

2019

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### Recommended Citation

Lisa Gelernter, *The Impact of Epic Systems in the Labor and Employment Context*, 2019 J. Disp. Resol. (2019)

Available at: <https://scholarship.law.missouri.edu/jdr/vol2019/iss1/10>

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# The Impact of *Epic Systems* in the Labor and Employment Context

Lise Gelernter\*

## INTRODUCTION

*Epic Systems* not only had an impact on the law of arbitration, but it also affected federal labor and employment law and policy. The main question in the case was whether an employee's agreement to a class or collective action waiver<sup>1</sup> violated the National Labor Relation Act's (NLRA) protection for workers engaging in "concerted activities."<sup>2</sup> Sections 7 and 8 of the NLRA<sup>3</sup> protect workers against adverse employment action due to the exercise of their "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."<sup>4</sup> In *Epic Systems*, the Supreme Court ruled that instituting a class or collective claim did not count as the type of "concerted activities" that the NLRA protects, even though it involves an activity that can be used for the "mutual aid or protection" of a group of employees.<sup>5</sup>

The *Epic Systems* case, like many of the Supreme Court's recent arbitration decisions, highlights the sometimes dissonant interplay between two previously separate bodies of law that have converged in the last 27 years: 1) the legal doctrine developed under the Federal Arbitration Act<sup>6</sup> (FAA), which Congress passed in 1925 to allow for federal court enforcement of arbitration agreements; and 2) legal doctrines arising from federal labor, employment discrimination, and worker protection laws that include the National Labor Relations Act (NLRA),<sup>7</sup> the Labor Management Relations Act (LMRA),<sup>8</sup> Title VII of the Civil Rights Act of 1964,<sup>9</sup> and the Fair Labor Standards Act.<sup>10</sup>

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\* Teaching Faculty, University at Buffalo School of Law. The author would like to thank Rafael Gely, Director of the Center for the Study of Dispute Resolution and James E. Campbell Missouri Endowed Professor of Law at the University of Missouri Law School, for his encouragement and support; and Martin Malin, Professor of Law and Co-Director of the Institute for Law and the Workplace, Chicago-Kent College of Law, for his insightful and helpful comments on an earlier draft of this paper.

1. The arbitration agreements in question required employees to pursue claims on an individual basis only.

2. 29 U.S.C. §§ 157, 158 (2018).

3. *Id.*

4. 29 U.S.C. § 157 (emphasis added).

5. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1642-26 (2018).

6. 9 U.S.C. §§ 1-16 (2018).

7. 29 U.S.C. §§ 151-69 (2018).

8. 29 U.S.C. §§ 185-88 (2018). § 301 of the LMRA, 29 U.S.C. § 185, authorizes courts to enforce arbitration agreements that are part of collective bargaining agreements between a union and an employer. *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 455 (1957). Although historically courts had viewed the FAA and LMRA arbitration regimes as existing in two separate legal worlds of commercial arbitration and union related-grievance arbitration, the Court's decision in *14 Penn Plaza v. Pyett* suggested otherwise. *14 Penn Plaza, L.L.C. v. Pyett*, 556 U.S. 247, 254 (2009). In *Pyett*, an employer used the FAA, *not* Section 301 of the LMRA, as the basis for its motion to

This further penetration of the FAA into the zone of labor and employment law has three notable impacts: 1) because class action waivers mostly affect non-unionized workers and have become more prevalent every year, many workers will not be able to bring class or collective actions and will be unable to enforce their rights under employment contracts and worker protection laws; 2) limiting the breadth of the rights that NLRA § 7 protects; and 3) the carrying forward of *Circuit City's*<sup>11</sup> differential treatment under the FAA of “transportation workers” and all other workers. I will discuss each impact in more detail below.

