THE SUPREME COURT DELIVERS AN *EPIC* BLOW TO EMPLOYEES SEEKING STRENGTH IN NUMBERS: THE CONSEQUENCES OF COMPELLING WORKERS TO WAIVE THEIR RIGHT TO CLASS ACTION SUITS IN FAVOR OF INDIVIDUAL ARBITRATION

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RUTGERS UNIVERSITY LAW REVIEW

I. INTRODUCTION

The relationship between employers and employees has historically been a contentious one. Workers have fought over the course of several decades for rights from which millions of people have since derived varying measures of benefit.[1] Earlier this year, however, the business community tallied a significant victory of its own through the United States Supreme Court's ruling in *Epic Systems Corp. v. Lewis*.[2] In *Epic*, the Court ruled that employment contracts in which an employee agrees to arbitrate on an individual basis any claims they have against his or her employer are enforceable and do not violate the National Labor Relations Act ("NLRA"). In writing for the 5-4 majority, Justice Neil Gorsuch reasoned that through the Federal Arbitration Act ("FAA"), Congress "has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings" and that the language in the NLRA offers no "conflicting command."[3]

Part I of this Commentary offers a brief synopsis of the Court's ruling in *Epic* and discusses not only the critical issues wrestled with by the majority in reaching its decision, but also the condemnation of the ruling found in Justice Ruth Bader Ginsburg's scathing dissent. Part II examines the role of arbitration as a method of dispute resolution in today's legal environment and discusses why it is generally favored over litigation by the business community. Part III considers the consequences of the Court's ruling in *Epic*, discussing the ripple effect of the decision and how it has already impacted workers bringing class-action lawsuits against large corporate employers such as Uber, Pizza Hut, and Domino's Pizza.

1. *E.g.*, Fair Labor and Standards Act ("FLSA"), Pub. L. No. 75-718, §§ 6, 7, 52 Stat. 1060, 1062–64 (1938) (establishing a federal minimum wage and mandatory overtime pay that is "one and one-half" times the employee's "regular rate") (codified as amended at 29 U.S.C. §§ 206–07 (2018)); Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56, 56–57 (prohibiting wage discrimination on the basis of sex) (codified as amended at 29 U.S.C. § 206(d) (2018)); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 2(b), 84 Stat. 1590, 1590 (assuring "every working man and woman in the Nation safe and healthful working conditions") (codified at 29 U.S.C. § 651 (2018)).

2. 138 S. Ct. 1612 (2018).

3. *Id.* at 1619.

II. ARBITRATION AGREEMENTS REQUIRING INDIVIDUALIZED PROCEEDINGS ARE LAWFUL UNDER THE FAA ND MUST BE ENFORCED

A. The Majority

In *Epic Systems Corp. v. Lewis*, the United States Supreme Court addressed three consolidated cases that had created a circuit split regarding employees' rights to litigate actions brought under the FLSA despite contracts entered into by those employees requiring individual arbitration proceedings to resolve employment disputes.[4] Justice Gorsuch opened his opinion by reducing this somewhat complex issue to a simple rhetorical question: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration[, o]r should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?"[5]

The Court answered this question by addressing the employees' arguments. *First*, Justice Gorsuch explained that the FAA requires courts to enforce agreements to arbitrate, including the terms of arbitration the parties select.[6] The employees argued that the FAA's "saving clause" created an exception for cases like theirs.[7] By its terms, the saving clause allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract."[8] According to the employees, "illegality under the NLRA [was] a 'ground' that 'exist[ed] at law' . . . for the revocation' of their arbitration agreements, at least to the extent those agreements prohibit[ed] class or collective action proceedings."[9]

4. Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016); Morris v. Ernst & Young LLP, 834 F.3d 975 (9th Cir. 2016); Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015).

5. *Epic*, 138 S. Ct. at 1619.

6. *Id.* at 1621 (citing 9 U.S.C. §§ 3–4 (2018) ("providing for a stay of litigation pending arbitration 'in accordance with the terms of the agreement'" and for "an order directing that . . . arbitration proceed in the manner provided for in such agreement")).

7. *Id.*

8. 9 U.S.C. § 2 (2018).

9. *Epic*, 138 S. Ct. at 1622.

