

Maryland Law Review


Volume 78 | Issue 3

Article 7

Epic Systems Corp. v. Lewis: Singled Out by Corporations and a Textualist Supreme Court, American Workers Are Left to Fend for Themselves

Grace O'Malley

Follow this and additional works at: <https://digitalcommons.law.umaryland.edu/mlr>

 Part of the [Dispute Resolution and Arbitration Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

78 Md. L. Rev. 635 (2019)

This Notes & Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Note

EPIC SYSTEMS CORP. v. LEWIS: SINGLED OUT BY CORPORATIONS AND A TEXTUALIST SUPREME COURT, AMERICAN WORKERS ARE LEFT TO FEND FOR THEMSELVES

GRACE O'MALLEY*

In *Epic Systems Corp. v. Lewis* (“*Epic*”),¹ the United States Supreme Court considered whether employer-drafted arbitration agreements requiring employees to individually arbitrate disputes and thus barring collective legal actions were enforceable. The Court’s decision turned on whether arbitration agreements barring collective claims conflicted with the National Labor Relations Act’s (“NLRA”) guarantees for workers to engage in “concerted activities for . . . mutual aid or protection.”² In Part I, this Note will discuss the three cases³ addressed by the decision in *Epic*. Part II will examine the language, history, and interpretations of the two statutes at issue: the NLRA and the Federal Arbitration Act⁴ (“FAA”).⁵ Part III will review the five-justice majority’s decision in *Epic*,⁶ which held that the employer-drafted agreements were enforceable because the NLRA does not contain an express intention to displace the FAA, the NLRA does not guarantee workers a right to collective *legal* action,⁷ and, therefore, the arbitration agreements at issue should be enforced according to their terms.⁸ Part IV of this Note will argue this decision improperly narrowed the rights of workers using textualist analysis in a manner that was inconsistent with the intent of the NLRA⁹ and the

© 2019 Grace O’Malley.

* J.D. Candidate, Evening Division, 2020, University of Maryland Francis King Carey School of Law. The author wishes to thank her editors, Karachi Achilihu, Brendan Kelly, Sarah Samaha, Alex Botsaris, and Bianca Spinosa, for their thoughtful feedback and insights. The author would also like to thank her advisor, Professor Martha Ertman, for being so generous with her time and knowledge throughout the writing process. The author dedicates this Note to her best friend and partner, J.D. Merrill, because of his constant support, encouragement, and inspiration.

1. 138 S. Ct. 1612 (2018).
2. 29 U.S.C. § 157 (2012).
3. See *infra* notes 14–16 and accompanying text.
4. 9 U.S.C. §§ 1–14 (2012).
5. *Epic*, 138 S. Ct. at 1632.
6. *Id.* at 1618.
7. *Id.* at 1628–30.
8. *Id.* at 1619.
9. See *infra* Section IV.A.

FAA.¹⁰ This decision erroneously expanded the scope of the FAA by defining arbitration as presumptively bilateral¹¹ rather than collective in nature even though this contention lacks support in the history and text of the FAA.¹² On a policy level, this decision will have the unfortunate effect of hindering workers' ability to enforce federal protections while insulating corporations and unscrupulous employers from liability.¹³

I. THE CASE

In *Epic Systems Corp. v. Lewis*, the Supreme Court addressed three cases involving wage-and-hour disputes between employees and employers: *Lewis v. Epic Systems Corp.*,¹⁴ *Murphy Oil USA, Inc. v. NLRB*,¹⁵ and *Morris v. Ernst & Young*.¹⁶ Employers in each case sought to enforce arbitration agreements barring collective legal actions so that employees may only *individually* arbitrate employment disputes with employers.¹⁷ The employees contended¹⁸ these agreements were unenforceable since the NLRA guarantees workers a right to "concerted activities for . . . mutual aid or protection."¹⁹ However, opponents of this view contended that the NLRA's guarantees only protect unionization and collective bargaining in the workplace, not collective legal action, and the FAA protects arbitration agreements from judicial interference.²⁰

In April of 2014, employees of Epic Systems Corporation ("Epic"), including Mr. Lewis, received an email from their employer.²¹ The email contained an arbitration agreement that barred class, collective, and representative claims, mandating instead that employees could only bring wage-and-hour claims through individual arbitration.²² Thus, while employees could still bring wage-and-hour claims against the employer, employees could only

10. See *infra* Section IV.B.

11. The Court's FAA jurisprudence has defined "bilateral" arbitration as dispute resolution that involves only the parties to a *single* arbitration agreement, rather than a process that could resolve similar claims arising out of multiple arbitration agreements. *Stolt-Nielsen S.A. v. Animal-Feeds Int'l Corp.*, 559 U.S. 662, 686 (2010).

12. See *infra* Section IV.B.

13. See *infra* Section IV.C.

14. 823 F.3d 1147 (7th Cir. 2016).

15. 808 F.3d 1013 (5th Cir. 2015).

16. 834 F.3d 975 (9th Cir. 2016).

17. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619–20 (2018) (describing the dispute in *Ernst & Young LLP v. Morris*, where the employer sought to prevent the employee from bringing a class claim, as the typical issue arising in each of the three cases addressed in *Epic*).

18. *Id.* at 1624.

19. *Id.* at 1619–20, 1624 (quoting 29 U.S.C. § 157 (2012)).

20. *Id.* at 1620.

21. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1151 (7th Cir. 2016).

22. *Id.*

do so in an arbitral forum (as opposed to a judicial forum) and in individualized proceedings.²³ The email further stipulated that employees would be deemed to have accepted the agreement if they continued to work at Epic.²⁴ However, the email requested that employees review and accept the agreement by clicking two buttons.²⁵ Epic provided no option to decline the agreement if employees wanted to keep their jobs.²⁶ The next day, Mr. Lewis followed the email's instructions for registering his agreement.²⁷

Later, a dispute arose between Mr. Lewis and Epic, in which Mr. Lewis contended that Epic misclassified him and other workers in violation of the Fair Labor Standards Act ("FLSA"),²⁸ and thereby unlawfully deprived them of overtime pay.²⁹ Mr. Lewis did not proceed under the arbitration agreement.³⁰ Instead, Mr. Lewis brought a representative action against Epic in the United States District Court for the Western District of Wisconsin.³¹ The employer moved to dismiss and to compel individual arbitration,³² but the district court found that the arbitration clause was unenforceable because it interfered with employees' rights under Section 7 of the NLRA.³³ On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the district court's decision.³⁴ The Seventh Circuit reasoned that the ordinary meaning of "concerted activities" in Section 7 of the NLRA encompasses a right to collective, representative, or class dispute resolution.³⁵ Since the FAA permits the invalidation of arbitration agreements based on ordinary contract defenses, such as illegality, the Court reasoned that the FAA did not mandate enforcement of Epic's agreement to individually arbitrate because its provisions violated the NLRA.³⁶ In other words, the arbitration agreements were unenforceable and could be set aside under the FAA's saving clause because the agreements conflicted with the rights granted by a federal statute.³⁷

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* Even if Mr. Lewis had not signaled his acceptance with the click of those two buttons, he would have been deemed to have constructively accepted the agreement if he continued in his employment with Epic. *Id.* Essentially, the choice presented to Mr. Lewis was quit his job or accept his employer's arbitration agreement. *Id.*

28. 29 U.S.C. § 201–204, 206, 207, 209–219 (2012).

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

30. *Id.*

31. *Id.* at 1150–51.

32. *Id.*

33. *Id.*

34. *Id.* at 1161.

35. *Id.* at 1152–53.

36. *Id.* at 1159 ("Illegality is a standard contract defense contemplated by the FAA's saving clause.").

37. *Id.*

Similarly, in *Morris v. Ernst & Young*, an employee brought a collective action against the accounting firm Ernst & Young for alleged violations of the FLSA despite an agreement to individually arbitrate employment disputes.³⁸ The federal district court granted Ernst & Young's motion to compel individual arbitration and dismissed the case.³⁹ On appeal, the United States Court of Appeals for the Ninth Circuit reversed and remanded the district court's decision.⁴⁰ The Ninth Circuit reasoned that the NLRA, consistent with congressional intent and the National Labor Relations Board's ("NLRB") interpretation,⁴¹ guarantees workers a substantive right to bring claims collectively.⁴² Since the right to collective action is a substantive federal right,⁴³ the FAA did not mandate the enforcement of the agreements in this case.⁴⁴ Accordingly, the court found Ernst & Young's mandatory arbitration agreement requiring that claims be brought individually and separately was unenforceable.⁴⁵

In *Murphy Oil USA, Inc. v. NLRB*, the employer, Murphy Oil, petitioned the United States Court of Appeals for the Fifth Circuit for review of the NLRB's decision that Murphy Oil's arbitration agreement constituted an unfair labor practice.⁴⁶ In 2010, employees of Murphy Oil filed a collective action against Murphy Oil in federal district court alleging violations of the FLSA, despite the fact that the employees had signed an agreement to individually arbitrate claims against Murphy Oil.⁴⁷ The NLRB held that the employer-drafted agreement to *individually*⁴⁸ arbitrate disputes violated the

38. *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 979 (9th Cir. 2016). Mr. Morris and other employees, as a condition of their employment, were required to sign a "concerted action waiver," which required employees to pursue claims exclusively through arbitration and exclusively as individuals in "separate proceedings." *Id.*

39. *Id.*

40. *Id.* at 990.

41. In *Morris*, the Ninth Circuit noted that the NLRB's interpretations of the NLRA are accorded *Chevron* deference, which means that reviewing courts will defer to the NLRB's "reasonable interpretations" of the NLRA. *Id.* at 980–81 (first citing *Chevron, USA, Inc., v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 & n.9 (1984); then citing *Hoffman Plastic Compounds, Inc., v. NLRB*, 535 U.S. 137, 143–44 (2002)).

42. *Id.* at 980–83.

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

44. *Id.* at 985–86 ("The problem with the contract at issue is not that it requires arbitration; it is that the contract term defeats a substantive federal right to pursue concerted work-related legal claims.").

45. *Id.* at 990.

46. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1017 (5th Cir. 2015).

47. *Id.* at 1015.

48. *But see* *Murphy Oil USA, Inc.*, 361 N.L.R.B. 774, 774–75, 781–82, 789–90 (2014) (noting that while mandatory arbitration agreements requiring employees to individually arbitrate claims are invalid under the NLRA, mandatory arbitration agreements that allow employees to pursue claims collectively are valid and conform with the NLRA).

NLRA and was, therefore, unenforceable.⁴⁹ The NLRB found that the agreements violate the NLRA because they require employees to forfeit their substantive right to act collectively.⁵⁰ To address the argument that the arbitration agreements should be enforced in light of the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*,⁵¹ which barred consumers from bringing classwide arbitration, the NLRB found that *Concepcion* involved federal preemption of a state law, while the question of whether collective action waivers for employment disputes were enforceable involved a conflict of two federal statutes. In *Murphy Oil*, the Fifth Circuit declined to enforce the NLRB's order,⁵² and reaffirmed its position that employer-drafted agreements to individually arbitrate claims are enforceable.⁵³ The Fifth Circuit reiterated the reasoning provided in its earlier decision in *D.R. Horton, Inc. v. NLRB*⁵⁴: "(1) [T]he NLRA does not contain a 'congressional command overriding' the [FAA]; and (2) 'use of class action procedures . . . is not a substantive right' under Section 7 of the NLRA."⁵⁵

The Supreme Court granted certiorari to determine a question in common to these three cases: Whether employer-drafted agreements to individually arbitrate employment disputes violate the NLRA and are, therefore, unenforceable.⁵⁶

II. LEGAL BACKGROUND

Arbitration as a dispute resolution method has become commonplace in a variety of contexts⁵⁷ and has been significantly bolstered by Supreme Court decisions over the past twenty years.⁵⁸ Arbitration's proponents on the Court

49. *Id.* at 794. A year prior to the Board's decision in *Murphy Oil*, however, the U.S. Court of Appeals for the Fifth Circuit rejected this analysis in *D.R. Horton, Inc. v. NLRB* and held a similar agreement to individually arbitrate claims enforceable. *Murphy Oil*, 808 F.3d at 1016–17 (citing *D.R. Horton, Inc., v. NLRB*, 737 F.3d 344, 348 (5th Cir. 2013)).

