has explicitly noted that decisions by FINRA arbitrators “will have no precedential value in other cases.” FINRA REGULATORY NOTICE 09-16 (March 2009).

<sup>28</sup> Fasman, *supra* note 25 (citing Elkouri & Elkouri, *supra* note 25).

in employment arbitration cases.<sup>29</sup> And at least three states, including California, require arbitration service providers to disclose information about the consumer (a term defined to include employee) arbitrations they administer.<sup>30</sup> California's requirements include, for example, the "name of

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<sup>29</sup> AAA, EMPLOYMENT ARBITRATION RULES, *supra* note 7, at R. 39(b) ("An award issued under these rules shall be publicly available, on a cost basis. The names of the parties and witnesses will not be publicly available, unless a party expressly agrees to have its name made public in the award."). The published awards in redacted format are available through both the LexisNexis and Westlaw databases.

<sup>30</sup> CAL. CIV. PROC. CODE § 1281.96 (West 2015) (amended effective Jan. 1, 2015) (requiring a "private arbitration company that administers or is otherwise involved in a consumer arbitration" to "collect, publish at least quarterly, and make available to the public on the Internet Web site of the private arbitration company, if any, and on paper upon request, a single cumulative report" with required information on "each consumer arbitration within the preceding five years"); D.C. CODE § 16-4430 (West 2015) ("Any arbitration organization that administers or otherwise is involved in 50 or more consumer arbitrations a year shall collect, publish at least quarterly, and make available to the public in a computer-searchable database that permits searching with multiple search terms in the same search, and is accessible at the Internet website of the arbitration organization, if any, and on paper, upon request . . . information regarding each consumer arbitration it has administered or otherwise been involved in within the preceding 5 years"); MD. CODE COM. LAW §§ 14-3901 to -3905 (West 2015) (requiring arbitration organization that administer 50 or more consumer arbitrations during a 5-year period service provider to "collect, publish, and make available to the public . . . information regarding each consumer arbitration for each arbitration during the preceding 5-year period"). While some states—Arkansas, California, Missouri, and Texas—have statutes imposing confidentiality requirements on alternative dispute resolution proceedings, Christopher Drahozal argues that the Texas statute "does not apply at all to contractual arbitration" while the others "arguably do no more than prevent arbitration materials from being discovered in or introduced into subsequent court proceedings." Christopher Drahozal, *Confidentiality in Consumer and Employment Arbitration*, 7 YEARBOOK ON ARB. & MEDIATION 28, 33 (2015). See ARK. CODE ANN. § 16-7-206 (West 2015) ("[A] communication relating to the subject matter of any civil or criminal dispute made by a participant in a dispute resolution process, whether before or after the institution of formal judicial proceedings, is confidential and is not subject to disclosure and may not be used as evidence against a participant in any judicial or administrative proceeding."); CAL. EVID. CODE § 703.5 (West 2015) ("No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator shall [unless otherwise provided by the statute] be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding."); MO. ANN. STAT. § 435.014 (West 2015) ("Arbitration, conciliation and mediation proceedings shall be regarded as settlement negotiations. Any communication relating to the subject matter of such disputes made during the resolution process by any participant, mediator, conciliator, arbitrator or any other person present at the dispute resolution shall be a confidential communication. No admission, representation, statement or other confidential communication made in setting up or conducting such proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery."); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (West 2015) ("[Except as otherwise provided], a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute



the nonconsumer party, if the nonconsumer party is a corporation or other business entity” (i.e., in employment arbitration, the employer), which party prevailed, “[t]he total number of occasions, if any, the nonconsumer party has previously been a party in an arbitration administered by the private arbitration company,” and “the amount of any monetary award, the amount of any attorney’s fees awarded, and any other relief granted, if any.”<sup>31</sup>

## II. OBSTACLES TO USING ISSUE PRECLUSION IN ARBITRATION

Two features of arbitration as a “creature of contract” potentially work against the greater use of issue preclusion in the employment arbitration context. First, employers may want to limit the potential application of offensive issue preclusion by, or have other reasons for, insisting upon confidentiality provisions in arbitration clauses in their employment agreements or policies. In her *Epic Systems* dissent, Justice Ginsburg notes as an example the agreement between Ernst & Young and the respondent in one of the consolidated cases, which stipulates confidentiality for “all aspects of the proceedings.”<sup>32</sup> If such confidentiality provisions are read to bar all reference to a prior arbitration award or proceeding and, so construed, are found to be valid and enforceable under state law and the FAA, any restrictions on their operation would kick in only after an arbitration award has been confirmed (when rules governing court judgments obtain); and many employers might not seek confirmation precisely to avoid any reference to prior awards.

Second, employers might seek simply to limit the preclusive effect of arbitration *directly* through the use of preclusion waivers. For instance, Epic Systems Inc.’s employment agreement—also singled out by Justice Ginsburg in her *Epic Systems* dissent—provides that “[t]he arbitrator’s authority shall be limited to deciding the case submitted by the parties to the arbitration. Therefore, no decision by any arbitrator shall serve as precedent in other arbitrations except in a dispute between the same parties, in which case it could be used to preclude the same claim from being re-arbitrated.”<sup>33</sup> We address each of these obstacles in turn.