The majority disagreed, reasoning that the FAA's saving clause only recognizes defenses that apply to "any" contract.[10] The Court held that the clause only permits arbitration agreements to "be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'"[11] The Court further opined that "the clause offers no refuge for 'defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'"[12] In other words, because the employees' argument specifically focused on the alleged illegality of the individualized nature of the arbitration proceedings, as opposed to arguing a defense which would render any contract unenforceable, such as fraud or duress, the Court ruled that the saving clause was not implicated and there was no "generally applicable contract defense" to overcome the presumption of the agreements' enforceability.[13]

Secondly, the employees argued that even if the saving clause did not apply in this case and the FAA required the enforcement of arbitration agreements like theirs, the NLRA overrode that directive and renders their agreements unlawful.[14] The statute relied upon by the employees is a provision found in section 7 of the NLRA, which provides that "[e]mployees shall have the right to self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[15] Specifically, the employees argued that class and collective actions are the sort of "concerted activities" protected by section 7 of the NLRA.[16]

10. *Id.*
11. *Id.* (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011)).
12. *Id.* (citing Concepcion, 563 U.S. at 339).
13. *Id.* at 1623.
14. *Id.* at 1623–24.
15. *Id.* at 1624 (citing 29 U.S.C. § 157 (2018)).
16. *Id.*

This argument faced an uphill battle, however, because a party suggesting that two statutes are incompatible with each other "bears the heavy burden of showing 'a clearly expressed congressional intention'" that its preferred ruling should follow.[17] The Court determined that, because section 7 focuses on the right to organize unions and bargain collectively, and does not mention class or collective action procedures, it was unlikely that Congress intended to confer a right to such procedures.[18] Justice Gorsuch further stressed that "the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress ha[d] not displaced the [FAA]."[19]

Although the majority conceded that the policy may be debatable, the Court ultimately concluded that "the law is clear," holding: "Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the [FAA]."[20]

B. *The Dissent*

Justice Ginsburg demonstrated her particular disdain for the majority's ruling in this case by reading her dissent aloud from the bench, a practice that has been described as an "act of theater" used by justices to convey their view that the majority is not only mistaken, but profoundly wrong.[21] In the dissent, which is five pages longer than the majority's opinion, Justice Ginsburg alludes to the majority's opening question: "[s]hould employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?"[22] Justice Ginsburg answered with a question of her own: "[w]ere the 'agreements' genuinely bilateral?"[23]

[17] *Id.* (citing Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 533 (1995)).

18. *Id.* at 1624–25.

19. *Id.* at 1627 (citing CompuCredit Corp. v. Greenwood, 565 U.S. 95, 103–04 (2012)).

20. *Id.* at 1632.

21. *E.g.* Linda Greenhouse, *Oral Dissents Give Ginsburg a New Voice on Court*, N.Y. TIMES (May 31, 2007), https://www.nytimes.com/2007/05/31/washington/31scotus.html.

22. *Epic*, 138 S. Ct. at 1636 n.2 (Ginsburg, J., dissenting).

23. *Id.*

In answering this question, the dissent notes that petitioner Epic Systems e-mailed its employees an arbitration agreement requiring resolution of wage-and-hour claims by individual arbitration, and this agreement provided that if the employees "continue[d] to work at Epic," they would "be deemed to have accepted th[e] Agreement."[24] Co-petitioner Ernst & Young engaged in a similar practice by e-mailing its employees an arbitration agreement, "which stated that the employees' continued employment would indicate their assent to the agreement's terms."[25] Justice Ginsberg argued that the employees of these two companies were relegated to making a "Hobson's choice: accept arbitration on their employer's terms or give up their jobs."[26]

She further suggested that, as a result of the majority's ruling, the number of suits brought by employees would likely decrease, citing the "[e]xpenses entailed in mounting individual claims . . . far outweigh[ing] potential recoveries," "[f]ear of retaliation," and "the slim relief obtainable" in individual suits.[27] Justice Ginsburg ultimately declared that a "Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order."[28]

24. *Id.* (alteration in original).
25. *Id.*
26. *Id.*
27. *Id.* at 1647.
28. *Id.* at 1633.

III. THE EMPLOYER-FRIENDLY HISTORY OF MANDATORY ARBITRATION

In 1991, *the Supreme Court in Gilmer v. Interstate/Johnson Lane Corp.* upheld the enforceability of mandatory arbitration agreements in employment contracts.[29] In 1992, an academic study was conducted on the topic of conflict resolution procedures used by corporations in non-union workplaces, and it found that just 2.1% of the companies surveyed included mandatory arbitration in their procedures.[30] In 2017, a survey was issued to private-sector businesses focusing on the use of mandatory arbitration clauses.[31] The results of the survey indicated that in the twenty-five years since the *Gilmer* ruling, the implementation of mandatory arbitration clauses had increased to 53.9% of private sector businesses, impacting over sixty million U.S. workers.[32]

One may wonder why there has been such a sudden increase in employers requiring their workers to submit to mandatory arbitration. While it is true that arbitration is oftentimes less costly than litigation and arbitration cases are typically handled more expeditiously than their court-litigated counterparts,[33] there may be other, less readily apparent reasons for this prodigious shift in dispute resolution strategy.