50. *Murphy Oil USA, Inc.*, 361 N.L.R.B. at 774–75.

51. 563 U.S. 333 (2011)

52. *Murphy Oil USA, Inc.*, 808 F.3d at 1021.

53. *Id.* at 1016.

54. 737 F.3d 344 (5th Cir. 2013).

55. *Murphy Oil USA, Inc.*, 808 F.3d at 1016 (footnote omitted) (quoting *D.R. Horton, Inc., v. NLRB*, 737 F.3d 344, 357, 360–62 (5th Cir. 2013)).

56. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619–20 (2018).

57. *E.g.*, BUREAU OF CONSUMER FIN. PROTECTION, CFPB-2016-0020, FINAL RULE; OFFICIAL INTERPRETATIONS 6 (2016) https://files.consumerfinance.gov/f/documents/201707_cfpb_Arbitration-Agreements-Rule.pdf ("In the last few decades, companies have begun inserting arbitration agreements in a wide variety of standard-form contracts, such as in contracts between companies and consumers, employees, and investors.") .

58. *See infra* Section II.A.

have hailed arbitration as an efficient alternative forum for dispute resolution,⁵⁹ while its critics have pointed to concerns about arbitration's exculpatory effects in situations involving unequal bargaining power.⁶⁰ This tension between arbitration's efficiency and exculpatory effect has animated recent debates regarding arbitration of statutory claims in employment contracts.⁶¹

The Supreme Court's generous interpretations of the FAA⁶² have collided⁶³ with the NLRA's broadly worded right of workers to engage in collective action for "mutual aid or protection"⁶⁴ in employer-drafted collective action waivers.⁶⁵ Section II.A examines the FAA's origins, interpretations, and scope. Section II.B discusses the legislative intent and force of the NLRA. Section II.C surveys the opinions of the NLRB and lower courts discussing whether collective action waivers in the employment context are enforceable in light of the NLRA's guarantees for workers.

A. *The Federal Arbitration Act's History and Scope*

Arbitration as an alternative dispute resolution mechanism has been strengthened over the past century through the enactment of the FAA,⁶⁶ which was principally supported by trade associations and commercial

59. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344–45 (2011) ("And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." (first citing *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009); then citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985))).

60. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 240–42 (2013) (Kagan, J., dissenting) (explaining how American Express' arbitration agreement with restaurateurs, which barred collective claims, effectively prevented the restaurateurs from bringing federal antitrust claims and, therefore, insulated American Express from liability); *Concepcion*, 563 U.S. at 365–66 (Breyer, J., dissenting) (noting terms in arbitration clauses in "consumer contracts can be manipulated to insulate an agreement's author from liability for its own frauds").

61. See *infra* Section II.C.

62. See *infra* Section II.A.3.

63. See *Murphy Oil USA, Inc.*, 361 N.L.R.B. 774, 774–75 (2014) (citing *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012)), for a discussion of the relatively recent collision of the two federal statutes and scholarly and judicial reactions to the NLRB's first decision to address the apparent conflict, *D.R. Horton, Inc.*

64. 29 U.S.C. § 157 (2012).

65. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018) (explaining that the Court's role is to harmonize the apparently conflicting statutes). A collective action waiver, in the employment context, is a provision contained in an employer-drafted contract with its employees that bars joint, group, class, collective, and representative claims, mandating instead that employment claims can only be brought individually. See, e.g., *id.* at 1622 (discussing the effect of collective action waivers in employment-related disputes).

66. 9 U.S.C. §§ 1–14 (2012).

groups as a way to resolve business disputes,⁶⁷ and the Court's favorable interpretations of the FAA's provisions.⁶⁸ Arbitration is a "dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute,"⁶⁹ and it is often used to foreclose access to traditional court room processes.⁷⁰ Congress enacted the FAA in 1925, in response to the reluctance of courts to enforce such agreements that limited the jurisdiction of courts to resolve disputes.⁷¹ The primary provision⁷² of the FAA is contained in Section 2,⁷³ which states, "[A]n agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."⁷⁴ Since its enactment, the Supreme Court has expanded the scope of the FAA beyond Congress's initial design.⁷⁵

67. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 409 n.2 (1967) (Black, J., dissenting) (first citing *Hearing on S. 4213 and S. 4214 Before the Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 3, 7, 9, 10 (1923); then citing *Joint Hearings on S. 1005 and H.R. 646 Before the Subcomm. of the Comm. on the Judiciary*, 68th Cong. 7 (1924)).

68. *See, e.g., Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 231, 238–39 (2013) (finding that the plaintiffs' federal antitrust claims were subject to individual arbitration per an agreement between American Express and individual restaurateurs even though the cost of bringing the claims individually was prohibitively high); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 340, 352 (2011) (finding that a California law prohibiting certain collective action waivers in litigation and arbitration was preempted by the FAA).

69. *Arbitration*, BLACK'S LAW DICTIONARY (10th ed. 2014).

70. *Id.* (citing JOHN P.H. SOPER, A TREATISE ON THE LAW AND PRACTICE OF ARBITRATIONS AND AWARDS 1 (David M. Lawrence ed., 5th ed. 1935)).

71. *Cf., Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 593 (2008) (Stevens, J., dissenting) (explaining that prior to the enactment of the FAA, "American courts were generally hostile to arbitration" and often refused to order specific enforcement of arbitration agreements). American courts had traditionally refused the notion that arbitration agreements could supplant courtroom dispute resolution and "oust the courts of jurisdiction." *Haskell v. McClintic-Marshall Co.*, 289 F. 405, 409–10 (9th Cir. 1923).

72. *See, e.g., Hall Street Assocs., L.L.C.*, 552 U.S. at 593 (Stevens, J., dissenting) (noting that Section 2 of the FAA is the "centerpiece of the FAA," which "reflects Congress' main goal in passing the legislation: 'to abrogate the general common-law rule against specific enforcement of arbitration agreements.'" (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 18 (1984) (Stevens, J., concurring in part and dissenting in part))).

73. 9 U.S.C. § 2 (2012).

74. *Id.*

75. *See infra* Sections II.A.2, II.A.3.

1. *Congress Initially Envisioned Arbitration as Proper only Under a Narrow Set of Conditions*

At the time of the FAA's enactment, Congress envisioned arbitration as a voluntarily negotiated agreement used primarily to address commercial disputes between merchants.⁷⁶ Although arbitration has since been expanded to consumer and employment contracts, "Congress did not intend to allow binding arbitration agreements on individuals if the contracts were between parties of unequal bargaining power."⁷⁷ Justice Breyer explained that Congress thought "arbitration would be used primarily where merchants sought to resolve disputes of fact, not law, under the customs of their industries, where the parties possessed roughly equivalent bargaining power."⁷⁸

In fact, the FAA's passage may have been due in part to Congress's assurances that the FAA would not apply to contracts between employers and employees.⁷⁹ When organized labor expressed opposition to the FAA based on its fears that arbitration could be applied to employment contracts, the American Bar Association ("ABA") committee that drafted the legislation and then-Secretary of Commerce Herbert Hoover suggested adding language to exclude employment contracts from the FAA.⁸⁰ Following then-Secretary Hoover's suggestion, the FAA was reintroduced with the exclusionary language in Section 1.⁸¹ Consequently, organized labor withdrew its opposition to the bill.⁸² Specifically, the exclusionary language of Section 1 states, "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or

76. H.R. REP. NO. 111-712, at 55 n.128 (2011); *see also* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 409 n.2 (1967) (Black, J., dissenting) ("Practically all who testified in support of the bill before the Senate subcommittee in 1923 explained that the bill was designed to cover contracts between people in different States who produced, shipped, bought, or sold commodities.").

77. H.R. REP. NO. 111-712, at 55-56 (2011); *see Prima Paint Corp.*, 388 U.S. at 413-14 (Black, J., dissenting) (noting that the draftsman of the FAA assured members of Congress that the FAA would only apply to voluntarily negotiated agreements).

78. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 362 (2011) (Breyer, J., dissenting); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 US 614, 650 (1985) (Stevens, J., dissenting) (noting that historically arbitration has been used in "ordinary disputes between merchants as to questions of fact" (quoting *Prima Paint Corp.*, 388 U.S. at 415 (Black, J., dissenting))).

79. *See Prima Paint Corp.*, 388 U.S. at 414 (Black, J., dissenting) ("Senator Walsh cited insurance, employment, construction, and shipping contracts as routinely containing arbitration clauses and being offered on a take-it-or-leave-it basis to captive customers or employees. . . . He was emphatically assured by the supporters of the bill that it was not their intention to cover such cases." (citing *Hearing on S. 4213 and S. 4214 Before the Subcomm. of the S. Comm. on the Judiciary*, 67th Cong., 3, 7, 9, 10 (1923))).

80. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 126-27 (2001) (Stevens, J., dissenting) (citing *Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong., 9 (1923)).

81. 9 U.S.C. § 1 (2012).

82. *Circuit City Stores, Inc.*, 532 U.S. at 127 (Stevens, J., dissenting).

interstate commerce.”⁸³ Thus, the language and history of the FAA indicate that Congress originally intended arbitration to occur under a narrow set of conditions, primarily in a commercial context.

2. *The Court Has Expanded the FAA’s Scope Beyond the Text and Legislative Intent of the FAA in Recent Decades*

The Court has held arbitration agreements enforceable in employment disputes⁸⁴ and in disputes involving federal statutory claims.⁸⁵ In *Gilmer v. Interstate/Johnson Lane Corp.*,⁸⁶ the majority held that an employee’s claims under the federal Age Discrimination in Employment Act (“ADEA”)⁸⁷ were subject to compulsory arbitration under the FAA⁸⁸ based on the Court’s then-recent decisions sanctioning arbitration of federal statutory claims.⁸⁹ Additionally, the majority found ADEA claims were arbitrable because the ADEA “did not explicitly preclude arbitration or other nonjudicial resolution of claims,”⁹⁰ and unequal bargaining power between employees and employers “is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”⁹¹ The majority’s opinion did not address the exclusionary language in Section 1 of the FAA, nor did it directly address whether the FAA applies to employment contracts.⁹²

It was not until 2001 in *Circuit City Stores, Inc. v. Adams*⁹³ that a five-justice majority adopted a narrow construction of Section 1’s exclusionary language⁹⁴ and held the only employment contracts exempt from the FAA’s

83. 9 U.S.C. § 1.

84. *See* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (upholding an arbitration agreement between a registered securities representative with the New York Stock Exchange (“NYSE”)); *Circuit City Stores Inc.*, 532 U.S. at 119 (upholding an arbitration agreement contained in an employment application of a sales associate at a national electronics retailer); *see also* *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (recognizing that employment contracts, except those of transportation workers, are covered by the FAA).

85. *See infra* note 89.

86. 500 U.S. 20 (1991).

87. 29 U.S.C. §§ 621–633, 633a, 634 (2012).

88. *Gilmer*, 500 U.S. at 23.