### I. THE BIGGEST EFFECT IS ON NON-UNIONIZED WORKERS

*Epic Systems* says, essentially, that the NLRA does not stand in the way of employers making it a condition of employment for workers to sign agreements to arbitrate all employment disputes and to waive their right to bring class or collective actions.<sup>12</sup> Since the Supreme Court’s decisions in *AT&T Mobility v. Concepción*<sup>13</sup> and *American Express v. Italian Colors Restaurant*<sup>14</sup> rejected other challenges to the enforceability of class action waivers, employers have almost no barriers to requiring employees to sign them.

This will have the greatest impact on non-unionized workers for two reasons. First, for unionized workers, the NLRA would require an employer to bargain in good faith with a union about a class action waiver because it arguably involves a mandatory subject of bargaining in relation to a term or condition of work. In addition, an employer could not try to get individual employees to sign waivers without an agreement with the union.<sup>15</sup> A union would be unlikely to consent to a class action waiver because it would contravene its core mission. By virtue of its representative status, a union bringing a dispute to arbitration or acting in any other collective bargaining capacity is essentially acting on behalf of the class of all affected employees. That is why it is called *collective* bargaining.

Second, at unionized workplaces, there is already a highly developed arbitration process that is enforceable under LMRA § 301.<sup>16</sup> Pursuant to 99% of union-management contracts, arbitration is the final step in a multi-step grievance

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compel the arbitration of a provision in a collective bargaining agreement. *Id.* Neither the majority nor the dissent in *Pyett* commented on the fact that Section 301 could or should have been the basis for the motion. The majority opinion in *Epic Systems* took that legal convergence even further by finding that the FAA also affected the scope of NLRA § 7 protections for employees’ concerted activity.

9. 42 U.S.C. §§ 2000e to 2000e-17 (2018).

10. 29 U.S.C. §§ 201-19 (2018).

11. *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

12. For purposes of this paper, I will use the term “class action waivers” to mean both class and collective actions.

13. *AT&T Mobility v. Concepción*, 563 U.S. 333 (2011).

14. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).

15. 29 U.S.C. §§ 158(a)(5), (d); *see* *Ga. Power Co. v. N.L.R.B.*, 427 F.3d 1354, 1358-59 (11th Cir. 2005) (grievance arbitration is a mandatory subject of bargaining); *United Elec., Radio and Mach. Workers of Am. v. N.L.R.B.*, 409 F.2d 150, 156 (D.C. Cir. 1969) (same); *Bargaining in Good Faith with Employees’ Union Representative (Section 8(d) & 8(a)(5))*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/rights-we-protect/whats-law/employers/bargaining-good-faith-employees-union-representative-section> (last visited Oct. 1, 2018); *see generally* ROBERT A. GORMAN & MATTHEW W. FINKIN, *BASIC TEXT ON LABOR LAW*, §§ 21.1, 21.4 (West 2d ed. 2004).

16. 29 U.S.C. § 185 (1947); *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 455-56 (1957).

process.<sup>17</sup> Both unions and employers are accustomed to the way the grievance arbitration system functions and have no incentive to seek to create a new one where each employee would have to pursue employment disputes on an individual basis. Class action waivers in unionized workplaces would result in employers losing the benefit of having only one entity to deal with on all workplace disputes, and, as stated earlier, unions losing a large part of their representative responsibilities.

#### A. *The Numbers.*

Employers clearly think or have been advised that using class action waivers in conjunction with mandatory arbitration agreements is advantageous for them because they are becoming standard requirements at many workplaces. Professor Alexander J.S. Colvin reported in April 2018 that 53.9% of non-union private sector employers require mandatory arbitration agreements, which translates into 56.2% of non-union employees (or 60 million workers).<sup>18</sup> Of those employers using mandatory arbitration agreements, 30.1% require class action waivers.<sup>19</sup> That number is likely to climb. Right after *Epic Systems* was decided, Ron Chapman, a prominent management attorney, predicted that employers would increase their use of class action waivers in arbitration agreements “significantly.”<sup>20</sup> Law 360 reported further:

“Prior to today, the use of arbitration agreements was fairly common. Three months from now, it’ll be the norm,” said Chapman, whose firm just hours after the high court’s ruling unveiled an automated tool that prepares custom arbitration agreements containing class waivers based on employers’ requirements and preferences.<sup>21</sup>

Since only 10.7% of employees in the private sector work at unionized workplaces,<sup>22</sup> this means that the majority of people working in the United States have signed or soon will be signing class action waivers.