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resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.”); *In re Cartwright*, 104 S.W.3d 706, 711 (Tex. App. 2003) (“Chapter 154 applies to court-ordered referrals to alternative methods of dispute resolution, not to private, contractual agreements to resolve disputes.”).

<sup>31</sup> CAL. CIV. PROC. CODE § 1281.96.

<sup>32</sup> *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1648 (2018) (Ginsburg, J., dissenting); Brief for Respondents at 6, *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612 (2018) (No. 16–300).

<sup>33</sup> Application to Petition for Certiorari at 34a, *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612 (2018) (No. 16–285).

### A. Effect of Confidentiality Provisions

Confidentiality provisions pose a practical obstacle to issue preclusion insofar as they bar parties from disclosing information that would be needed for an arbitrator in a subsequent proceeding to determine whether an issue was “actually litigated” or its determination was “necessary” to the prior award. Additionally, confidentiality provisions may prevent employees from sharing or learning about the outcomes of other arbitrations of similar issues against the same employer, as well as deny all parties the ability to use past arbitrations as precedent. Courts that have declined to enforce confidentiality provisions have relied on the state law doctrine of unconscionability or on the federal common law doctrine that bars contractual provisions that prevent the “effective vindication” of statutory rights.

#### 1. State Law Restrictions on Confidentiality

Courts that have found confidentiality provisions unconscionable and therefore unenforceable have done so mainly on two related but distinct grounds. First, as held by the Ninth Circuit in a series of cases interpreting California law (until a California Court of Appeal ruled otherwise in 2014),<sup>34</sup> arbitration agreements are unconscionable if they put the employer “in a far superior legal posture” relative to its employees—by denying them access to precedent while at the same time accumulating that knowledge as a “repeat player” or barring “an employee from contacting other employees to assist in litigating (or arbitrating) an employee’s case.”<sup>35</sup> Second, as held by the

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<sup>34</sup> *Sanchez v. Carmax Auto Superstores California, LLC*, 168 Cal.Rptr.3d 473, 481 (Cal. App. 2014) (holding that confidentiality provision that covers the “hearing and record of the proceeding” is enforceable under California law).

<sup>35</sup> *Davis v. O’Melveny & Myers*, 485 F.3d 1066, 1078 (2006), *overruled on other grounds by Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 937 (9th Cir. 2013); *Ting v. AT&T*, 319 F.3d 1126, 1152 (9th Cir. 2003) (“We conclude . . . that if the company succeeds in imposing a gag order, plaintiffs are unable to mitigate the advantages inherent in [the employer’s] being a repeat player.”); *cf. Narayan v. Ritz-Carlton Dev. Co.*, 400 P.3d 544, 556 (Haw. 2017) (holding that the confidentiality provision of the arbitration clause in an agreement between individual home owners and condominium developer is substantively unconscionable because it “impairs the Homeowners’ ability to investigate and pursue their claims”); *Schnuerle v. Insight Commc’ns Co., L.P.*, 376 S.W.3d 561, 578 (Ky. 2012) (holding that the confidentiality provision barring the disclosure of the “existence, content or results of any arbitration or award” is unconscionable because it gives the company “an unyielding advantage over individual customers”); *Sprague v. Household Int’l*, 473 F. Supp. 2d 966, 974 (W.D. Mo. 2005) (holding that a confidentiality provision requiring that “the award . . . be kept confidential” is unconscionable under Missouri law because “Household reaps the advantages of repeatedly

Washington Supreme Court, in hampering “an employee’s ability . . . to take advantage of findings in past arbitrations,” a confidentiality provision can be found unconscionable because it “undermines an employee’s confidence in the fairness and honesty of the arbitration process and thus . . . potentially discourages that employee from pursuing a valid claim.”<sup>36</sup>

While it was once the case that the larger number of jurisdictions held confidentiality provisions to be unconscionable and therefore unenforceable,<sup>37</sup> more recent decisions suggest a greater divergence in views if not a trend away from the anti-enforcement position. Most notably, a 2014 California appellate ruling declared that “we see nothing unreasonable or prejudicial” about a confidentiality provision that covers the “hearing and record of the proceeding.”<sup>38</sup> The Ninth Circuit subsequently followed suit.<sup>39</sup> Even before

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appearing before the same group of arbitrators, while consumers do not”). *But see* *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (“While the confidentiality requirement is probably more favorable to the cellular provider than to its customer, the plaintiffs have not persuaded us that the requirement is so offensive as to be invalid” or unenforceable under Louisiana law.); *Parilla v. IAP Worldwide Serv., VI, Inc.*, 368 F.3d 269 (3d Cir. 2004) (holding that confidentiality provisions are not unconscionable under the law of the U.S. Virgin Islands, as “there is nothing inherent in confidentiality itself that favors or burdens one party vis-a-vis the other in the dispute resolution process”); *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940, 952-53 (Or. Ct. App. 2007) (holding that confidentiality provision stating the arbitration award “shall be kept confidential” is “roughly even-handed in effect” on the parties and thus enforceable because the provision does not apply to facts, parties, arbitrators’ identities, arguments, or outcomes and because “nonconfidential information, while not officially reported, is widely available to plaintiffs’ lawyers through informal networks and organizations”).