89. *Id.* at 26 (first citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); then citing *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 238 (1987); and then citing *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485–86 (1989)).

90. *Id.* at 29.

91. *Id.* at 32–33.

92. *Id.* at 25 n.2 (asserting that since the arbitration clause was contained in a securities registration agreement between a securities representative and the NYSE and not an employment contract, the Court would not address the scope of the exclusionary language in Section 1 of the FAA).

93. 532 U.S. 105 (2001).

94. *Id.* at 119.

provisions were those of transportation workers.⁹⁵ To arrive at this conclusion, the Court employed the *ejusdem generis* canon of statutory construction, which directs that general words appearing at the end of a list to be construed narrowly so as to embrace only objects similar to the preceding terms.⁹⁶ The Court reasoned that because the phrase “any other class of workers engaged in foreign or interstate commerce” appears after specific references to the exclusion of “seamen” and “railroad employees,”⁹⁷ the general terms should be construed narrowly to only embrace transportation workers.⁹⁸ The Court, again employing textualist devices, reasoned that Congress did not intend to provide a broad exemption for employment contracts because it used the words “engaged in . . . commerce”⁹⁹ rather than more generous phraseology such as “involving commerce” or “affecting commerce.”¹⁰⁰ From a policy perspective, the Court contended that arbitration in employment matters would be beneficial because it would allow parties to avoid the costs of litigation.¹⁰¹ The Court dismissed the historical arguments¹⁰² that favored a more expansive view of Section 1’s exclusionary language¹⁰³ and explicitly declined to assess the legislative history of the exclusionary provision to inform its judgment.¹⁰⁴ With this decision, the Court narrowed the categories of contracts exempt from the FAA, and in doing so, expanded the scope of the FAA.¹⁰⁵ Most importantly, this decision provided

95. *Id.*

96. *Id.* at 114–15.

97. 9 U.S.C. § 1 (2012).

98. *Circuit City Stores, Inc.*, 532 U.S. at 114–15.

99. 9 U.S.C. § 1.

100. *Circuit City Stores, Inc.*, 532 U.S. at 115–16 (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995)).

101. *Id.* at 123. The Court argued that such cost avoidance would be particularly beneficial in employment disputes because these controversies often involve smaller sums of money than disputes concerning commercial contracts. *Id.*

102. *Id.* at 125–29 (Stevens, J., dissenting) (“[T]he exclusion fully responded to the concerns of the Seamen’s Union and other labor organizations that § 2 might encompass employment contracts by expressly exempting the labor agreements not only of ‘seamen’ and ‘railroad employees,’ but also of ‘any other class of workers engaged in foreign or interstate commerce.’” (quoting 9 U.S.C. § 1)).

103. The Court dismissed arguments that Section 1’s language was intended to broadly exempt employment contracts from the FAA because of organized labor’s initial fears about the legislation. *Id.* at 119–20 (majority opinion). The Court asserted that the source used to support these arguments, testimony before a Senate subcommittee, was too far “removed from the full Congress.” *Id.* at 120. The Court also contended that examining legislative history becomes “problematic” when reviewing courts “speculate upon the significance of the fact that a certain interest group sponsored or opposed particular legislation.” *Id.* at 120.

104. *See id.* at 119 (“As the conclusion we reach today is directed by the text . . . we need not assess the legislative history of the exclusion provision.”).

105. *Id.*

the concrete legal basis for employers to insert mandatory arbitration agreements in employment contracts.¹⁰⁶

3. *The Court Has Bolstered Arbitration Clauses by Sanctioning Collective Action Waivers and Narrowing the FAA's Saving Clause*

The Court's recent decisions in *AT&T Mobility LLC v. Concepcion*¹⁰⁷ and *American Express Co. v. Italian Colors Restaurant*¹⁰⁸ together permit collective action waivers in arbitration clauses even when these waivers make all permissible claims under the agreement economically and practically unfeasible.¹⁰⁹ In *Concepcion*,¹¹⁰ the Court held that a California state law prohibiting consumer class action waivers on the basis of unconscionability¹¹¹ is inconsistent with and preempted by the FAA.¹¹² Section 2 of the FAA provides arbitration agreements can be set aside on grounds that exist for the revocation of any contract,¹¹³ which has been understood to include defenses such as "fraud, duress, or unconscionability."¹¹⁴ Although contract law is defined by the states, and the state in this case held the waivers at issue unconscionable and unenforceable,¹¹⁵ the Court reasoned that a state law prohibition on class action waivers was inconsistent with the FAA.¹¹⁶ The Court reasoned that the state law barring class action waivers for their inherent un-

106. *Id.*

107. 563 U.S. 333, 351–52 (2011).

108. 570 U.S. 228 (2013).

109. *See infra* notes 122–124 and accompanying text.

110. AT&T customers filed a class action against the company in federal court alleging fraud and false advertising because the company had advertised a free phone with the purchase of AT&T services but charged customers \$30.22 in sales tax for the phone. 563 U.S. at 337.

111. This judicially created state law in California was known as the *Discover Bank* rule. Under the *Discover Bank* rule, consumer class action waivers in contracts of adhesion in which disputes between the contracting parties will predictably involve small amounts of damages are unconscionable and therefore unenforceable under California contract law. The rule applies to class action waivers in arbitral as well as judicial forums. *Concepcion*, 563 U.S. at 357–59 (Breyer, J., dissenting).

112. *Id.* at 348 (majority opinion).

113. 9 U.S.C. § 2 (2012).

114. *Concepcion*, 563 U.S. at 339 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

115. *See supra* note 111.

116. *Concepcion*, 563 U.S. at 339, 341–44. The Court recognized that the FAA's saving clause allows for arbitration agreements to be set aside based on traditional contract defenses, but noted that a defense cannot stand and cannot invalidate the agreement if the defense applies only to arbitration, or derives its meaning from the fact that an arbitration agreement is at issue. *Id.* at 341–42. The Court found that the *Discover Bank* rule disproportionately affected arbitration agreements, interfered with the FAA's purposes, and was therefore invalid. *Id.* at 342, 344, 346.

conscionability was inconsistent with the FAA's general purpose of enforcing arbitration agreements according to their terms.¹¹⁷ Furthermore, the Court asserted that a switch from bilateral to classwide arbitration interferes with the "fundamental attributes of arbitration,"¹¹⁸ namely its "efficient, streamlined procedures."¹¹⁹ Bilateral arbitration involves only the parties to a single arbitration agreement, while collective and classwide arbitration involves multiple arbitration agreements an entity has entered with consumers, employees, or other parties.¹²⁰ Although collective legal actions practically may be necessary to prosecute small-dollar claims, which would be too small to justify the legal costs of pursuing the claim individually, the Court responded that "[s]tates cannot require [the availability of] a procedure . . . inconsistent with the FAA, even if it is desirable for unrelated reasons."¹²¹ Thus, this decision sanctioned the unrestricted use of class action waivers in consumer arbitration agreements by invalidating a state law that sought to limit consumer class action waivers generally.¹²²

Two years later, in *American Express Co. v. Italian Colors Restaurant*,¹²³ the Court decided that class action waivers could be enforced even if compliance with the waivers makes pursuing a claim economically unfeasible.¹²⁴ The restaurant owners resisting individual arbitration invoked a judicially-created exception to the FAA, the "effective vindication" doctrine, which harmonizes competing federal policies by allowing courts to invalidate agreements that prevent the effective vindication of a federal statutory

117. The Court asserted that the principal purpose of the FAA is to enforce arbitration agreements according to the terms the parties agreed to. *Concepcion*, 563 U.S. at 344. The Court noted instances in which it has held that parties to an arbitration agreement may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit with whom a party will arbitrate its disputes. *Id.* But see *id.* at 359–60 (Breyer, J., dissenting) (contending that the purpose behind the FAA was to ensure judicial enforcement of arbitration agreements by merely putting agreements to arbitrate on the same footing as other contracts).

118. *Id.* at 344, 347–48 (majority opinion).

119. See *id.* (arguing that classwide arbitration would sacrifice the primary advantages of arbitration because it would be costlier, since it involves higher stakes, and slower because of its attendant procedural formalities such as class certification).

120. See *supra* note 11. For example, the bilateral nature of the arbitration agreement between AT&T and a customer was expressed with a provision that stated, "You and AT&T agree that each may bring claims against the other only in your or its individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." Brief for Petitioner at 27, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (No. 09-893) (quoting Petitioner Appeal 61a).

121. *Concepcion*, 563 U.S. at 351.

122. *Id.* at 352.

123. In this case, restaurant owners, who accepted American Express cards from their patrons, had accepted an agreement with American Express that required claims be resolved in arbitration and prohibited the arbitration of claims on a class basis. 570 U.S. 228, 231 (2013). The restaurant owners brought a class action against American Express alleging violations of antitrust laws, and American Express motioned to compel arbitration. *Id.*

124. *Id.* at 235–36.

right.¹²⁵ The Court disagreed with these arguments and found that federal antitrust laws did not contain a congressional command overriding the FAA or requiring the availability of aggregate claims.¹²⁶ Additionally, the Court found that the effective vindication doctrine could only bar an arbitration agreement if the agreements prospectively waived a party's ability to assert a statutory right or if the arbitration fees were so high as to make access to the forum impracticable.¹²⁷ The Court asserted that the class action waiver at issue did not rise to this level of impracticability because it "merely limit[ed] arbitration to the two contracting parties."¹²⁸ In other words, the Court sanctioned the use of collective action waivers even when such waivers meant that the cost of prosecuting the individual claim exceeded the maximum recovery for an individual plaintiff.¹²⁹

B. The National Labor Relations Act's History and Scope

In 1935, Congress passed the NLRA in an effort to address "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association."¹³⁰ To effectuate this goal, the NLRA applies to almost¹³¹ all private sector employees,¹³² grants substantive rights to workers to engage in collective action,¹³³ and provides for the enforcement of these rights.¹³⁴ Section 7 enumerates substantive rights to collective action for workers: "Employees shall have the

125. *Id.* at 231. The restaurateurs argued that the cost of proving their antitrust claims against American Express could exceed \$1 million while the maximum recovery for an individual plaintiff would be a little below \$40,000, making an aggregate legal action necessary for an affordable prosecution of their claims. *Id.* at 231, 235.

126. *Id.* at 233–34.

127. *Id.* at 236.

128. *Id.* at 239. The Court also argued that since class procedures were not included in the Federal Rules of Civil Procedure until 1938 and previously individual proceedings had been the norm, individual proceedings could not now be considered "ineffective vindication." *Id.* at 236–37.

129. *Id.* at 236.

130. 29 U.S.C. § 151 (2012); *see also* NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 835 (1984) (explaining that the NLRA was designed to "equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment").

131. The NLRA applies broadly to "any employee" and "shall not be limited to the employees of a particular employer," but includes a few well-delineated exceptions. 29 U.S.C. § 152(3). The NLRA specifically exempts agricultural laborers, those employed in the domestic service of a family or person at their home, independent contractors, supervisors, "any individual employed by his parent or spouse . . . or any individual employed by an employer subject to the Railway Labor Act." *Id.*

132. *Id.*

133. *Id.* § 157.

134. *Id.* § 158(a)(1).

right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”¹³⁵ Section 7 grants employees a variety of rights in order to carry out the NLRA’s express intent to address the “inequality of bargaining power” between employees and employers.¹³⁶ Meanwhile, Section 8 provides for the enforcement of these rights: “It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.”¹³⁷ To aid in the enforcement of workers’ rights, the NLRA created an independent agency, the NLRB.¹³⁸ Congress granted the NLRB rulemaking¹³⁹ and adjudicatory¹⁴⁰ authority to enforce the provisions of the NLRA. The statute sought to comprehensively address inequality in bargaining power between workers and their employers.