This phenomenon affects the efficacy of worker protection laws. As the majority in *Italian Colors*<sup>23</sup> acknowledged and the dissent complained in *Epic Systems*,<sup>24</sup> making victims unable to bring class or collective actions may allow wrongdoers to escape liability for legal violations because without a class action, it would be impossible to mount any kind of legal action to vindicate low-value individual claims. By removing the possibility of relying on the NLRA’s protections for concerted activity to defeat class action waivers, *Epic Systems*

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17. LAURA J. COOPER, DENNIS R. NOLAN, RICHARD A. BALES & STEPHEN F. BEFORT, *ADR IN THE WORKPLACE* 20 (3d ed. 2014), citing *BASIC PATTERNS IN UNION CONTRACTS* 37 (BNA 14th ed. 1995).

18. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, *ECON. POL’Y INST.* 2 (Apr. 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/>.

19. *Id.*

20. Vin Gurrieri, *5 Takeaways From Employers’ Win on Class Waivers*, *LAW 360* (May 21, 2018), <https://www.law360.com/employment/articles/1045759/5-takeaways-from-employers-win-on-class-waivers>.

21. *Id.*

22. *Union Members Summary*, U.S. DEPT. OF LABOR (2018), <https://www.bls.gov/news.release/union2.nr0.htm>. The latest statistics reflect union participation in calendar year 2017.

23. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).

24. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1642-26 (2018) (Ginsburg, J., dissenting).

effectively wiped out many minimum wage, health and safety, and employment discrimination claims.<sup>25</sup>

### B. Union Organizing Opportunity?

Some in the union community think that non-union employers' use of mandatory arbitration clauses and class action waivers could become a rallying cry for union organizing.<sup>26</sup> For example, if individual workers think their employers are cheating them on their wages but cannot find a lawyer who will take their individual cases to arbitration, they might be attracted to a union's free, collective representation for workers in arbitration proceedings on disputes over terms and conditions of work. However, it may be difficult for unions to use *Epic Systems* as an effective organizing tool for two reasons. First, unions would have to know where workers have felt the negative impact of a class action waiver, something that may be difficult to discover. Second, being able to translate the arcane legal doctrine of arbitration into an organizing tool would require organizers to have the time to explain what arbitration and class action waivers are and why it would be to a worker's advantage to have union representation in a grievance arbitration system. Often, union organizers do not have the luxury of much time in face-to-face meetings or space in written materials to get their information across in the quick conversations they might have with workers at shift changes, or in e-mails or social media postings that need to grab a reader's attention quickly.

### C. Be Careful of What You Wish for

Some employers may not benefit as much as they had hoped from class action waivers. Arbitrators of disputes over employment discrimination and minimum wage laws are reporting, anecdotally, that enterprising plaintiff attorneys are bringing individual arbitration actions for multiple plaintiffs with the same type of claims. As a result, employers can be hit with hundreds of thousands of dollars in fees for multiple arbitration proceedings, especially if they use the rules of the American Arbitration Association, which require employers to pay all arbitration fees in employment cases.<sup>27</sup> This can lead to employers becoming interested in consolidating the cases in some way, or using one or more of the cases as a test case.<sup>28</sup> This makes the arbitration process more efficient and also helps to lead to

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25. Professor Cynthia Estlund's empirical study on the volume of employment arbitration claims filed showed that mandatory arbitration clauses actually suppress the initiation of otherwise viable claims. Cynthia L. Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679 (2018). She concluded: "It now appears that, by imposing mandatory arbitration on its employees, an employer can ensure that it will face only a miniscule chance of ever having to answer for future legal misconduct against employees. Such a provision amounts to a virtual *ex ante* waiver of substantive rights that the law declares non-waivable." *Id.* at 707.