<sup>36</sup> *Zuver v. Airtouch Commc’ns, Inc.*, 103 P.3d 753, 765 (Wash. 2004). *See also* *Larsen v. Citibank FSB*, 871 F.3d 1295, 1319 (11th Cir. 2017) (holding as substantively unconscionable under Washington law a provision that, while not “prevent[ing] consumers [as a class] from sharing discovery, fact patterns, or briefing from other similar arbitrations,” “prohibits disclosure only of ultimate decisions by an arbitrator” and may therefore “have the effect of discouraging consumers from pursuing valid claims”); *Delta Funding Corp. v. Harris*, 912 A.2d 104, 117 (N.J. 2006) (“It is not unconscionable to require that the proceedings before the arbitrator be kept confidential when the arbitrator’s written award is not required to be kept confidential.”).

<sup>37</sup> *See* Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 *BUFF. L. REV.* 185, 218-19 (2004) (“The majority of courts have held these provisions unconscionable. Only a few courts have found otherwise.”). As Christopher Drahozal notes, “[c]ases decided since Professor Randall published her article are more evenly divided on the enforceability of confidentiality provisions.” Drahozal, *supra* note 30, at 44-45 n.67.

<sup>38</sup> *Sanchez*, 168 Cal.Rptr.3d at 481-82.

<sup>39</sup> *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1266 (9th Cir. 2017) (holding that confidentiality provision was substantively identical to that considered in *Carmax* and enforceable notwithstanding the public policy argument that “such confidentiality provisions inhibit employees from discovering evidence from each other”) (internal quotation omitted).

that, however, the Ninth Court had limited its restrictions on confidentiality provisions to cases that involve a “large class of customers.”<sup>40</sup> And relying on that reasoning, some state courts have ruled or indicated in dicta that they would enforce confidentiality provisions if the number of plaintiffs falls short of the 120 that the Ninth Circuit refused to regard as a “large class.”<sup>41</sup>

## 2. FAA Preemption of State Law Restrictions on Confidentiality

Even where courts have found that confidentiality provisions to be unenforceable under state law, recent U.S. Supreme Court decisions raise the question whether such rulings are preempted by the FAA. That is because the Court has narrowly construed the so-called “savings clause” in Section 2 of the FAA, which provides that arbitration clauses are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>42</sup> As interpreted in *AT&T Mobility LLC v. Conception*,<sup>43</sup> the clause “permits agreements to arbitrate to be invalidated [only] by generally applicable contract defenses, such as fraud, duress, or unconscionability.”<sup>44</sup> Limiting what counts as a “generally applicable contract defense,” the *Conception* Court cautioned that courts may not “rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.”<sup>45</sup> In essence, judicial attempts to interfere with the “fundamental attributes of arbitration” are not saved by Section 2 and are preempted by the FAA.

And while we are not aware of any decision that treats confidentiality as a fundamental attribute of arbitration *as such*, the Fifth Circuit has suggested that restrictions on confidentiality are “in part, an attack on the

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<sup>40</sup> *Kilgore v. Keybank, N.A.*, 718 F.3d 1052, 1059 n.9 (9th Cir. 2013) (“Although we have found confidentiality provisions to be substantively unconscionable when applied to a large class of customers . . . the small number of putative class members in this case (approximately 120) mitigates such concerns.”) (citations omitted).

<sup>41</sup> See *African Methodist Episcopal Church, Inc. v. Smith*, 217 So.3d 816, 826 (Ala. 2016) (holding that confidentiality clause was not unconscionable, in part because “[t]he instant cases do not involve a class at all; rather, they involve only two plaintiffs, and there is no suggestion that the number of individuals holding potential claims against the defendants could approach even the 120 in *Kilgore*”); *Machado v. System4 LLC*, 28 N.E.3d 401, 415 (Mass. 2015) (dicta) (“Here, while a motion for class certification has yet to be filed, the putative class consists of franchisees, a relatively small and known quantity of individuals. Any gains System4 might gather from the typical ‘repeat player’ effect are therefore diminished.”).

<sup>42</sup> 9 U.S.C. § 2

<sup>43</sup> 563 U.S. 333, 339 (2011).

<sup>44</sup> *Id.* at 339 (internal quotation marks omitted).