In keeping with the comprehensive design of the statute, courts and the NLRB have interpreted Section 7’s guarantees broadly and upheld workers’ rights to collective action in a variety of contexts. The Court in *Eastex Inc. v. NLRB*¹⁴¹ granted certiorari to address the differences among the circuits as to the scope of rights protected by the “mutual aid or protection” clause of Section 7 of the NLRA and explicitly rejected a narrow construction of this provision.¹⁴² The Court explained that “Congress knew . . . that labor’s cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context.”¹⁴³ Specifically, the Court noted that the phrase “mutual aid or protection” is meant to “protect[] employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums, and that employees’ appeals to legislators to protect their interests as employees are within the scope of this clause.”¹⁴⁴

Accordingly, courts and the NLRB have found Section 7’s concerted activities for “mutual aid or protection”¹⁴⁵ guarantees workers the right to

135. *Id.* § 157.

136. *Id.* § 151.

137. *Id.* § 158(a)(1).

138. *Id.* § 153.

139. *Id.* § 156.

140. *Id.* § 161.

141. 437 U.S. 556 (1978).

142. *Id.* at 562; 29 U.S.C. § 157.

143. *Eastex Inc.*, 437 U.S. at 565.

144. *Id.* at 565–66 (footnote omitted).

145. 29 U.S.C. § 157.

collectively lobby elected officials,¹⁴⁶ the media,¹⁴⁷ and, most relevant to the concerns here, to bring lawsuits on class and representative bases to improve working terms and conditions.¹⁴⁸ Just seven years after the NLRA was enacted, the NLRB decided three employees' collective legal action against their employer under the FLSA was protected under the NLRA since their legal action directly concerned wages and working conditions.¹⁴⁹ Courts have also endorsed the view that collective legal action is protected under the NLRA.¹⁵⁰ As recently as 2011, the United States Court of Appeals for the Eighth Circuit reaffirmed this understanding in *Brady v. National Football League*¹⁵¹ when the court recognized "a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under [Section] 7 of the [NLRA]."¹⁵² Therefore, the NLRA has been designed and interpreted to comprehensively address unequal bargaining power between employees and employers in part by enforcing a broad right to collective action on the part of the employees.

C. Collective Action Waivers in Employment: The NLRB's Interpretation and the Circuit Split

As arbitration has become more common and bolstered by favorable Supreme Court decisions in recent years,¹⁵³ the NLRB and the courts have been presented with the question of whether collective action waivers conflict with Section 7's guarantees.¹⁵⁴ The NLRB's interpretation of the NLRA is

146. See, e.g., *Bethlehem Shipbuilding Corp. Ltd. v. NLRB*, 114 F.2d 930, 937 (1st Cir. 1940) (enforcing the NLRB's order to allow employees to collectively address the Massachusetts legislature because the right "guaranteed by Section 7 of the [NLRA], is not limited to direct collective bargaining with the employer, but extends to other activities for 'mutual aid or protection,' including appearance of employee representatives before legislative committees").

147. E.g., *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505–06 (2d Cir. 1942) (finding that the union's publication of its resolution condemning certain activities of its employer in local newspapers was protected under Section 7).

148. See *infra* notes 149–152.

149. *Spandisco Oil & Royalty Co.*, 42 N.L.R.B. 942, 948–49 (1942).

150. See, e.g., *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) ("[F]iling 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."); *NLRB v. Poultrymen's Service Corp.*, 138 F.2d 204, 210 (3d Cir. 1943) (enforcing the NLRB's order which found in part that the employer was guilty of unfair labor practices by interfering with the workers' attempts to bring collective legal action under the FLSA).

151. 644 F.3d 661 (8th Cir. 2011).

152. *Id.* at 673. But see *infra* notes 176–183.

153. See *supra* Section II.A.

154. See *infra* notes 161–192 and accompanying text.

accorded judicial deference due to its expertise in employment and labor related issues.¹⁵⁵ On the issue of collective action waivers in employment contracts, the NLRB has found these waivers constitute an unfair labor practice in violation of the NLRA.¹⁵⁶ However, in light of the Court's decisions in *Concepcion*, the circuits have split on whether to adopt or reject the NLRB's interpretation.¹⁵⁷

The NLRB, which is tasked with the enforcement of the NLRA, routinely decides complaints filed under the NLRA.¹⁵⁸ The Court has recognized the NLRB's role is often to define what constitutes a protected collective action under Section 7 of the NLRA.¹⁵⁹ Before the Court's more recent interpretations of the FAA, the NLRB found in *J.H. Stone & Sons*¹⁶⁰ that employer-drafted arbitration agreements requiring employees to individually arbitrate employment claims violated employees' rights under Section 7 of the NLRA.¹⁶¹ The Seventh Circuit enforced this order and agreed with the NLRB's finding that arbitration agreements waiving collective action are illegal in light of Section 7's guarantees.¹⁶²

After the Court's decision in *Concepcion*, the NLRB again addressed the issue of class action waivers in *D.R. Horton, Inc.*¹⁶³ The NLRB found that the employer-drafted arbitration agreement constituted an unfair labor practice under the NLRA by barring collective claims and by requiring all claims to be brought individually.¹⁶⁴ The NLRB reasoned that collective enforcement of rights in court or in arbitration serves Congress's intention to equalize the bargaining power of employees and employers.¹⁶⁵ Furthermore, the NLRB found that its conclusion under the NLRA could be harmonized

155. NLRB v. City Disposal Sys. Inc., 465 U.S. 822, 829 (1984); see also Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 201 (1991) (finding the NLRB's interpretation of the NLRA will be upheld "so long as it is 'rational and consistent with the Act.'" (quoting Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 42 (1987))).

156. D.R. Horton, Inc., 357 N.L.R.B. 2277, 2285–87 (2012).

157. See *infra* notes 172–193 and accompanying text.

158. See *supra* notes 138–140 and accompanying text.

159. Eastex, Inc. v. NLRB, 437 U.S. 556, 568 (1978) ("It is neither necessary nor appropriate, however, for us to attempt to delineate precisely the boundaries of the 'mutual aid or protection' clause. That task is for the Board to perform in the first instance as it considers the wide variety of cases that come before it.").

160. 33 N.L.R.B. 1014 (1941). In fact, the scope of the FAA has been expanded so much by the Court in recent decades that the NLRB does not even discuss the possibility that the NLRA and the FAA are in conflict. *Id.* at 1023–24.

161. *Id.* at 1023 ("The effect of this restriction is that, at the earliest and most crucial stages of adjustment of any dispute, the employee is denied the right to act through a representative and is compelled to pit his individual bargaining strength against the superior bargaining power of the employer.").

162. NLRB v. Stone, 125 F.2d 752, 756 (7th Cir. 1942).

163. 357 N.L.R.B. 2277, 2284–88 (2012).

164. *Id.* at 2278–80.

165. *Id.* at 2279.

with the FAA so both statutes could be given effect.¹⁶⁶ The NLRB reasoned that the NLRA's substantive right to collective action could not be overshadowed by the FAA.¹⁶⁷ However, the NLRB found that the FAA's saving clause allowed for collective action waivers in arbitration agreements to be set aside because an agreement waiving workers' substantive federal rights violated public policy.¹⁶⁸ Federal statutes are a manifestation of public policy, so agreements that violate the terms of a federal statute, such as the employer-drafted arbitration agreements that interfered with workers' rights to collective action, violate public policy and will not be enforced by the courts.¹⁶⁹ The NLRB also distinguished its decision from *Concepcion*.¹⁷⁰ The NLRB argued that, unlike classwide consumer arbitration discussed in *Concepcion*, collective employment arbitration will not sacrifice the principal advantages of arbitration.¹⁷¹ Collective employment arbitration will maintain arbitration's informality and efficiency because the agreements are between employers and their own employees, unlike consumer class actions, which the Court in *Concepcion* feared could involve thousands of potential claimants.¹⁷²

Following the NLRB's decision to strike down the employer-drafted collective action waiver in *D.R. Horton, Inc.*, the United States Court of Appeals for the Fifth,¹⁷³ Second,¹⁷⁴ and Eighth¹⁷⁵ Circuits rejected the NLRB's interpretation and found collective action waivers enforceable in employment contracts. In *D.R. Horton, Inc. v. NLRB*,¹⁷⁶ the Fifth Circuit asserted that the

166. *Id.* at 2284. The NLRB recognized that it is responsible for administering the NLRA, not the FAA, and when possible conflicts between statutes exist, it must take care to accommodate both. *Id.* If the two federal statutes are capable of coexistence, both are "given effect 'absent a clearly expressed congressional intention to the contrary.'" *Id.* at 2283–84 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

167. *See id.* at 2286 ("[F]inding the [Mutual Arbitration Agreement]'s class-action waiver unlawful does not conflict with the FAA, because the waiver interferes with substantive statutory rights under the NLRA, and the intent of the FAA was to leave substantive rights undisturbed.").

168. *Id.* at 2287.

169. *Id.*

170. *Id.* at 2288. The NLRB argued that the decision in *Concepcion* was governed by the Supremacy Clause because the case involved a conflict between a state law and the FAA, a federal law. *Id.* (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)). Meanwhile, the decision before the Board involved an apparent conflict between two federal statutes and therefore was not governed by the Court's decision in *Concepcion*. *Id.*

171. *Id.* at 2287.

172. *Id.* While contracts of adhesion between consumers and companies may cover thousands of potential claimants, employers on average employ twenty employees, and employment claims often involve a distinct subset of employees, so the number of potential claimants in employment arbitration would be significantly smaller than in consumer arbitration. *Id.*

173. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).

174. *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013).

175. *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

176. 737 F.3d 344 (5th Cir. 2013).

NLRB's decision impermissibly conflicted with the FAA's policy of enforcing arbitration agreements according to their terms¹⁷⁷ and that the right to class procedures was a procedural device and not a substantive right.¹⁷⁸ The Second Circuit, in *Sutherland v. Ernst & Young LLP*,¹⁷⁹ similarly reasoned that collective action waivers in arbitration agreements were enforceable due to the FAA's policy commands and a lack of contradictory command in the FLSA.¹⁸⁰ Additionally, the Second Circuit rejected employees' arguments that filing claims individually would not be economically feasible because the cost of pursuing the claim would be more than the potential individual recovery.¹⁸¹ The Eighth Circuit in *Owen v. Bristol Care, Inc.*¹⁸² similarly concluded that the FLSA does not contain a contrary congressional command, and the arbitration agreement was therefore subject to the FAA's command to enforce agreements according to their terms.¹⁸³

On the other hand, the United States Court of Appeals for the Seventh,¹⁸⁴ Ninth,¹⁸⁵ and Sixth¹⁸⁶ Circuits have, in agreement with the NLRB, found collective action waivers unenforceable in employment contracts. In *Lewis v. Epic Systems Corp.*, the Seventh Circuit held that collective action waivers violate Section 7 of the NLRA,¹⁸⁷ are illegal,¹⁸⁸ and, therefore, unenforceable under the FAA's saving clause which permits arbitration agreements to be set aside for illegality.¹⁸⁹ Similarly, in *Morris v. Ernst & Young LLP*, the Ninth Circuit held class action waivers unenforceable under the

177. *Id.* at 359.

178. *Id.* at 357. The court cited decisions finding that the right to bring a class action is a procedural right, and asserted that even under the NLRA, class actions do not rise to the level of a substantive right because there have been decisions finding that there is no substantive right to use class actions under employment statutes, such as the ADEA and FLSA. *Id.* (first citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991); then citing *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004)).

179. 726 F.3d 290 (2d Cir. 2013).