26. See, e.g., Kevin Gundlach, *Wisconsin's Civil Service Will Rise Again* (June 11, 2016), [https://host.madison.com/ct/opinion/column/kevin-gundlach-wisconsin-s-civil-service-will-rise-again/article\\_5b69acaa-7596-57f6-9695-c2dd88d49859.html](https://host.madison.com/ct/opinion/column/kevin-gundlach-wisconsin-s-civil-service-will-rise-again/article_5b69acaa-7596-57f6-9695-c2dd88d49859.html).

27. Martin H. Malin, *The Employment Decisions of the Supreme Court's 2012-13 Term*, 29 ABA J. LAB. & EMP. L. 203, 213-14 (2014).

28. The author's telephone and e-mail interviews with Ira Cure, Arbitrator, member of the National Academy of Arbitrators (6/5/18), and Martin F. Scheinman, Esq., Arbitrator, member of the National

more consistent results, much as a class action would. The American Arbitration Association, which administers many arbitration proceedings concerning individual employment disputes, has developed rules for handling multi-plaintiff cases so that the arbitration process remains fair, efficient, and worthwhile.<sup>29</sup>

Employers facing multiple individual claims also have to consider whether it is worth the cost of paying arbitrators' and experts' fees in 10, 20, 100 or a 1,000 cases when the fees can typically range from \$1,000 to \$5,000 per day.<sup>30</sup> Each individual plaintiff, if he or she is required to pay part of a fee, only has to pay it once, whereas the employer would have to pay the fees in each case filed.<sup>31</sup>

Another potential problem for employers who ban collective actions is that they will not be able to take advantage of a claimant's loss (the employer's win) in an arbitration proceeding in subsequent cases with similar claims. Because collateral estoppel binds only the parties to a particular proceeding, one individual case result cannot bind another claimant who was not a party in the earlier proceeding.<sup>32</sup> Thus, a claimant could win on the same type of claim that resulted in a loss for another claimant. Conversely, claimants could use the collateral estoppel effect of one claimant's "win" to an employer's detriment. Since the employer will be a party in every proceeding, the employer would be bound by an earlier case's result if the same issues were litigated in subsequent cases.

## II. DEFINING THE BREADTH OF THE PROTECTIONS OFFERED BY NLRA § 7

One of the more important rulings in *Epic Systems* concerns how broadly to interpret NLRA § 7's protection for "concerted activities." NLRA § 7 provides employees: "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 or other mutual aid or protection."<sup>33</sup> The question in *Epic Systems* was whether bringing a class action was a protected "concerted" activity and if so, whether class action waivers were nonetheless enforceable.

Justice Gorsuch, writing for the majority in *Epic Systems*, said there were several reasons why NLRA § 7 was not even implicated by the enforcement of class action waivers. First, he explained, engaging in "concerted activities" could not possibly include instituting collective or class actions in court because "class or collective procedures . . . were hardly known when the NLRA was adopted in 1935."<sup>34</sup> Second, he found that the term "concerted activities" was limited by the

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Academy of Arbitrators (6/5/18). The fact that employment arbitrators are dealing increasingly with multi-plaintiff claims of a similar nature is reflected in the meeting session entitled "Complex Procedural Issues in the Arbitration of Mass Employment Claims" at the May 2018 meeting of the National Academy of Arbitrators.

29. E-mail exchange with Martin Scheinman, Founder, Scheinman Arbitration and Mediation Services (on file with author).

30. Deborah Rothman, *Trends in Arbitrator Compensation*, DISP. RES. MAGAZINE 8 (2017), [https://www.americanbar.org/.../3\\_rothman\\_trends\\_in\\_arbitrator\\_authcheckdam.pdf](https://www.americanbar.org/.../3_rothman_trends_in_arbitrator_authcheckdam.pdf).