<sup>45</sup> *Id.* at 341.

character of arbitration itself.”<sup>46</sup> If confidentiality cannot be imposed, the Fifth Circuit panel reasoned, “one would expect that parties contemplating arbitration would demand discovery similar to that permitted under F.R.Civ.P. Rule 26, adherence to formal rules of evidence, more extensive appellate review, and so forth—in short, all of the procedural accoutrements that accompany a judicial proceeding.”<sup>47</sup>

On the other hand, some courts have continued to hold confidentiality clauses unconscionable even after *Concepcion*, with the Supreme Court of Kentucky noting that “the potential obstacles to arbitration presented by the forbidding of class action waivers are simply not present in the case of confidentially provisions.”<sup>48</sup> Indeed, in a context in which the parties to an employment arbitration proceeding must anticipate that at least some awards will be challenged in court, and where the disclosure rules of the AAA and other arbitration services organizations require prospective arbitrators to list prior awards involving the same employer party, it is unclear whether a limited carve-out from confidentiality sufficient to assess whether a party’s plea that claim or issue preclusion is warranted in a particular case in fact undermines the core benefit of confidentiality. Likewise, the FAA arguably leaves untouched state restrictions on confidentiality provisions insofar as those provisions conflict with a “strong policy that justice should be administered openly and publicly” and such a policy is applied even-handedly to all forms of adjudication.<sup>49</sup> Given a well-established common law right to public judicial documents, discussed below, it would seem difficult to argue that state laws requiring the publication of redacted arbitration awards or limited disclosure of prior awards involving the same employer and the same or similar issue,

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<sup>46</sup> *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004).

<sup>47</sup> *Id.* at 176. The empirical premise underlying the Fifth Circuit’s observation is questioned in Drahozal, *supra* note 30, at 44-46.

<sup>48</sup> *Schnuerle v. Insight Commc’ns Co., L.P.*, 376 S.W.3d 561, 578 (Ky. 2012). *But see* *Damato v. Time Warner Cable, Inc.*, No. 13-CV-994 (ARR)(RML), 2013 WL 3968765, at \*12 (E.D.N.Y. Jul. 31, 2013) (“While the Court did not address directly a claim that an arbitration clause was unconscionable because of a requirement of confidentiality, the writing is on the wall: the confidentiality of proceedings does not, by itself, render an agreement to arbitrate unconscionable.”).

<sup>49</sup> *See* *McKee v. AT&T Corp.*, 191 P.3d 845, 858-59 (Wash. 2008) (“Washington has a strong policy that justice should be administered openly and publicly. Under our constitution, [j]ustice in all cases shall be administered openly . . . We hold that the confidentiality provision before us is substantively unconscionable.”) (brackets in the original) (internal citations omitted, including *Dreiling v. Jain*, 93 P.3d 861, 869-71 (Wash. 2004) (holding that under state constitutional requirement of open administration of justice, the motion, and documents filed with the court in support of it, cannot be sealed unless the court follows the analytical approach set out by the Washington Supreme Court)).

discussed above, undermine arbitration's unique features or implicate the FAA's equal-treatment rule requiring that arbitration agreements be treated no differently than any other contract.<sup>50</sup>

### 3. Exceptions to Federal Preemption

It is commonplace that private arbitration agreements cannot require waiver of a party's substantive federal or state statutory rights,<sup>51</sup> but it is doubtful that employees have a federal statutory right to a public arbitral proceeding or published awards. Courts inclined to rule that restrictions on confidentiality clauses are not preempted by the FAA because imposing confidentiality on employees denies them the ability to effectively vindicate their statutory rights will find that the Supreme Court has significantly narrowed the so-called "effective vindication" doctrine. In *American Express Co. v. Italian Colors Restaurants*,<sup>52</sup> the Court held that the doctrine invalidates only a "prospective waiver of a party's *right* to pursue statutory remedies." In that case, the fact that an expert would need to be hired to prosecute the antitrust claim and that, without a class action, attorneys could not readily finance the expert's fees, made it more difficult but did not eliminate the right to pursue the statutory remedy.<sup>53</sup>

There is some life left in the "effective vindication" doctrine when it comes to cost barriers to being able to invoke the arbitration process. In *Green Tree Financial Corporation—Alabama v. Randolph*, the Court left open the possibility that the imposition of "large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights."<sup>54</sup> Relying on *Randolph*, the Tenth Circuit invalidated an arbitration agreement in its entirety containing a clause providing that "[e]ach party shall bear the expense of its own counsel" because the agreement would prevent a plaintiff from vindicating her rights under the Fair Labor Standards Act (FLSA).<sup>55</sup> In many employment

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<sup>50</sup> *Kindred Nursing Ctrs. L.P. v. Clark*, 137 S.Ct. 1421, 1426 (2017) ("9 U.S.C. § 2 establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on generally applicable contract defenses like fraud or unconscionability, but not on legal rules that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.").

<sup>51</sup> *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.")

<sup>52</sup> 570 U.S. 228, 235 (2013).

<sup>53</sup> *Id.* at 235-36 ("But the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.").

<sup>54</sup> 531 U.S. 79, 90 (2000).