180. *Id.* at 299.

181. *See id.* at 298–99 (discussing the unavailability of the effective vindication doctrine in light of the Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant*, which held plaintiffs could not invalidate a collective action waiver based on the fact that pursuing the claim is not worth the expense).

182. 702 F.3d 1050 (8th Cir. 2013).

183. *Id.* at 1052–54.

184. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016).

185. *Morris v. Ernst & Young*, 834 F.3d 975 (9th Cir. 2016).

186. *NLRB v. Alt. Entm't, Inc.*, 858 F.3d 393 (6th Cir. 2017).

187. *Id.* at 1151.

188. *Id.* at 1157.

189. *Id.*

NLRA.¹⁹⁰ It asserted that its decision was consistent with the policy mandates and statutory language of both the NLRA and FAA.¹⁹¹ In *NLRB v. Alternative Entertainment, Inc.*,¹⁹² the Sixth Circuit largely adopted the reasoning of the Seventh and Ninth Circuits when it enforced the NLRB's order finding an employer's collective action waiver unenforceable.¹⁹³

III. THE COURT'S REASONING

In *Epic Systems Corp. v. Lewis*, the Court legitimized the use of arbitration clauses prohibiting collective action in employment disputes. The five-justice majority opinion written by Justice Gorsuch held that employer-drafted agreements requiring employees to individually arbitrate disputes are enforceable even though the NLRA guarantees workers the right to engage in collective activities for the purpose of mutual aid and protection.¹⁹⁴ The narrow majority reasoned that the FAA's saving clause cannot be used to invalidate collective action waivers¹⁹⁵ and that the NLRA's Section 7 guarantees do not include the right to bring legal claims collectively.¹⁹⁶

First, the majority announced that agreements to individually arbitrate should be enforced in keeping with the FAA and "a liberal federal policy favoring arbitration agreements."¹⁹⁷ Justice Gorsuch explained that the agreements to individually arbitrate employment disputes should be enforced because the FAA was drafted to ensure agreements to arbitrate would be enforced "according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted."¹⁹⁸

Although the FAA's saving clause provides for the revocation of arbitration agreements on grounds that exist for the revocation of any contract,¹⁹⁹ the Court asserted that it does not provide a ground to invalidate the agreements here.²⁰⁰ The employees argued that the mandatory agreements to individually arbitrate violated the NLRA and therefore could not be enforced

190. *Morris v. Ernst & Young LLP*, 834 F.3d 975, 981–84 (9th Cir. 2016).

191. *See id.* at 984–86 (finding the decision consistent with the FAA since the FAA's saving clause permits arbitration to be set aside on the basis of illegality and the agreements at issue fit within this exception because they are illegal under the NLRA).

192. 858 F.3d 393 (6th Cir. 2017).

193. *See id.* at 403 (finding that the right to collective action under Section 7 of the NLRA is a substantive right that is violated by class action waivers and unenforceable under the FAA).

194. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619, 1622–24 (2018).

195. *Id.* at 1623.

196. *Id.* at 1624–25.

197. *Id.* at 1621 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

198. *Id.* (quoting *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 288, 233 (2013)).

199. 9 U.S.C. § 2 (2012).

200. *Epic*, 138 S. Ct. at 1622–23 (discussing *AT&T Mobility LLC v. Concepcion*).

because the FAA's saving clause prohibits the enforcement of illegal agreements.²⁰¹ The majority disagreed.²⁰² Relying on *AT&T Mobility LLC v. Concepcion*,²⁰³ the majority found that the illegality defense did not provide a grounds for invalidating the arbitration agreements under the savings clause because "the employees' argument seeks to interfere with one of arbitration's fundamental attributes."²⁰⁴ The majority reasoned that courts may not allow a contract defense under the savings clause "to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent."²⁰⁵ The Court held that the saving clause of the FAA could not be used to invalidate the arbitration agreements since the defense of illegality here would alter the "fundamental," bilateral nature of arbitration by permitting collective arbitration.²⁰⁶

Next, the Court engaged in a lengthy discussion explaining why the NLRA's Section 7 guarantees do not include a right to collective legal action and, therefore, could not invalidate the mandatory collective action waivers at issue.²⁰⁷ The employees argued that the last category of protections in Section 7²⁰⁸ guarantees a right to collective dispute resolution and, therefore, irreconcilably conflicts with the FAA and renders agreements to individually arbitrate employment disputes unenforceable.²⁰⁹ The Court reasoned there was no conflict between the FAA and Section 7 of the NLRA, citing the strong presumption against repeals by implication.²¹⁰ Additionally, the Court adopted a narrow view of the NLRA's guarantees in Section 7 since the *ejusdem generis* canon mandates that the general terms in Section 7 only encompass things similar to the preceding terms.²¹¹ To support its contention that Section 7 of the NLRA does not contain a right to collective legal action

201. *Id.* at 1622.

202. *Id.*

203. In *Concepcion*, the Court held that consumers were not entitled to classwide arbitration procedures, despite a state law that prohibited class action waivers in consumer contracts, because permitting class-wide arbitration constituted a "'fundamental' change" to the arbitration process. *Id.* at 1623 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 347 (2011)).

204. *Id.* at 1622–23 ("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.").

205. *Id.* at 1623.

206. *Id.* at 1622–23.

207. *Id.* at 1624–30.

208. Section 7 of the NLRA guarantees workers the right to self-organization, to bargain collectively through representatives, and "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (2012).

209. *Epic*, 138 S. Ct. at 1623–24.

210. *See infra* notes 214–216 and accompanying text.

211. *See infra* notes 218–221 and accompanying text.

by employees, the Court cited the “usual rule”²¹² that Congress does not alter details of a regulatory regime in vague terms.²¹³

The Court explained that the FAA and the NLRA do not conflict because there is a strong presumption against repeals by implication, and the employees did not offer evidence of a “clear and manifest” intention of Congress to displace the FAA with Section 7 of the NLRA.²¹⁴ The Court reasoned that the language of Section 7 of the NLRA does not meet this threshold since the provisions focus on collective bargaining and there is no specific reference to arbitration and collective action procedures.²¹⁵ Therefore, the Court found the presumption against repeals by implication must be applied in this instance.²¹⁶ The Court also contended that its decision is in keeping with the Court’s tendency to uphold the FAA and avoid conflicts with other federal statutes.²¹⁷

The Court found that the *ejusdem generis* canon of construction directs that Section 7’s guarantee of a worker’s right to engage in concerted activities for “mutual aid or protection”²¹⁸ must be interpreted narrowly and, therefore, does not include a right to collective dispute resolution.²¹⁹ The *ejusdem generis* canon directs that when a general term follows more specific terms in a list, the general term is understood to “embrace only objects similar in nature” to the preceding terms.²²⁰ The Court reasoned, that since “[n]one of the preceding . . . terms speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace,” there is no basis to read a right to collective action into Section 7.²²¹ Additionally, the Court found that the NLRA’s “broader structure”²²² supports this textualist analysis because the NLRA does not provide specific procedures to exercise a right to collective

212. *Epic*, 138 S. Ct. at 1626–27.

213. *See infra* notes 222–224 and accompanying text.

214. *Epic*, 138 S. Ct. at 1624 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

215. *Id.* Additionally, the majority argued that while some group litigation existed when the NLRA was enacted in 1935, class and collective actions “were hardly known” when the NLRA was adopted so the drafters of the NLRA could not have intended to protect collective dispute resolution. *Id.*

216. *Id.*

217. *See id.* at 1627 (“[W]e’ve stressed that the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act.” (citing *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 103–04 (2012))).

218. 29 U.S.C. § 157 (2012).

219. *Epic*, 138 S. Ct. at 1625–26.

220. *Id.* at 1625 (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)).

221. *Id.*

222. *Id.*

dispute resolution,²²³ and there is a rule that Congress does not alter regulatory regimes in vague terms.²²⁴ Thus, the Court found that *ejusdem generis* and the statute's "broader structure" mandate a narrow interpretation of the NLRA's Section 7 right to engage in "concerted activities for . . . mutual aid or protection."²²⁵

Lastly, the Court addressed some of the dissent's arguments.²²⁶ The Court attempted to refute the dissent's criticism that this decision marks a return to the *Lochner* era,²²⁷ a time when the Court, based on its own policy preferences, regularly overrode legislation designed to protect workers.²²⁸ The majority countered that its decision seeks to honor Congress's policy-making role,²²⁹ and the majority accused the dissent of retreating to policy arguments to support its opinion that the NLRA guarantees workers the right to collective dispute resolution.²³⁰ Capitalizing on this theme, right before the majority set out its judgment, the majority stated, "The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written."²³¹ Accordingly, the lower courts' decisions in *Lewis v. Epic Systems Corp.* and *Morris v. Ernst & Young LLP* were reversed, and the judgment in *Murphy Oil USA, Inc. v. NLRB* was affirmed.²³²

The four-justice dissent, penned by Justice Ginsburg, would have held that Section 7 of the NLRA guarantees workers a right to collective dispute resolution, and therefore the employer-drafted agreements forcing employees to individually arbitrate their claims are unenforceable.²³³ The dissent contended that the legislative history of the NLRA²³⁴ and the FAA²³⁵ supported the employees' arguments for invalidating the agreements to individually ar-

223. *Id.* at 1625–26.

224. *Id.* at 1626–27. The Court also reasoned that it does not owe any deference to the NLRB's contrary interpretation of Section 7 of the NLRA because the NLRB's interpretation of the NLRA, a statute it administers, implicates the FAA, a statute it does not administer. *Id.* at 1629. Additionally, the Court found that deference was not owed to the NLRB's interpretation because the Court was able to resolve the statutory ambiguities using canons of construction. *Id.* at 1629–30.

225. 29 U.S.C. § 157 (2012); *Epic*, 138 S. Ct. at 1625.

226. *Epic*, 138 S. Ct. at 1630.

227. *Id.*

228. *See id.* at 1634–35 (Ginsburg, J., dissenting) (describing a time in history when courts frequently invalidated legislative efforts to address the imbalance of power between workers and employers).

229. *Id.* at 1630 (majority opinion).

230. *Id.* at 1632.

231. *Id.*

232. *Id.*

233. *Id.* at 1633, 1649 (Ginsburg, J., dissenting).

234. *Id.* at 1634–35.

235. *Id.* at 1643.

bitrate. The legislative history of the NLRA directs that the NLRA be interpreted to embrace a right to collective dispute resolution,²³⁶ since Congress framed Section 7 broadly so that the NLRB could interpret it in accordance with changing employment practices.²³⁷ Meanwhile, the FAA was originally intended to apply only to commercial disputes, not employment agreements.²³⁸ The dissent asserted that “[i]n recent decades, th[e] Court has veered away from Congress’ intent,”²³⁹ and its overreaching application of the FAA had led the NLRB to confront whether there is a conflict between the NLRA and the FAA.²⁴⁰

Although the dissent disagreed with the Court’s recent interpretations of the FAA, Justice Ginsburg argued these decisions do not “compel the destructive result the Court reach[ed]” in this case.²⁴¹ *Concepcion* and the Court’s other FAA decisions prohibit the FAA’s saving clause to be used in a way that discriminates against arbitration “either by name or by more subtle methods.”²⁴² However, the dissent reasoned that NLRA’s guarantee does not discriminate against arbitration on its face or by more subtle methods since the NLRA applies to all employer-drafted contracts equally.²⁴³ Therefore, even in light of the Court’s recent decisions, the dissent asserted that the saving clause of the FAA could be invoked to invalidate the agreements here on the ground of illegality.²⁴⁴ Even if the Court had viewed the NLRA and the FAA as incompatible, the dissent contended that the NLRA should control since it was enacted later in time and as the more specific statute, cannot “be controlled or nullified by a general one.”²⁴⁵

The dissent ended with a discussion of the consequences of the Court’s decision, namely the underenforcement of federal and state statutes designed to protect workers²⁴⁶ and abuse of vulnerable workers at the hands of unscrupulous employers.²⁴⁷ The dissent observed that the Court’s decision will

236. *Id.* at 1636–37 (“Recognizing employees’ right to engage in collective employment litigation and shielding that right from employer blockage are firmly rooted in the NLRA’s design. Congress expressed its intent, when it enacted the NLRA, to ‘protect the exercise by workers of full freedom of association,’ thereby remedying ‘[t]he inequality of bargaining power’ workers faced.” (quoting 29 U.S.C. § 151 (2012))).