31. Many plaintiffs do not pay arbitrator fees in mandatory arbitration systems. For example, AAA's rules require the employer to do so. AMERICAN ARBITRATION ASSOCIATION, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES 34 (2016), available at [adr.org/employment](http://adr.org/employment).

32. 46 Am. Jur. 2d Judgments § 468 (2018).

33. 29 U.S.C. § 157 (2018) (emphasis added).

34. *Epic*, 138 S. Ct. at 1624.

list of specific rights preceding it in Section 7: “the right to self-organization, to form, join or assist labor organizations, to bargain collectively.”<sup>35</sup> He used the interpretive canon of *ejusdem generis* to reach this conclusion, reasoning that when “a more general term follows more specific terms in a list, the general term is usually understood” to be limited by the more specific terms.<sup>36</sup> He concluded:

All of which suggests that the term “other concerted activities” should, like the terms that precede it, serve to protect things employees “just do” for themselves in the course of exercising their right to free association in the workplace, rather than “the highly regulated, courtroom-bound ‘activities’ of class and joint litigation.”<sup>37</sup>

Because the terms that precede “concerted activities” in Section 7 do not have anything to do with “the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum,” Justice Gorsuch wrote, “There is no textually sound reason to suppose the final catchall term [“concerted activities”] should bear such a radically different object than all its predecessors.”<sup>38</sup>

Third, Justice Gorsuch argued, the NLRA’s “broader structure” supports the conclusion that Section 7 does not protect the right to bring a class or collective action.<sup>39</sup> He listed all the things that the NLRA explicitly covers: union recognition by employers, obligations to bargain collectively, picketing, strikes, and adjudication of disputes by the National Labor Relations Board. He then noted: “But missing entirely from this careful regime is any hint about what rules should govern the adjudication of class or collective actions in court or arbitration.”<sup>40</sup> This statutory silence on anything touching on class or collective procedures meant that NLRA § 7 protection for “concerted activities” did not extend to class or collective actions, according to the majority’s opinion.<sup>41</sup>

Does this mean that NLRA § 7 now has to be understood to protect only concerted activities directly related to collective bargaining activities or union organizing? I do not think the majority’s opinion went that far. Justice Gorsuch characterized protected Section 7 activities as things that employees “just do” in order to exercise their right to free association.<sup>42</sup> He did not limit “concerted activities” to things directly related to collective bargaining or union organizing activity. This is consistent with longstanding NLRB and federal court doctrines that have applied the same tests for Section 7 protection for “concerted activity” to non-unionized and unionized workers alike.<sup>43</sup> Relatively recent examples of the application of Section 7’s concerted activity protection for actions unrelated to

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35. *Id.* at 1626-27.

36. *Id.*

37. *Id.* (quoting *N.L.R.B. v. Alt. Entm’t*, 858 F.3d 393, 414-15 (6th Cir. 2017) (Sutton, J., concurring in part and dissenting in part)).

38. *Id.*

39. *Id.* at 1625-26.

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

41. *Id.* at 1626.

42. *Id.* at 1625.

43. See *N.L.R.B. v. Wash. Aluminum*, 370 U.S. 9, 14-16 (1962) (holding that walkout of non-unionized workers due to bitter cold was “concerted activity”). See also *N.L.R.B., OFFICE OF THE GENERAL COUNSEL*, OM 11-74, REPORT OF THE GENERAL COUNSEL (Aug. 18, 2011).

collective bargaining or union organizing can be found in the cases in which the NLRB found that non-union employees who posted Facebook gripes that were true “concerted activities” received Section 7 protection.<sup>44</sup>