<sup>55</sup> *Nesbitt v. FCNH*, 811 F.3d 371, 380 (10th Cir. 2016). The FLSA, 29 U.S.C. § 216(b), requires a district court to order a defendant to pay "a reasonable attorney's fee . . . and costs of the action" to a successful plaintiff. (Emphasis added).

arbitrations based on statutory claims, the question of forum costs does not arise because the AAA requires the employer to pay those costs, save for a non-refundable filing fee capped at \$300 unless the arbitration agreement provides that the individual pay less.<sup>56</sup> Attorney’s fees are awarded in accordance with the fee allocation provisions of the substantive law governing the dispute.<sup>57</sup>

#### 4. Confidentiality and the Enforcement of Awards

Any confidentiality bar, however, is likely to drop out once a party seeks to confirm or enforce an arbitration award in court,<sup>58</sup> where a strong presumption obtains that the award and (at a minimum) dispositive pleadings produced during the arbitration must remain open to public view, notwithstanding even the existence of a confidentiality provision in the agreement.<sup>59</sup> This presumption flows, as recognized by the U.S. Supreme Court in *Nixon v. Warner Communications, Inc.*,<sup>60</sup> from a well-established right of access to “judicial records.”<sup>61</sup> In order to seal a judicial order confirming an arbitration award, courts use a balancing test to determine whether the presumption of public access is overcome by compelling interests that favor non-disclosure.<sup>62</sup>

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<sup>56</sup> AMERICAN ARBITRATION ASSOCIATION, EMPLOYMENT/WORKPLACE FEE SCHEDULE, COSTS OF ARBITRATION (effective October 1, 2017), [www.adr.org](http://www.adr.org).

<sup>57</sup> *See, e.g.*, *Folck v. Lennar Corporation*, No.: 3:17-cv-00992-L-NLS, 2018 WL 1726617, at \*11 (S.D. Cal. Apr. 10, 2018) (holding that an agreement containing fee/cost shifting provisions “provides that the arbitrator may award fees and costs, but only to the extent authorized by applicable law.”)

<sup>58</sup> The AAA’s employment arbitration rules expressly provide that “[p]arties to these procedures shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction.” AAA, EMPLOYMENT ARBITRATION RULES, *supra* note 10, at R. 42c.

<sup>59</sup> *Drahozal*, *supra* note 30, at 32, n.14 (collecting cases). *See, e.g.*, *Ovonic Battery Co., Inc. v. Sanyo Elec. Co., Ltd.*, No. 14-cv-01637-JD, 2014 WL 2758756, at \*5 (N.D. Cal. June 17, 2014) (holding that motion to seal arbitration awards because they contain “sensitive terms of confidential licenses” was “not narrowly tailored”); *Century Indem. Co. v. AXA Belgium*, No. 11 CIV. 7263 JMF, WL 4354816, at \*24-25 (S.D.N.Y. Sept. 24, 2012) (holding that, while the “public interest in the relationship between an insurer and its reinsurers is relatively low,” “the parties have not identified sufficient countervailing factors to overcome the presumption in favor of access”).

<sup>60</sup> 435 U.S. 589 (1978).

<sup>61</sup> *Id.* at 607.

<sup>62</sup> *Compare, e.g.*, *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) (finding a “strong presumption” that a record of judicial proceeding is public) *with* *Decapolis Grp., LLC v. Mangesh Energy, Ltd.*, No. 3:13-cv-1547-M, 2014 WL 702000, at \*4 (N.D. Tex. Feb. 24, 2014) (holding “that any public interest in the Award is minimal and counterbalanced by the interest in confidentiality expressed in the parties’ agreement”).

Courts apply different standards to determine what counts as a “judicial record.”<sup>63</sup> The Second Circuit, for instance, has endorsed two separate approaches.<sup>64</sup> Under the first approach, the public has a right of access to judicial records (1) that “have historically been open to the press and general public,” and (2) where “public access plays a significant positive role in the functioning of the particular process in question.”<sup>65</sup> Under the second approach, the right of access is “derived from or [as] a necessary corollary of the capacity to attend the relevant proceedings.”<sup>66</sup> Relying on these approaches, lower courts consider it “well-settled”<sup>67</sup> that “the petition, memoranda, and other supporting documents filed in

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<sup>63</sup> Compare, e.g., *City of Greenville, Ill. v. Syngenta Crop Prot., LLC*, 764 F.3d 695, 697 (7th Cir. 2014) (limiting the “presumption of public access” to documents that affect the disposition of the litigation) and *United States v. Gonzales*, 150 F.3d 1246, 1255 (10th Cir. 1998) (holding that fee, cost, and expense vouchers submitted by counsel appointed for indigent defendants under Criminal Justice Act (CJA) are not judicial documents because they are “not directly related to the process of adjudication”) with *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 780 (3rd Cir. 1994) (holding that a settlement agreement is not a “judicial record” because it was never filed with the court). See also *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 970 A.2d 656, 680 (Conn. 2009) (“The vast majority of courts examine whether the document filed reasonably may be relied upon in support of the adjudicatory process, regardless of whether the decision is a dispositive one.”)

<sup>64</sup> See generally *In re N.Y. Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 408-11 (2009) (holding that wiretap applications are not judicial documents to which the public has a right of access).