237. *Id.* at 1640.

238. *Id.* at 1642–43.

239. *Id.* at 1643.

240. *Id.* at 1644–45.

241. *Id.* at 1645.

242. *Id.* (quoting *id.* at 1622 (majority opinion)).

243. *Id.* at 1646.

244. *Id.*

245. *Id.* at 1646 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)).

246. *Id.*

247. *Id.* at 1647–48.

likely have a freezing effect on private claims²⁴⁸ and widen the existing “enforcement gap.”²⁴⁹ In turn, employers who realize that employees may not be able to mount a legal challenge to seek redress for wage-and-hour violations may decide to skirt legal obligations.²⁵⁰ Justice Ginsburg concluded, “[i]f these untoward consequences stemmed from legislative choices,” the Court should be obliged to honor them, but the Court’s decision did not stem from a congressional command.²⁵¹ The dissent would have reversed *Murphy Oil* and affirmed *Lewis* and *Ernst & Young*.²⁵²

IV. ANALYSIS

The “bitter irony” for the modern American worker is that they have “more rights and less protection than ever.”²⁵³ Congress has enacted more laws to protect workers,²⁵⁴ but the reality is that few workers are represented by unions,²⁵⁵ and government agencies do not have sufficient capacity to enforce these laws.²⁵⁶ These institutions that could provide a counterweight to corporations and employers’ power in the workplace are presently lacking. Moreover, private enforcement efforts have been weakened by the growing trend toward employer-favored mandatory arbitration, which bars access to

248. *Id.* at 1647.

249. *Id.*

250. *Id.* at 1647–48. The dissent also noted that the Court has recognized the centrality of group action to the effective enforcement of antidiscrimination statutes, and the same logic holds true for the enforcement of wage-and-hour laws. *Id.*

251. *Id.* at 1648. Instead, the dissent argued that the majority’s decision was “the result of take-it-or-leave-it labor contracts harking back to the type called ‘yellow dog,’ and of the readiness of this Court to enforce those unbargained-for agreements.” *Id.* at 1648–49.

252. *Id.* at 1649.

253. Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1050 (1996); see also Matthew W. Finkin, *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act*, 93 NEB. L. REV. 6, 29 (2014) (noting that as unions have declined, positive law has sought to fill the vacuum, but these protections could be undermined by employer-drafted arbitration agreements).

254. See Van Wezel Stone, *supra* note 253, at 1019 (“There are a myriad of federal and state laws that give employees substantive rights and protections—protections for whistle-blowers, protection against racial and gender discrimination, rights to be free of lie-detector tests, rights to be free of sexual harassment, rights to a safe and healthy workplace, and protection against unjust dismissal through various modifications of the at-will rule, and so forth.”).

255. U.S. BUREAU OF LABOR STATISTICS, UNION MEMBERS SUMMARY, 2018 (2019) <https://www.bls.gov/news.release/union2.nr0.htm> (providing unionization numbers for 2018, including overall unionization rate of 10.5% and private sector rate of 6.4%).

256. See Nantiya Ruan, *What’s Left to Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1112–14 (2012) (noting a decline in federal enforcement of wage and hour laws, delays in federal investigations, and general lack of funding and staffing for enforcement efforts at the state and federal levels).

courts that would otherwise enforce workers' employment rights.²⁵⁷ Amid this backdrop, the Supreme Court's decision in *Epic Systems Corp. v. Lewis* further weakens private enforcement efforts by giving its imprimatur to employer-drafted clauses requiring employees to individually arbitrate claims,²⁵⁸ a controversial practice²⁵⁹ that had been growing steadily in the wake of the Court's recent decisions strengthening the FAA.²⁶⁰

This Note argues that the Court's decision, couched in textualist analysis, arbitrarily applies *ejusdem generis* in a manner that is contrary to the intent of the NLRA.²⁶¹ Meanwhile, the Court erroneously expanded the scope of the FAA in this decision by defining arbitration as a fundamentally bilateral rather than collective process.²⁶² Unfortunately, the Supreme Court's policy rationales for bilateral arbitration overwhelmingly benefit employers at the expense of millions of American workers by insulating corporations from liability for wage-theft.²⁶³

A. *The Court's Decision Improperly Narrows Workers Rights Under Section 7 by Selectively Applying Canons of Statutory Construction and Ignoring the Intent of the NLRA*

In relying heavily on textual analysis and selectively applying canons²⁶⁴ of statutory construction,²⁶⁵ the Court unduly constrained its analysis to arrive at a result that is contrary to the purposes of both the NLRA and the FAA. The Court concluded that the NLRA's Section 7 guarantee that workers be permitted "to engage in other concerted activities for the purpose of

257. ALEXANDER J.S. COLVIN, ECON. POLICY INST., THE GROWING USE OF MANDATORY ARBITRATION 1–2 (2017), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration> (finding employees subject to mandatory arbitration agreements have risen from just over two percent in 1992 to over half of private sector nonunion employees, 60.1 million workers, in 2017).

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

259. COLVIN, *supra* note 257, at 6 (noting that "class action waivers are one of the most controversial features of mandatory arbitration procedures").

260. Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1344–45 (2015) (noting that arbitral class action prohibitions more than doubled from 2012 to 2014, rising from 16.1% to 42.7%, and management-side attorneys describe the *AT&T Mobility LLC v. Concepcion* and *American Express Co. v. Italian Colors Restaurant* decisions as an opportunity for companies to avoid expensive class actions).

261. *See infra* Section IV.A.

262. *See infra* Section IV.B.

263. *See infra* Section IV.C.

264. A canon of construction is defined as a "rule used in construing legal instruments, especially] contracts and statutes Also termed *rule of construction*; *rule of interpretation*; *principle of interpretation*; *interpretive canon*." *Canon*, BLACK'S LAW DICTIONARY (10th ed. 2014).

265. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1625–29 (2018) (applying the *ejusdem generis* canon and citing the NLRA's "broader structure" in order to support the conclusion that the NLRA does not encompass a right to collective legal action).

collective bargaining or other mutual aid or protection”²⁶⁶ does not include the right to bring collective legal actions against their employers.²⁶⁷ Thus, the Court decided, there is no conflict between the NLRA and FAA, and in keeping with the “liberal federal policy” favoring arbitration, the arbitration clauses at issue must be enforced according to their terms.²⁶⁸ The Court misused its authority by selectively applying the *ejusdem generis*²⁶⁹ canon of statutory construction to narrow the scope of rights protected under Section 7, despite the existence of canons of construction that would yield the opposite result²⁷⁰ and the histories of the NLRA²⁷¹ and FAA.²⁷²

1. *The Court Selectively Applied Ejusdem Generis Despite Alternative Canons*

The Court misused its authority by selectively applying *ejusdem generis* to narrow workers’ rights under Section 7. The Court has noted in the past that “[l]ike many interpretive canons . . . *ejusdem generis* is a fallback, and if there are good reasons not to apply it, it is put aside.”²⁷³ In *Circuit City Stores, Inc. v. Adams*, Justice Souter pointed out that specific terms preceding a general catchall term should not always be interpreted as limiting the broader language.²⁷⁴ Justice Souter noted that sometimes it is appropriate to interpret general terms at the end of a list according to the *ex abundati cautela*, abundance of caution, canon of statutory construction.²⁷⁵ *Ex abundati cautela* recognizes that the “existence of a special reason for emphasizing specific examples of a statutory class can negate any inference that an otherwise unqualified general phrase was meant to apply only to matters *ejusdem generis*.”²⁷⁶

266. 29 U.S.C. § 157 (2012).

267. *Epic*, 138 S. Ct. at 1625.

268. *Id.* at 1621 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

269. The *ejusdem generis* canon directs that when a general term follows more specific terms in a list, the general term is understood to “embrace only objects similar in nature” to the preceding terms. *Id.* at 1625 (quoting *Circuit City Stores, Inc., v. Adams*, 532 U.S. 105, 115 (2001)). The Court reasoned, since “[n]one of the preceding . . . terms speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace,” there is no basis to read a right to collective action into Section 7. *Id.*

270. *See infra* Section IV.A.1.

271. *See infra* Section IV.A.2.

272. *See infra* Section IV.B.

273. *Circuit City Stores, Inc., v. Adams*, 532 U.S. 105, 138 (2001) (Souter, J., dissenting); e.g., *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass’n*, 499 U.S. 117, 129 (1991) (explaining that the *ejusdem generis* canon does not control when the whole context dictates a different conclusion).

274. *Circuit City Stores, Inc.*, 532 U.S. at 138–40 (Souter, J., dissenting).

275. *Id.*

276. *Id.* at 140; *see also* *Fort Stewart Sch. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 646 (1990) (referencing the *ex abundati cautela* canon as a potential explanation to the exceptions listed

Thus, the specificity of the subjects²⁷⁷ preceding the phrase “mutual aid or protection”²⁷⁸ in Section 7 of the NLRA can be understood as listed in the statute in an abundance of caution. The NLRA was enacted, in 1935, to address the imbalance of power in employment relations²⁷⁹ and specifically to prohibit the use of employer tactics, such as yellow dog contracts,²⁸⁰ which sought to prohibit employees from joining unions and other forms of collective action as a condition of employment.²⁸¹ Thus, while the drafters of the NLRA could have simply written Section 7 to read, “[e]mployees shall have the right to engage in concerted activities for mutual aid or protection” and thereby encompassed protections for unionization and collective bargaining, the drafters chose to specifically list those activities before the “mutual aid or protection”²⁸² phrase because those activities had been most immediately and prominently attacked by employers.²⁸³ It is illogical to assume that Congress sought to limit the protections of workers to collective bargaining and labor unions by specifying the existing tactics of unscrupulous employers and concluding with a broad guarantee of workers right to concerted action for “mutual aid or protection.”²⁸⁴ That assumption is especially flawed given that draftsmen of the NLRA’s predecessor specifically chose language with the “broadest possible sweep”²⁸⁵ in order to account for the “almost endless array of legal games” employers could use to thwart collective action.²⁸⁶ Thus, although the *ex abundati cautela* canon of statutory construction would honor both the text and the intent of the NLRA, the Court chose to limit the scope of the NLRA’s Section 7 protections by using the *ejusdem generis*

in a statute because the exceptions were “technically unnecessary”); *Marx v. Gen. Revenue Corp.*, 668 F.3d 1174, 1183 (10th Cir. 2011), *cert. granted on other grounds*, 132 S. Ct. 2688 (2012) (invoking the *ex abundati cautela* canon of construction “which teaches that Congress may on occasion repeat language in order to emphasize it” (citing *Fort Stewart Sch.*, 495 U.S. at 646)).