29. 500 U.S. 20, 34 (1991).

30. *See* Alexander J.S Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. 4 n.7 (Sept. 27, 2017), https://www.epi.org/files/pdf/135056.pdf.

31. *Id.* at 4. The survey population was restricted to private-sector business establishments of fifty or more employees, and the analysis was restricted to procedures affecting non-union employees. *Id.* at 8. A total of 1530 businesses were surveyed, from which 627 respondents provided complete data on the key variables of interest. *Id.* at 9.

32. *Id.* at 5. The "sixty million" figure extrapolates the 53.9% usage rate of mandatory arbitration agreements across the entire private sector, non-union workforce.

33. Arbitral resolution has been described as superior to court adjudication because of its "quick, inexpensive, expert, and fair" nature. Stephen A. Plass, *Federal Arbitration Law and the Preservation of Legal Remedies*, 90 TEMP. L. REV. 213, 233 (2018).

A study was conducted in 2011 involving 3945 arbitration cases that were derived from employer-promulgated arbitration procedures and administered by the American Arbitration Association.[34] 1213 of these cases were decided by an award and filed in the five-year period between January 1, 2003 and December 31, 2007.[35] The study compared the results of these arbitration cases with the results of non-civil rights employment disputes in state courts and employment discrimination cases in federal courts.[36]

The study found that the rate at which employees win at mandatory arbitration (21.4%) is much lower than in either state court (57%) or federal court (36.4%).[37] The average award received by an employee through their mandatory arbitration ($23,548) is also lower than the average award received by employees through state court ($328,008) and federal court ($143,497) litigation.[38] In other words, the average award won through mandatory arbitration is 7% of the average award won through state court litigation and 16% of the average award won through federal court litigation.[39] As a result, it is much less likely for an employee to win via mandatory arbitration than through state and federal litigation, and even if the employee manages to win, the size of his or her award is dwarfed by the average award won at trial.

34. Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011).

35. *Id.*

36. The data for the state court results was acquired from the records of the Civil Trial Court Network and came from a random sample of state courts in 45 of the 75 most populous U.S. counties in 1996. Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J. 44, 46 (2003). The federal trial results were from 1999 to 2000 and were obtained from the Administrative Office of the United States Courts. *Id.* Dollar amounts were converted to 2005 totals to adjust for inflation and facilitate comparison. Colvin, *supra* note 34, at 5.

37. Colvin, *supra* note 34, at 5 tbl.1.

38. These figures include cases in which the employee lost or received $0 as an award. Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, ECON. POL'Y INST. 19 (Dec. 7, 2015), https://www.epi.org/files/2015/arbitration-epidemic.pdf.

39. *Id.*

Not only may an employer compel its employees to pursue all of their grievances through arbitration, which the statistics indicate is an employer-friendly legal mechanism, but as a result of the ruling in *Epic Systems Corp.*, employers may now also require each individual employee to embark on this journey alone. This precludes employees from enjoying the benefits of class or collective actions, which oftentimes provide a remedy for low-value, high-volume infractions, and, as a result, help deter corporate malfeasance.[40] Justice Ginsburg expressed her concern over this issue in her *Epic* dissent, stating: "[e]mployers, aware that employees will be disinclined to pursue small-value claims when confined to proceeding one-by-one, will no doubt perceive that the cost-benefit balance of underpaying workers tips heavily in favor of skirting legal obligations."[41] Although the outlook in a post-*Epic* world may seem bleak for employees, there remain several avenues through which they may diminish the ruling's impact on employment disputes.

40. Nicholas M. Engel, *On Waiving Class Action Waivers: A Critique and Defense of the Consumer Financial Protection Bureau's Proposed Regulations*, 89 TEMP. L. REV. 231, 234 (2016).

41. *Epic*, 138 S. Ct. at 1647–48 (Ginsburg, J., dissenting).