<sup>65</sup> *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 92 (2004) (citing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-9 (1986)).

<sup>66</sup> *Pellegrino*, 380 F.3d at 93. The second approach has its roots in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 556, 580 (1980), in which the Supreme Court found itself “bound to conclude that the presumption of openness inheres in the very nature of a criminal trial under our system of justice” and held that the right to attend criminal trials is implicit in the First Amendment. While the Court declined to consider whether the public has a right to attend trials of civil cases, it noted that “historically both civil and criminal trials have been presumptively open.” *Id.* at 580 n.17. As the Second Circuit noted in *Pellegrino*, 380 F.3d at 91, several courts of appeals have held that the First Amendment covers civil as well as criminal proceedings. See, e.g., *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir.1984) (“[T]he First Amendment does secure to the public and to the press a right of access to civil proceedings”). Lower courts, moreover, have relied on the presumption of openness identified in *Richmond Newspapers* to extend First Amendment protections to “the public’s capacity to inspect” judicial documents related to court proceedings. *Pellegrino*, 380 F.3d at 92 (collecting cases).

<sup>67</sup> *Aioi Nissay Dowa Ins. Co. v. ProSight Specialty Mgmt. Co.*, No. 12 Civ. 3274(JPO), 2012 WL 3583176, at \*3 (S.D.N.Y. Aug. 21, 2012) (rejecting motion to seal confirmed arbitration award in a contractual dispute between two companies notwithstanding a confidentiality provision in their agreement that provides that “all submissions of Arbitration Information to a court shall be sealed”); see generally *Alexandria Real Estate Equities, Inc. v. Fair*, 2011 WL 6015646, at \*2 (S.D.N.Y. Nov. 30, 2011) (holding that arbitration awards and supporting documents are judicial records).



connection with a petition to confirm an arbitration award (including the Final Award itself) are judicial documents.”

The presumption in favor of disclosure of judicial records does not kick in, however, if the winning party in the first arbitration does not seek judicial confirmation of the arbitration award—as is likely to be the case if the employee prevailing on, say, a discharge has no need to go to court for confirmation or enforcement of the award. Thus, if confidentiality provisions are valid and enforceable, and are properly interpreted to block access to the awards and documents generated in prior arbitrations involving the same employer, there will be no basis for invoking claim or issue preclusion absent independent knowledge of what was decided in a prior arbitration involving the same employer.

### *B. Proposed Disclosure Protocol*

In order to secure the advantages of consistency of outcome and discourage repetitive arbitration of previously decided issues, we propose that the AAA update Rule 23 of its *Employment Arbitration Rules and Mediation Procedures*. In its current form, Rule 23 imposes an obligation of confidentiality solely on the arbitrator, who “shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary.”<sup>68</sup> Our proposal would create a limited exception that permits a *subsequent* arbitrator to disclose a prior award and opinion in cases (1) involving multiple arbitration of statutory employment claims against the same employer and (2) which involve similar issues – *unless* the parties to the previous arbitration had expressly agreed that the award and opinion may not be disclosed to non-parties *or* the second arbitrator finds that the harms caused by such disclosure outweigh any commensurate benefits.

Our proposed disclosure protocol preserves the recognized benefits of confidentiality in arbitration proceedings. For example, it leaves untouched AAA Rule 23’s requirement preventing the arbitrator from disclosing the details of the prior proceeding; the proposed disclosure exception is limited to the prior award and any opinion accompanying the award.<sup>69</sup> The proposal, moreover, establishes a default rule that the parties can opt out of but only by express provision. In addition, even in the absence of such an express provision, the

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<sup>68</sup> AAA, EMPLOYMENT ARBITRATION RULES, *supra* note 10, at R. 23.

<sup>69</sup> The proposal is also consistent with Rule 9, which provides that “[t]he arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.” *Id.* at R. 9.

proposal permits arbitrators to take into account the interests of the employer in sealing or redacting documents, the same way courts engage in a balancing analysis when deciding to confirm arbitration awards under seal. As held by the Seventh Circuit, for instance, “[w]hen there is a compelling interest in secrecy, as in the case of trade secrets, the identity of informers, and the privacy of children, portions and in extreme cases the entirety of a trial record can be sealed.”<sup>70</sup> Arbitrators, likewise, may decide to enforce confidentiality provisions where doing so would be the sole way to prevent the disclosure of highly embarrassing but otherwise irrelevant facts, and the risks of such disclosure are sufficiently compelling to outweigh the value of determining the preclusive effect of the issues on which those facts bring to bear.<sup>71</sup>

### C. Effect of Preclusion Waivers

The foregoing proposal does not prevent employers who do not wish to have arbitration awards given preclusive effect from simply contracting out of issue preclusion entirely. As stated in the Restatement (Second) of Judgments, “[i]f the terms of an agreement to arbitrate limit the binding effect of the award in another adjudication or arbitration proceeding, the extent to which the award has conclusive effect is determined in accordance with that limitation.”<sup>72</sup> As Christopher Drahozal has noted, “courts and commentators have followed the Restatement rule that parties can modify the binding effect of awards by contract, most commonly in the context of claim preclusion but occasionally in the context of issue preclusion as well.”<sup>73</sup>

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<sup>70</sup> *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002).