277. See 29 U.S.C. § 157 (2012) (“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining . . .”).

278. *Id.*

279. See *supra* notes 130–134 and accompanying text.

280. In 1932, the NLRA’s predecessor, the Norris LaGuardia Act (“NLA”), was specifically enacted to make yellow dog contracts unenforceable by the courts. 29 U.S.C. §§ 102–103 (2012). Section 7 of the NLRA converted Section 2 of the NLA, which limits the courts, into restraints on employers. Finkin, *supra* note 253, at 21.

281. *E.g.*, Van Wezel Stone, *supra* note 253, at 1037 n.146 (describing the Court and Congress’s reactions to “yellow dog” contracts).

282. 29 U.S.C. § 157 (2012).

283. See *supra* notes 278, 280–281.

284. 29 U.S.C. § 157.

285. Finkin, *supra* note 253, at 14.

286. *Id.* at 14–15 (quoting DANIEL JACOBY, LABORING FOR FREEDOM: A NEW LOOK AT THE HISTORY OF LABOR IN AMERICA 62 (1988)).

canon.²⁸⁷ The Court could have used the *ex abundati cautela* canon to harmonize the NLRA and the FAA instead of using the *ejusdem generis* canon. Had the Court used the *ex abundati cautela* canon, it would have found that NLRA protects a broad range of collective actions, including collective legal actions, making agreements to individually arbitrate illegal and unenforceable under Section 2 of the FAA.²⁸⁸

While implied repeals are generally disfavored,²⁸⁹ the Court could have found a direct conflict between the FAA and NLRA since “[t]he labor law-based right to collective adjudication (and the corresponding bar to compelled waiver of that right) stands in *direct opposition* to the bilateral conception of arbitration that has emerged in the Court’s most recent FAA jurisprudence.”²⁹⁰ When two federal statutes conflict, the later enacted statute, here the NLRA, would be impliedly understood to repeal provisions in the earlier enacted statute²⁹¹ “under familiar principles of statutory construction.”²⁹² In that case, “[w]hile the NLRA lacks a comparable express repealer, Supreme Court interpretive methodology requires the finding that it too, as the later-enacted law, repeals the FAA *pro tanto*.”²⁹³ Therefore, the Court arbitrarily chose to use one canon of construction to the exclusion of viable alternatives to arrive at the conclusion that Section 7 of the NLRA does not guarantee workers the right to bring collective legal actions.

287. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1625 (2018).

288. 9 U.S.C. § 2 (2012).

289. *See Epic*, 138 S. Ct. at 1624 (noting the strong presumption against finding an implied repeal when the courts interpret allegedly conflicting statutes).

290. Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013, 1038 (2013).

291. *E.g.*, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (noting that repeals may be implied if necessary to make a later-enacted law work); *Chicago & N. W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582–83 n.18 (1971) (noting that in the event of an irreconcilable conflict, the more specific provisions of the later-enacted statute would prevail); *Posadas v. Nat’l City Bank*, 296 U.S. 497, 503 (1936) (noting that the later-enacted statute repeals provisions of earlier-enacted laws to the extent they irreconcilably conflict).

292. *Chicago & N. W. Ry. Co.*, 402 U.S. at 582–83 n.18.

293. Sullivan & Glynn, *supra* note 290, at 1039; *see also* Finkin, *supra* note 253, at 23; Brief of Amici Curiae Maryland, et. al. Supporting Respondents in Nos. 16-285 & 16-300 and Petitioner in No. 16-307 at 4, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (Nos. 16-285, 16-300, 16-307) (“Even if the Employers’ interpretation of the Arbitration Act were correct, however, that statute would yield to the NLRA and NLA. These two later-enacted labor statutes, not the Arbitration Act, govern whether employers may dictate the terms under which their employees can join together . . .”).

2. *The Court's Constrained Textual Analysis of Section 7 Disregards the Intent of the NLRA and Countervailing Considerations of Public Policy*

Though textualist approaches are not inherently flawed, when the Court's "refusal to look beyond the raw statutory text enables it to disregard countervailing considerations that were expressed by Members of the enacting Congress and that remain valid today, the Court misuses its authority."²⁹⁴ In this instance, the Court relied heavily on textualist analysis, without considering the underlying purposes of the NLRA,²⁹⁵ the limited initial scope of the FAA, and the countervailing considerations of public policy.

In this decision, the Court's textual analysis ignores the history of the NLRA and Congress's intentions to address the imbalance of power between employees and employers by broadly granting workers the right to join together to address workplace grievances.²⁹⁶ Prior to the NLRA, workers, as a condition of their employment, waived their rights to join unions in employer-drafted yellow dog contracts and were, therefore, forced to present any workplace grievances they had individually.²⁹⁷ The NLRA and its predecessor sought to end this practice but framed employees' rights more broadly to bar any agreement or practice that interfered with employee concerted action.²⁹⁸ Today, as unions have declined, individual employment rights in federal statutes have become a new source of protection and bargaining power for employees.²⁹⁹ Yet, workers face an all-too-familiar assault on their ability to contract freely when they are presented with mandatory arbitration agreements that require them to waive their right to bring collective actions as a condition of employment.³⁰⁰ In fact, the "contract terms designed to deter employees from pursuing their interests by collective action

294. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 132 (2001) (Stevens, J., dissenting).

295. See, e.g., Stanley Fish, *There Is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 649 (2005) ("A text means what its author intends. There is no meaning apart from intention. There is no textualist position because intention is prior to text; no intention, no text."); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 150–51 (2006) ("Relying on text to the exclusion of purpose can undermine not only the particular legislation but also the democratic objective of the Constitution. . . . [I]solating the text from the intent behind the text simply means that the law disappears and is replaced by an exercise of power." (footnote omitted)).

296. See *supra* notes 130–138 and accompanying text.

297. Finkin, *supra* note 253, at 27–28.

298. Sullivan & Glynn, *supra* note 290, at 1025–26.

299. Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 78 (2014).

300. Van Wezel Stone, *supra* note 253, at 1037 ("Today's 'yellow dog contracts' require employees to waive their statutory rights in order to obtain employment. Like the yellow dog contracts of the past, the new mandatory arbitration provisions are often imposed on workers without even the illusion of bargaining or consent." (footnote omitted)).

are precisely the kind of yellow dog-like provisions Congress sought to combat in enacting the Norris LaGuardia Act and the NLRA.”³⁰¹ Collective action waivers achieve the same effect as the yellow dog contracts Congress sought to eliminate³⁰² in that they limit employees’ ability to join together and wield their collective strength against their employer.

Therefore, the Court’s conclusion that “concerted activities for . . . mutual aid or protection”³⁰³ in Section 7 of the NLRA does not encompass collective legal action is at odds with the purpose of the NLRA and New Deal reforms that sought to empower workers to vindicate their rights and interests in employment matters. It is also at odds with the NLRB’s interpretations, which have repeatedly been met with judicial approval,³⁰⁴ and with the Supreme Court’s own interpretation of Section 7 rights in *Eastex, Inc. v. NLRB*,³⁰⁵ when the Court explicitly found that Section 7 protects workers collective action in judicial and administrative forums.³⁰⁶ Thus, a collective or “class action lawsuit easily comes within the existing interpretation of concerted activity.”³⁰⁷ The Court misused its interpretive authority by ignoring these powerful indications of congressional intent and the NLRB and courts’ expansive interpretations of Section 7.

This constrained analysis of Section 7 also ignores the realities of the workplace³⁰⁸ and undermines legislation designed to protect workers.³⁰⁹ Understaffed and underfunded state and federal agencies rely on the ability of workplace employees to enforce their rights through private enforcement efforts.³¹⁰ Private enforcement is essential to the vindication of workers’ rights because government “enforcement efforts are, at best, merely scratching the surface of potential violations.”³¹¹ Yet the Supreme Court’s decision ignores

301. Sullivan & Glynn, *supra* note 290, at 1066.

302. *See supra* notes 279–281 and accompanying text.

303. 29 U.S.C. § 157 (2012).

304. *See supra* notes 145–152 and accompanying text; *see also* Sullivan & Glynn, *supra* note 290, at 1029 (noting “the [NLRB] has consistently held, with repeated judicial approval, that the NLRA protects the right of employees to join together to pursue workplace grievances through litigation and arbitration”).

305. 437 U.S. 556 (1978).

306. *See supra* notes 141–144 and accompanying text.

307. Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 WAKE FOREST L. REV. 173, 204 (2003).

308. Noah Feldman, *This Is What a More Conservative Court Looks Like*, BLOOMBERG (May 22, 2018), <https://www.bloomberg.com/opinion/articles/2018-05-22/this-is-what-a-more-conservative-supreme-court-looks-like>.

309. Van Wezel Stone, *supra* note 253, at 1043 (reasoning that “compelled arbitration of statutory claims threatens to nullify all employee protection legislation” because protections may be disregarded by employer-designated arbitrators and the private nature of arbitration prevents effective public review and accountability).

310. Brief of Amici Curiae Maryland, et. al., *supra* note 293, at 5.

311. *Id.*; *see also supra* note 256.

this reality and the fact that these unbargained for collective waivers will lead to widespread underenforcement of workers' rights. One study of the present "epidemic of wage theft" found that in three major U.S. cities, low-wage employees lost an estimated \$3 billion in legally owed wages a year.³¹² Workers faced with arbitration clauses waiving all collective claims as a condition of their employment or continued employment do not have a real choice in whether to accept the agreement or not.³¹³ Without the ability to aggregate claims, workers, especially low-wage workers with relatively small individual claims, will not be able to afford to bring claims in arbitration.³¹⁴ As documented in the consumer context, collective action waivers in arbitration make it so that very few claims are filed at all.³¹⁵ Therefore, the Court's decision to endorse collective action waivers in the employment context will suppress the number of claims made and hinder private enforcement of workers' rights.³¹⁶

Perhaps even more troubling, without the threat of collective claims from their employees, companies may be tempted to underpay and overwork employees, as the benefits of skirting legal obligations would outweigh the costs of compliance.³¹⁷ Thus, the Court's decision ignores these realities about government enforcement efforts, the effects of collective action waivers on claims, and the cost-benefit analyses businesses undertake when evaluating legal obligations. In essence, Justice Gorsuch's opinion was written

312. BRADY MEIXELL & ROSS EISENBREY, ECON. POLICY INST., AN EPIDEMIC OF WAGE THEFT IS COSTING WORKERS HUNDREDS OF MILLIONS OF DOLLARS A YEAR 1, 2 (2014), <https://www.epi.org/files/2014/wage-theft.pdf>.

313. Ruan, *supra* note 256, at 1133; Van Wezel Stone, *supra* note 253, at 1037.

314. *E.g.*, Colvin, *supra* note 299, at 82 (explaining that "individual wage and hour claims are relatively small" and, therefore, "can only effectively be brought when aggregated with other similar claims in a class action"); Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 695 (2018) (explaining that FLSA claims cannot practically be made on an individual basis because these claims often involve "incremental pay disparities over a few years," making the cost of litigating the claims individually more expensive than the expected return).

315. *See, e.g.*, Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> ("Verizon, which has more than 125 million subscribers, faced [sixty-five] consumer arbitrations in [2010 to 2014], the data shows. Time Warner Cable, which has 15 million customers, faced seven."). The data demonstrates that arbitration agreements barring collective claims have insulated corporations from liability in the consumer context. *Id.*

316. *See generally* Sternlight, *supra* note 260 at 1344–45 (noting that arbitral class action prohibitions doubled from 2012 to 2014 in the wake of the Court's *Concepcion* and *American Express* decisions, and that employers know that similar prohibitions in the employment context will greatly reduce employers' exposure since very few individual employees will bring claims).