In addition, the majority opinion in *Epic Systems* focused narrowly on the issue of Section 7 protection for using a class or collective action procedure in a judicial or arbitration proceeding. The opinion did not upset the many previous court decisions, finding that Section 7 protected the other “myriad ways in which employees may join together to advance their shared interests” that Justice Ginsburg listed in her dissent.<sup>45</sup> Those cases involved “concerted appeals” to the media, legislators, and government agencies.<sup>46</sup>

The upshot is that in terms of defining the reach of Section 7’s protections for “concerted activities,” *Epic Systems* should be read to do no more than exclude from Section 7 protection the litigation procedures of class and collective actions.<sup>47</sup> To be sure, this contradicted the legal thinking of four dissenting justices and many labor relations professionals who had thought that employee class and collective lawsuits were the very definition of “concerted activities” carried out for the mutual benefit and aid of a class of employees. Nonetheless, the decision’s effect on Section 7 jurisprudence should not be extended beyond its application to class and collective actions.

### III. THE FAA’S “TRANSPORTATION WORKERS” EXEMPTION AND *EPIC SYSTEMS*.

Another impact of the *Epic Systems* decision is that it perpetuates and extends the impact of the division between transportation workers and all other workers that the Supreme Court created in the *Circuit City* case.<sup>48</sup> Because the FAA does not apply to the “contracts of employment” of “transportation workers,”<sup>49</sup> *Epic Systems*, based on the FAA, does not give the courts any authority to enforce class action waivers against them. This is emblematic of the continuing and unexpected effects of the Supreme Court’s anomalous differentiation in *Circuit City*.

#### A. *The Circuit City Case*

In the *Circuit City* case, Saint Clair Adams, a non-unionized employee at a Circuit City store, filed an employment discrimination claim in court against his employer. Circuit City sought to compel arbitration of his claims pursuant to the FAA due to the fact that he had signed an employment application that said he would “settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment,

44. See *Three D, LLC*, 361 N.L.R.B. No. 31 (Aug. 22, 2014) *aff’d* *Three D, LLC v. N.L.R.B.*, 629 Fed Appx. 33 (2d Cir. 2015). See also *Karl Knauz Motor, Inc.*, 358 N.L.R.B. No. 164 (Sept. 28, 2012); *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37 (Dec. 14, 2012).

45. *Epic*, 138 S. Ct. at 1637 (Ginsburg, J., dissenting).

46. *Id.* at 1637-38.

47. The limited effect on the interpretation of Section 7 does not, of course, diminish the overall impact of the majority’s decision enforcing the class action waivers. As discussed in Part I, *Epic Systems* will greatly reduce the availability of class action relief and the enforcement of worker protection laws for non-unionized employees.

48. See *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

49. *Id.* at 109.



employment and/or cessation of employment with Circuit City, *exclusively* by final and binding *arbitration* before a neutral Arbitrator.”<sup>50</sup> Circuit City based its motion on Section 2 of the FAA, which requires courts to enforce arbitration agreements.<sup>51</sup>

Adams argued that the FAA did not apply to him because Section 1 of the FAA exempted “contracts of employment” from the statute. Section 1 states that “nothing herein contained shall apply to *contracts of employment of seamen, railroad employees, or any other class of workers* engaged in foreign or interstate commerce.”<sup>52</sup> Adams argued that he fell within the “any other class of workers” that were exempt from the statute.

The 5-4 majority of the Supreme Court used the interpretive canon of *ejusdem generis* to examine FAA § 1 as they would later do in *Epic Systems* to examine the rights that NLRA § 7 protects. Justice Kennedy, writing for the majority, stated that the canon required that “[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”<sup>53</sup> Therefore, he reasoned, in FAA § 1, the preceding terms of “seamen” and “railroad employees,” limited “any other class of workers” to those workers similar to seamen and railroad employees. He concluded: “Section 1 exempts from the FAA only contracts of employment of transportation workers.”<sup>54</sup>