<sup>71</sup> Because the only non-parties that would benefit from our proposed exception would be employees engaged in individualized arbitration of similar issues against the same employer, the exception is unlikely to result in the disclosure of firm practices or trade secrets beyond those employees who are themselves bound by confidentiality provisions. The risks of information spillage are thus limited.

<sup>72</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 84(4) (1982).

<sup>73</sup> Drahozal, *supra* note 15, at 14. *See, e.g.* *Anderson v. Beland (In re Am. Exp. Fin. Advisors Sec. Litig.)*, 672 F.3d 113, 133 (2d Cir. 2011) (quoting dicta from *Miller v. Runyon*, 77 F.3d 189, 194 (7th Cir.1996)) (“Given the contractual nature of arbitration, it can be argued that the preclusive effect of either a judicial judgment or an arbitration award on a subsequent arbitration should depend on what the parties agreed to. And then the court will decide as a matter of interpretation of the parties’ agreement to arbitrate whether the arbitrators can ignore a prior judicial judgment.”); *IDS Life Ins. Co. v. Royal Alliance Ass’n, Inc.*, 266 F.3d 645, 651 (7th Cir. 2001) (dicta) (“Although res judicata and collateral estoppel usually attach to arbitration awards . . . they do so (if they do so) as a matter of contract rather than as a matter of law. The preclusive effect of the award is as much a creature of the arbitration contract as any other aspect of the legal-dispute machinery established by such a contract.”) (internal citations omitted).

In a noteworthy exception, however, the New York Appellate Division, Second Department held that a contractual provision limiting the preclusive effect of awards is enforceable only insofar as it “reflects either the parties’ expectations not to fully litigate issues, or the parties’ acknowledgment that they did not fully litigate.”<sup>74</sup> That case involved a legal malpractice claim for the lawyer’s failing to preserve the issue of the preclusive effect of a prior arbitration brought by the lawyer’s client against his accountant. Even though the arbitration agreement with the accountant included a preclusion waiver, the factual record showed that “there was extensive pre-hearing discovery; that there were 18 days of hearings before a panel of three arbitrators; that 16 witnesses testified; that the depositions of most of the 34 deponents as well as 1,450 exhibits were introduced into evidence.”<sup>75</sup> Accordingly, the court held that “[n]othing in the relevant case law supports Feinberg’s argument as to the validity of a limitation agreement made after arbitration, after litigating the issues fully, vigorously and exhaustively, and where the agreement is directed at one third party after other third parties have asserted collateral estoppel defenses based on the arbitration award.”<sup>76</sup> Given that the court’s holding was limited to the use of collateral estoppel by a third-party defendant in a commercial dispute, no court has to our knowledge extended this reasoning to offensive, non-mutual issue preclusion.

#### *D. Proposed Limitation on Preclusion Waivers*

Here, too, the AAA should consider revising its rules and perhaps its *Employment Due Process Protocol* to explicitly provide that, in cases involving multiple arbitration of statutory employment claims against the same employer, the arbitrator has discretion to give preclusive effect to an issue decided in a prior arbitral proceeding against the same employer. In making this determination, the arbitrator should consider (1) whether the claimant before it had an opportunity to appear in the prior arbitration; (2) whether the issue in the prior arbitration is the same as the issue before the present arbitrator; (3) whether the issue was fully litigated, (4) whether its resolution in the prior arbitration was necessary to the award rendered in that prior proceeding. We also propose that where (1) the agreement between the parties expressly limits consideration of the effect of a prior arbitration involving such claims against the same employer and (2) neither party has

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<sup>74</sup> Feinberg v. Boros, 951 N.Y.S.2d 110, 116 (1st Dept. 2012).

<sup>75</sup> *Id.* at 117

<sup>76</sup> *Id.*

sought judicial confirmation of the prior award, the arbitrator should enforce such a preclusion waiver – *unless* a statutory basis exists for invalidating or giving the arbitrator discretion to invalidate such a clause.

### III. OBJECTIONS TO USING COLLATERAL ESTOPPEL IN ARBITRATION

Our proposals are designed to meet two concerns about extending the doctrine of issue preclusion further into the world of arbitration. Zachary Fasman has recently argued, for example, that the use of non-mutual issue preclusion creates perverse incentives for plaintiffs to “wait for a favorable arbitral opinion to be handed down before bringing a cause of action against a common defendant.”<sup>77</sup> Fasman insists that the use of issue preclusion in arbitration becomes unworkable when multiple arbitrations of the same issue result in conflicting awards and parties then seek to have the awards enforced in court.

On Fasman’s first point, if the claimant seeking non-mutual issue preclusion could have intervened in the prior arbitral proceeding, that would be a conclusive basis for denying issue preclusive effect to determinations made in that proceeding. If the arbitration agreement bars joinder of claims, however, such a clause would provide ample justification for not intervening in the prior proceeding.