IV. *EPIC*'S IMPACT AND HOW EMPLOYEES ARE FIGHTING BACK

The impact of the Supreme Court's holding in *Epic* was felt immediately. Less than two weeks after the decision was passed down, a federal judge in California ruled that a proposed class of Domino's Pizza delivery drivers must individually arbitrate their business-expense reimbursement claims against the owners of seventy-four franchise stores.[42] Similarly, a federal judge in Illinois granted Pizza Hut's motion to compel arbitration in response to the *Epic* ruling.[43] In that case, drivers from Illinois, Florida, and Missouri had filed a collective action asserting that Pizza Hut had failed to properly reimburse them for vehicle expenses.[44] Uber employees were also affected, as roughly 160,000 drivers were forced to disband their class-action suit against the company in favor of individual arbitration.[45]

42. The lead plaintiff in this class-action had alleged he was reimbursed $1.16 per delivery, a rate of approximately $0.23 per mile, which failed to meet the Internal Revenue Service's required minimum payment of $0.535 per mile. RJ Vogt, *After Epic, Judge Says Domino's Drivers Must Arbitrate Suit*, LAW 360, (May 31, 2018, 5:56 PM), https://www.law360.com/articles/1049000/after-epic-judge-says-domino-s-drivers-must-arbitrate-suit.

43. Joyce Hanson, *Pizza Hut Franchisee Wins Bid to Arbitrate Drivers' Claims*, LAW 360, (June 22, 2018, 4:38 PM), https://www.law360.com/articles/1056326/pizza-hut-franchisee-wins-bid-to-arbitrate-drivers-claims.

44. *Id.*

45. O'Connor v. Uber Techs., 904 F.3d 1087, 1091 (9th Cir. 2018). In this case, Uber drivers alleged "they were misclassified as independent contractors instead of employees, were not given the entire amount of their riders' tips, and were not properly reimbursed for their business expenses." Peter Stuhldreher, *Uber's Arbitration Agreements Break Down Drivers' Misclassification Suits*, LEXOLOGY, (Sept. 25, 2018), https://www.lexology.com/library/detail.aspx?g=09f6c7b8-77d3-4a19-b0c3-427f8218bc8d.

The *Epic* ruling has led employment lawyers to predict a slowing in wage-and-hour litigation, and an increased usage of collective action waivers in employment contracts.[46] Plaintiff-side employment attorneys have their own concerns, with one such attorney claiming *Epic* "is an unquestionable win for employers" citing all of the lawsuits it will "strangle in their cribs."[47] However, for the following reasons, the legalization of class and collective-action waivers may not have as detrimental an effect on employment litigation as once thought.

First, states may follow Washington's lead, where Governor Jay Inslee issued an executive order stating: "to the extent permissible under state and federal law," state agencies should seek to contract with "qualified entities and business owners that can demonstrate or will certify that their employees are not required to sign, as a condition of employment, mandatory individual clauses and class or collective action waivers."[48] In explaining the reasoning behind his executive order, Governor Inslee stated that, in his opinion, *Epic* "overwhelmingly favors employers who repeatedly or systematically mistreat their workers."[49] He further stated: "We can't change the Supreme Court's ruling, but we can change how we do business."[50] If states follow in Governor Inslee's footsteps, the expected increase in class action waivers following *Epic* may be stifled.

46. *E.g.* Charles Toutant, *'Epic Systems,' Heading Off Third Circuit's Ruling on Class Waivers, Seen as Curb on Wage Litigation*, N.J. L.J., (June 14, 2018, 6:24 PM), https://www.law.com/njlawjournal/2018/06/14/epic-systems-heading-off-3rd-circuits-ruling-on-class-waivers-seen-as-curb-on-wage-litigation/.

47. *Id.* This attorney explains that thousands of lawsuits will never be filed because it won't be financially viable for the plaintiff to do so, such as "a store cashier who makes $10 an hour." *Id.*

48. ST. OF WASH. OFF. OF THE GOVERNOR, EXECUTIVE ORDER 18-03, SUPPORTING WORKERS' RIGHTS TO EFFECTIVELY ADDRESS WORKPLACE VIOLATIONS (2018).

49. Wash. Governor's Off., *Supreme Court Deals a Blow to Vulnerable Workers; Inslee Announces Executive Order to Support Workers' Rights*, MEDIUM (June 12, 2018), https://medium.com/wagovernor/supreme-court-deals-a-blow-to-vulnerable-workers-inslee-announces-executive-order-to-support-8cea43d6c295.