### B. The Fallout from Circuit City.

Justice Kennedy did not define the term “transportation workers” in *Circuit City*, which has led to some confusion over what a worker has to do in order to be exempt from the FAA. The Supreme Court has not had or taken the opportunity to clarify this further. This has led to many cases in which the parties dispute whether or not an employee is a “transportation worker.”<sup>55</sup>

The difficulty in drawing the line is illustrated by comparing *Lenz v. Yellow Transportation, Inc.*<sup>56</sup> and *Palcko v. Airborne Express*.<sup>57</sup> In *Lenz*, a trucking company’s Customer Service Representative argued that his employer could not use the FAA to enforce an arbitration agreement against him because he was an exempt “transportation employee.” He did not drive trucks, but he assisted customers in arranging for their goods to be transported from one place to the other. Using an amalgam of factors that other courts had used to determine the “transportation worker” status of other employees, the Eighth Circuit concluded that the Customer Service Representative was *not* a “transportation worker.” This

50. *Id.* at 109-10.

51. *Id.* at 124; 9 U.S.C. § 2 (2018). Section 2 provides: “[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

52. 9 U.S.C. § 1 (2018) (emphasis added).

53. *Circuit City*, 532 U.S. at 115 (citing NORMAN SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47.17 (1991)).

54. *Id.* at 119.

55. *See, e.g.*, cases discussed in *Lenz v. Yellow Transp., Inc.*, 431 F.3d 348, 351-52 (8th Cir. 2005).

56. *Lenz v. Yellow Transp., Inc.*, 431 F.3d 348 (8th Cir. 2005).

57. *Palcko v. Airborne Express*, 372 F.3d 588 (3rd Cir. 2004).

was due mainly to the fact that the employee did not directly transport goods in interstate commerce, did not handle the packages that the truckers transported, and did not supervise truckers.<sup>58</sup>

In *Palcko*, the Third Circuit held that a Field Service Representative at a package delivery company was a transportation worker exempted from the FAA.<sup>59</sup> Although she, like the Customer Service Representative in *Lenz*, did not drive the trucks that delivered the packages, nor did she handle the packages, she supervised the drivers who performed those tasks. The Court found that the “direct supervision of package shipments makes Palcko’s work ‘so closely related [to interstate and foreign commerce] as to be in practical effect part of it.’”<sup>60</sup>

Because determining whether a worker is a “transportation worker” is so fact-dependent, it is difficult to predict if a worker in any type of transportation-related company is exempt from the FAA unless he or she directly transports goods or people as a seaman,<sup>61</sup> railroad engineer, airplane pilot, or driver of a car, truck or bus engaged in interstate commerce. Determining the exemption status of all the other workers in the transportation industry requires a very fact-specific inquiry with few clear guidelines. Although a majority of the Supreme Court considers the FAA to be a very clear congressional mandate to enforce arbitration agreements in almost any situation, the standards for determining the applicability of the FAA itself are totally unclear.

### C. *An Anomalous Difference in Treatment of Transportation Workers*

Given the fact that the NLRA,<sup>62</sup> Title VII of the Civil Rights Act,<sup>63</sup> and worker-protection laws like the Fair Labor Standards Act<sup>64</sup> do not treat transportation-related workers differently from other workers in terms of their basic rights, the *Circuit City* decision created an anomalous differentiation among workers that is not consistent with federal labor and employment policy. Why should a customer service representative at a trucking company who is subject to the FAA have to comply with a mandatory arbitration agreement, but not a driver for that same company, particularly if they are in the same bargaining unit? Why should the people in a bus company involved in scheduling and making bus routes have to comply with the FAA, but the bus drivers do not? All of them receive the same protections under the NLRA, the FLSA, and employment discrimination

58. *Lenz*, 431 F.3d at 352-53.

59. *Palcko*, 372 F.3d at 593.

60. *Id.* (quoting *Tenney Eng’g, Inc. v. United Elec. Radio & Mach. Workers of Am.*, 207 F.2d 450, 452 (3d Cir.1953)).