On Fasman’s second point, the Supreme Court in *Parklane* counseled against applying offensive issue preclusion “if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant.”<sup>78</sup> Issue preclusion is not likely where prior awards have resulted in disparate results. It may well be that non-mutual issue preclusion will be recognized only when the employer has lost on the same issue in at least two or more arbitrations and there are no conflicting decisions, but that is precisely the kind of situation that calls for preventing the employer from fighting a war of attrition against claimants—a war that could not be fought in court and which no fundamental feature of arbitration requires that it be fought in arbitration.

And while some employers may decide, after losing enough cases, to settle anyway, the greater use of issue preclusion by arbitrators can help expedite that outcome and avoid unnecessary litigation. In an illustrative case in the Seventh Circuit,<sup>79</sup> changes made by an employer to its staffing procedures to avoid having to pay overtime wages led the union to sue, claiming the changes were in violation of the parties’ collective bargaining agreement. Seven

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<sup>77</sup> Fasman, *supra* note 25, at 31.

<sup>78</sup> *Parklane Hosiery*, 439 U.S. at 330.

<sup>79</sup> *Consolidation Coal Co. v. United Mine Workers of America*, Dist. 12, 213 F.3d 404 (7th Cir. 2000).

arbitrations ensued, with the employer prevailing in all but the fourth arbitration. The union, however, obtained confirmation of the sole pro-union award before the employer could do likewise for the other six awards, and tried to block the employer from obtaining confirmation of the remaining awards. Rejecting the union's argument, the appeals court noted that "by failing to argue preclusion to the fourth arbitrator, the employer forfeited a good defense that would have headed off the confusion that ensued."<sup>80</sup> The case also illustrates that, even if litigation of avoidable disputes in arbitration does not waste judicial resources *directly*, those resources are nonetheless still put to use when courts are later asked to confirm and enforce multiple awards.

Finally, even when multiple arbitrations result in several conflicting awards, it becomes all the more important that the AAA promote transparency, such that arbitrators can consider the outcomes of several ongoing arbitrations before applying collateral estoppel—even if they are not ultimately bound by them. That is one reason we propose amending AAA Rule 23 to permit disclosure of information that is relevant to determining the preclusive effect of previous arbitration awards involving the same employer.<sup>81</sup>

## CONCLUSION

In view of the Supreme Court's decision in *Epic Systems*, it becomes imperative to take up the challenge of Justice Ginsburg's dissent and see if there are ways to capture some of the efficiency gains of employment class actions

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<sup>80</sup> *Id.* at 407.

<sup>81</sup> It may be objected that arbitration providers like the AAA will be reluctant to adopt the default rules we propose here unless competing providers do so as well. Likewise, it may be objected that, even if these rules would be implemented, employers would be likely nearly always to opt out of preclusion entirely. We believe it is in the interest of most employers, if they wish to avoid adverse public reaction that could lead to a wholesale revision of the Supreme Court's FAA jurisprudence, to agree to rules of basic fairness in employment arbitration. *See, e.g.* Letter from State Attorneys General to Congressional Leadership (Feb. 12, 2018) (on file with authors) (asking Congress to enact legislation to "ensure access" to courts for victims of sexual harassment in the workplace and applauding Microsoft Corporation for announcing that "it will discontinue arbitration requirements with respect to sexual harassment claims and for supporting legislation to ensure that victims of sexual harassment be accorded the right of access to our judicial system to the courts"). This has been the experience with adoption in the mid-1990s of the Due Process Protocol by leading arbitration providers and its widespread acceptance by employers. *See* Samuel Estreicher & Zev Eigen, *The Forum for Adjudication of Employment Disputes*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 418 (Michael L. Wachter & Cynthia L. Estlund eds. 2012, Edward Elgar Publishing Ltd.) (noting that the Due Process Protocol has been widely and voluntarily adopted by companies and both the AAA and JAMS, and advocating for an updating of the Protocol to capture issues that have become salient since the Protocol).

without compromising the core benefits of bilateral arbitration proceeding between the employer and its employee. As one of us has argued, “if it is properly structured and regulated,” employment arbitration “improves the likelihood that employees, and most especially those who are relatively low-paid, will be able to obtain an adjudication on the merits of their rights disputes with the employer.”<sup>82</sup> We believe that greater use of issue preclusion in arbitration, subject to the conditions laid down by the Supreme Court in *Parklane*, can promote a fairer process for both the employer and its employees.

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<sup>82</sup> Estreicher & Eigen, *supra* note 81, at 419; see also Samuel Estreicher, *The Supreme Court Did Workers a Favor: Class Action Lawsuits Are the Wrong Way to Settle Employment Disputes*, BLOOMBERG VIEW (May 24, 2018), <https://www.bloomberg.com/view/articles/2018-05-24/how-neil-gorsuch-s-ruling-on-class-actions-does-workers-a-favor> [<https://perma.cc/LV5Z-LCSJ>].