50. *Id.*

Secondly, in cases involving hundreds or thousands of plaintiffs, a plaintiffs' firm may offer to represent each plaintiff at their individual arbitration, which helps to achieve economies of scale for the firm while simultaneously saddling the employer with the cost of each arbitration. This strategy incentivizes employers to allow employees to form class or collective actions so that their case(s) may be dealt with in a more cost-effective and efficient manner. Chipotle dealt with this exact issue after a federal judge in Colorado ruled that, as a result of *Epic.*, approximately 2800 of the company's employees could not participate in a collective FLSA action.[51]

After succeeding in having the plaintiffs' class action suit dismissed, Chipotle requested that the court bar the plaintiffs' attorneys from representing them at arbitration.[52] Chipotle explained to the court that, if its motion was denied, "the possibility of thousands of individual follow-along arbitrations is real," and that "[a]llowing Plaintiffs' Counsel to threaten Chipotle with those thousands of individual arbitrations in the hopes of gaining a tactical advantage in this litigation and independent leverage outside of this litigation is untenable and should not be permitted."[53] The judge ultimately denied Chipotle's motion, opting not to interfere with the plaintiffs' choice of counsel.[54]

51. Alison Frankel, *Employer's Attempt to Derail Lawyers Overseeing Mass of Individual Arbitration Fails . . . This Time*, REUTERS, (Aug. 14, 2018, 6:35 PM), https://www.reuters.com/article/legal-us-otc-chipotle/employers-attempt-to-derail-lawyers-overseeing-mass-of-individual-arbitration-fails-this-time-idUSKBN1KZ2HR.

52. Chipotle's Supplemental Brief in Support of its Motion to Dismiss Opt-In Plaintiffs Bound by Chipotle's Arbitration Agreement at 31, Turner v. Chipotle Mexican Grill, Inc., No. 1:14-cv-02612-JLK (D. Colo. Apr. 16, 2018).

53. *Id.*

54. Turner v. Chipotle Mexican Grill, Inc., No. 14-cv-02612-JLK, 2018 U.S. Dist. LEXIS 152589, at *22 (D. Colo. Aug. 3, 2018) ("[A]bsent more concrete evidence of legal incompetence or evidence demonstrating a clear pattern of abuse of the judicial process, I will not interfere with the Arbitration Plaintiffs' right to choice of counsel.").

Lastly, employees may implore Congressional intervention. The *Epic* decision relied upon statutory, rather than Constitutional grounds, and as a result, Congress may reverse the Court's decision by enacting new legislation.[55] This has happened before, most notably after the Supreme Court decided *Ledbetter v. Goodyear Tire & Rubber Co.*, which held that the statute of limitations for presenting equal-pay discrimination claims began on the date the employer first made an illegal payment decision, not on the date of the last paycheck.[56] Two years later, Congress passed the Lilly Ledbetter Fair Pay Act, clarifying that "an unlawful employment practice occurs . . . when an individual is affected by [the] application of a discriminatory compensation decision . . . including each time wages, benefits, or other compensation is paid."[57] If the political makeup of Congress changes over the course of the next several years, it is possible that an effort is made to overturn *Epic* with legislation, similar to the manner in which *Ledbetter* was overturned.

V. CONCLUSION

From the advent of "yellow dog" contracts,[58] to the passage of the FLSA, to this year's ruling in *Epic Systems Corp. v. Lewis*, workers and employers have been in a proverbial tug-of-war for almost a century with each side gaining a momentary advantage before giving way to a new court ruling or piece of legislation. Given the employer-friendly nature of arbitration and the concern that employees will be unable to afford to bring wage disputes on an individual basis, *Epic*'s impact on employer-employee relations has the potential to be seismic. That being said, employees and the plaintiffs' bar possess the tools necessary to limit *Epic*'s impact, and if the stars align politically, to completely erase it.

55. Justice Ginsburg requested this sort of intervention in her *Epic* dissent, stating "Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order." *Epic*, 138 S. Ct. at 1633 (Ginsburg, J., dissenting).

56. 550 U.S. 618, 632 (2007).

57. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2 § 3, 123 Stat. 5, 5–6 (codified at 42 U.S.C. § 2000e-5(e)(3)(A) (2018); 29 U.S.C. § 626(d)(3) (2018).

58. This term refers to agreements that employees used to be required to sign as a condition of employment, typically commanding employees to abstain from joining labor unions and sometimes forbidding all manner of concerted activity. *Epic*, 138 S. Ct. at 1634 (Ginsburg, J., dissenting).