317. *The Supreme Court Sides with Companies over Arbitration Agreements*, ECONOMIST (May 23, 2018), <https://www.economist.com/democracy-in-america/2018/05/23/the-supreme-court-sides-with-companies-over-arbitration-agreements>.

as if the Court “lived on the moon, with no knowledge of the realities of labor relations or the politics of class actions.”³¹⁸

By confining its analysis, the Court has used textualism as a vehicle for its own policy preferences in favor of arbitration at the expense of workers’ rights and well-being. Justice Breyer summarized concerns about constrained textual approaches in his dissent in *Circuit City*, when he noted:

[T]he “minimalist” judge “who holds that the purpose of the statute may be learned only from its language” has more discretion than the judge “who will seek guidance from every reliable source.” A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, may produce a result that is consistent with a court’s own views of how things should be, but it may also defeat the very purpose for which a provision was enacted. That is the sad result in this case.³¹⁹

B. The Court Erroneously Expanded the Scope of the FAA to Permit Class Action Waivers Despite a Lack Support for This Outcome in the FAA’s Text and History

Similarly, the Court misused its authority regarding the FAA when it reasoned, based on its recent precedents, that allowing collective actions in arbitration would be counter to “one of arbitration’s fundamental attributes,”³²⁰ namely its “individualized and informal nature.”³²¹ This conclusion does not flow from the FAA’s text, which says nothing of the form arbitration should or must take, but rather from the Court’s recent decisions³²² that have found that arbitration should be bilateral unless the parties agree otherwise.³²³ This presumption in favor of bilateral arbitration is derived from the Court’s

318. Feldman, *supra* note 308.

319. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 133 (2001) (Stevens, J., dissenting) (quoting AHARON BARAK, *JUDICIAL DISCRETION* 62 (Y. Kauffman trans., 1989) (1987)).

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

321. *Id.* at 1623.

322. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 686–87 (2010).

323. Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 *YALE L.J.* 2804, 2890–91 (2015) (noting nothing in the text of the FAA describes the form arbitrations should take, but in 2010, Justice Alito introduced the term “bilateral arbitration” into the FAA case law “when ruling that silence in a contract about the availability of class arbitration could not be taken by arbitrators as the basis for authorizing a class process”).

own notions of efficiency and cost-effectiveness and lacks doctrinal support.³²⁴ Therefore, by finding that collective action conflicts with the FAA's fundamental attribute of bilateralism, the Court continues the trend in its FAA jurisprudence of "standing on its own shoulders"³²⁵ as it builds its own version of the FAA, which is divorced from the intent and text of the statute at the time of its enactment.³²⁶

Furthermore, a requirement for bilateral arbitration in employment matters would not find support in an examination of the FAA's legislative intent, and *Epic* is readily distinguishable from the Court's recent decisions requiring bilateral arbitration. A requirement of bilateral arbitration in employment disputes is not supported by the legislative intent of the FAA since Congress intended for arbitration to occur voluntarily between parties of equal bargaining power.³²⁷ In fact, because Congress intended arbitration to occur between parties of roughly equivalent bargaining power, permitting employees to collectively arbitrate claims would be consistent with the legislative intent of the FAA.³²⁸ And the Court's bilateral arbitration preference should not hold in the employment context given the express congressional guarantee for workers to engage in collective action for "mutual aid or protection,"³²⁹ a right that has not been present in the Court's decisions requiring parties to submit to arbitration individually.³³⁰

324. *Concepcion*, 563 U.S. at 362 (Breyer, J., dissenting) ("Where does the majority get its contrary idea—that individual, rather than class, arbitration is a 'fundamental attribut[e]' of arbitration? The majority does not explain. And it is unlikely to be able to trace its present view to the history of the arbitration statute itself." (citation omitted)).

325. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 132 (2001) (Stevens, J., dissenting) (reasoning that the Court's professed policy favoring arbitration is its own creation that "has given [the FAA] a scope far beyond the expectations of the Congress that enacted it" (citation omitted)).

326. *Cf. Moses*, *supra* note 295 at 113 ("The Court has, step by step, built a house of cards that has almost no resemblance to the structure envisioned by the original statute. Each card put in place by the Court builds on the prior flimsy court-created structure.").

327. *See supra* notes 76–83 and accompanying text; *see also Sternlight*, *supra* note 260, at 1316–17 ("Indeed, commentators have convincingly argued that Congress did not intend for the [FAA] to cover employees.").

328. *See Concepcion*, 563 U.S. at 362 (Breyer, J., dissenting) (arguing that aggregate consumer claims against corporations would be consistent with the FAA's intent that arbitration occur between parties of equivalent bargaining power).

329. 29 U.S.C. § 157 (2012).

330. *Sullivan & Glynn*, *supra* note 290, at 1066 (reasoning that the Court should find individual arbitration agreements invalid in the employment context, despite its decision in *Concepcion*, because unlike the consumer plaintiffs in *Concepcion*, the employees in the present case have a federal right to collective pursuit of workplace grievances).

C. *The Court's Generalizations About Bilateral Arbitration's Efficiency Do Not Hold True for Employees Seeking to Bring Claims Against Employers*

In essence, through its series of pro-arbitration decisions, including *Epic*, the Court has legislated its own policy preferences in favor of expansive arbitration.³³¹ However, the generalizations that have been used to justify the Court's support of collective action waivers in arbitration clauses, namely the Court's view that bilateral arbitration is more cost effective, informal, and expeditious as compared to class arbitration,³³² may be true for employers and corporations,³³³ but those justifications do not hold true for employees seeking to bring claims. In fact, the Court's recent FAA jurisprudence³³⁴ seems to only be concerned with protecting corporate defendants from increased liability, while ignoring the detrimental effects its decisions will have on the ability of employees and consumers to effectively vindicate claims.³³⁵ In sum, "[f]or low-wage workers fearful of losing their jobs, and faced with a growing wage theft epidemic, the notion that the U.S. Supreme Court is mostly concerned with defendants' right to be free from potentially expensive litigation is disappointing."³³⁶

Certainly, if the Supreme Court was concerned about cost-effectiveness and efficiency of dispute resolution from the perspective of the employees, it would find in favor of workers' rights to bring collective legal proceedings and bar collective action waivers in employment.³³⁷ For workers, in order to

331. Moses, *supra* note 295, at 154.

332. *Concepcion*, 563 U.S. at 348; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686–87 (2010).

333. Compare David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 100 (1999) ("For employers, the reduced cost, increased speed, private nature, and elimination of juries make arbitration an attractive option. Employers who are litigation-averse (because of fears of costs, bad publicity, or both) utilize arbitration to avoid de facto severance."), with Estlund, *supra* note 314, at 682 ("It now appears that the great bulk of disputes that are subject to mandatory arbitration agreements . . . that is, a large share of all legal disputes between individuals (consumers and employees) and corporations—simply evaporate before they are even filed.").

334. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235–37 (2013) (adopting a narrow view of the "effective vindication" doctrine and thereby lending the Court's imprimatur to arbitration agreements that have exculpatory effects); *Concepcion*, 563 U.S. at 341–44, 352 (finding a state law prohibiting the enforcement of collective action waivers in certain consumer contracts as preempted by the FAA because allowing class and collective claims fundamentally alters the agreement to arbitrate).

335. Ruan, *supra* note 256, at 1133.

336. *Id.* at 1133–34.

337. See Sternlight, *supra* note 260, at 1346–48 (noting that wage and hour claims are often only economically feasible if brought collectively in order to attract legal representation on a contingency fee basis). But see Sherwyn et al., *supra* note 333, at 99 ("Because it is faster and less expensive, arbitration is arguably more accessible to employees.").

secure legal representation, it is more cost-effective and practical to aggregate their small claims, which alone would not be worth arbitrating, with other workers' similar claims.³³⁸ Likewise, it is more efficient for multiple claims based on similar evidence to be resolved in one proceeding, which obviates the need to resolve the same issue repeatedly and prevents inconsistent adjudications.³³⁹ It is also more cost-effective and efficient for workers to proceed collectively so that no one complainant will have to shoulder the personal and financial costs of pursuing the claim, including hours assisting in the investigation,³⁴⁰ the costs of legal representation,³⁴¹ and potentially any retaliatory actions by the employer³⁴² alone. Additionally, "arbitration's perceived informality is illusory for low-wage workers if they are unable to afford the significant costs of private arbitration."³⁴³

These theoretical barriers have borne out in empirical assessments of mandatory arbitration, which have found that mandatory arbitration prevents access to justice for employees and consumers.³⁴⁴ If mandatory arbitration truly is a more convenient, efficient, and expeditious forum for dispute resolution, one would expect to see claims filed at a greater rate than they are filed in litigation, but that is not the case.³⁴⁵ A recent study found that while approximately 60.1 million American workers are subject to mandatory arbitration agreements, there are only about 1880 mandatory employment arbitration cases filed each year nationally so that only one in 32,000 employees actually files a claim under these procedures.³⁴⁶ Researchers have attributed this small number of claims to a variety of factors, including the presence of class and collective action prohibitions, which makes litigating small sums unfeasible.³⁴⁷ As more businesses adopt collective action prohibitions in light of the *Epic* decision, it is easy to imagine that even less workers will file claims.³⁴⁸ A further decrease in the number of claims filed should provide the Court with a clear indication that arbitration is only *efficient* in

338. Ruan, *supra* note 256, at 1118–19 (explaining that since workers' claims are small, workers' claims will fail to get legal representation unless the claims are brought in the aggregate).

339. Hodges, *supra* note 307 at 204.

340. Ruan, *supra* note 256, at 1119.

341. *Id.*

342. Sternlight, *supra* note 260, at 1348–49.

343. Ruan, *supra* note 256, at 1133.

344. *See* COLVIN, *supra* note 257, at 2–3 (explaining that arbitration agreements for consumers and employees bar access to the courts for claims, including those that arise under federal statutes, and, for employees, often result in less favorable outcomes).

345. Resnik, *supra* note 323, at 2812.

346. COLVIN, *supra* note 257, at 6.

347. Estlund, *supra* note 314, at 700; Sternlight, *supra* note 260, at 1312.

348. *See generally* COLVIN, *supra* note 257, at 7–8 (noting that upon the Supreme Court's approval of collective action waivers, "imposing mandatory arbitration with class action waivers is likely to become the predominant management practice and workers will find it exponentially more difficult to enforce their rights going forward").

the sense that it provides corporations with a powerful tool to insulate themselves from liability at the expense of workers' rights and wellbeing.

V. CONCLUSION

In *Epic Systems Corp. v. Lewis*, the Supreme Court held that the NLRA's guarantee that workers be able to engage in "concerted activities for . . . mutual aid or protection"³⁴⁹ does not include the right to bring legal claims collectively in an arbitral forum.³⁵⁰ In doing so, the Court endorsed collective action waivers in mandatory arbitration agreements, a controversial practice that has been growing in popularity among corporations and other employers as a way to deter the filing of claims.³⁵¹ The Court's decision calls for legislative intervention³⁵² because it is a clear departure from the intent of national labor laws,³⁵³ ignores the challenges workers face in enforcing widespread wage-theft,³⁵⁴ and further expands the scope of the FAA beyond the text³⁵⁵ and intentions of the original statute for the benefit of powerful corporate defendants.³⁵⁶

349. 29 U.S.C. § 157 (2012).

350. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624–28 (2018).

351. *See supra* note 333 and accompanying text.

352. *See Epic*, 138 S. Ct. at 1633 (Ginsburg, J., dissenting) (asserting the decision is "egregiously wrong" and requires "[c]ongressional correction").

353. *See supra* notes 296–301 and accompanying text.

354. *See supra* notes 331–342 and accompanying text.

355. *See supra* notes 322–324 and accompanying text.

356. *See supra* notes 327–330 and accompanying text.