61. *Id.* Because there is no statutory definition of “seaman,” this is not a clear-cut term. There are multipart judicial tests for determining who is a “seaman” working on a qualifying “vessel.” *Chandris, Inc. v. Latsis*, 515 U.S. 347, 376-77 (1995); *Burks v. Am. River Transp. Co.*, 679 F.2d 69, 75 (5th Cir. 1982). The Fifth Circuit Court of Appeals observed that the definition of “vessel” was so broad that “[n]o doubt the three men in a tub would also fit within our definition [of vessel], and one probably could make a convincing case for Jonah inside the whale.” *Id.*

62. 29 U.S.C. § 152(3) (1978) (definition of “employee” covered by the NLRA).

63. 42 U.S.C. § 2000e(f) (1991) (definition of “employee covered by Title VII).

64. 29 U.S.C. §§ 201-14 (2018); see 29 U.S.C. § 203(e); *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947). In determining how broadly to read the FLSA’s coverage of employees, the Supreme Court held: “The [FLSA’s] purpose as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage.” *Id.*

laws. The FAA's division between transportation and non-transportation workers stands out for its inconsistency with all other laws regulating employment relationships.

In *Circuit City*, Justice Kennedy stated that it was “reasonable to assume that Congress excluded ‘seamen’ and ‘railroad employees’ from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers.”<sup>65</sup> He noted that in 1925, at the time Congress adopted the FAA, it “had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers,” and “grievance procedures existed for railroad employees under federal law.”<sup>66</sup> The “any other class of workers” group was understandably linked to seamen and railroad employees, and was confined to transportation workers who had a similarly “necessary role in the free flow of goods.”<sup>67</sup> Justice Kennedy reasoned. In exempting transportation workers from the FAA, Congress reserved “for itself more specific legislation for those engaged in transportation. . . . Indeed, such legislation was soon to follow, with the amendment of the Railway Labor Act in 1936 to include air carriers and their employees.”<sup>68</sup> He left out that Congress also enacted “more specific legislation” concerning arbitration at unionized workplaces for all other types of workers both within *and* outside the transportation industries when it adopted Section 301 of the LMRA in 1947.<sup>69</sup> Yet, pursuant to *Circuit City*, non-transportation workers did not become exempt from the FAA even though “more specific legislation” on arbitration applied to them. Justice Kennedy never explained why it made any sense for both the FAA and LMRA § 301 to apply to most unionized workers’ arbitration proceedings, while *only* LMRA § 301 applies to arbitration processes for unionized “transportation workers.”

#### D. The Extension of the Impact of the FAA Exemption

*Epic Systems* carries forward the arbitrary line of demarcation for FAA applicability between transportation and non-transportation workers. This means that, for example, truck drivers for a package delivery company would not have to comply with an arbitration agreement with a class action waiver, whereas the customer service representative who works with customers and schedules their deliveries would have to comply with the same agreements. Carrying it even further, it also means that the FAA would not preempt any state legislation or doctrine that banned pre-dispute mandatory arbitration agreements and class action waivers for the “transportation workers” exempted from the FAA. The *AT&T Mobility* and *Italian Colors* cases, which rest on the FAA’s preemptive power over state laws or doctrines that interfere with arbitration agreement enforcement otherwise permitted by the FAA, do not apply to state laws or doctrines that deal only with arbitration for FAA-exempt “transportation workers.”

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65. *Circuit City*, 532 U.S. at 121.

66. *Id.*

67. *Id.*

68. *Id.*

69. LMRA § 301 provides for the enforcement of arbitration agreements between unions and management. *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 455-56 (1957).

Nonetheless, state arbitration laws could interfere with transportation workers' freedom from complying with arbitration agreements and class action waivers. If a state's arbitration enforcement law applied to employees of all types, then a business could use state law to enforce, say, a truck driver's class action waiver even though it would not be enforceable under the FAA. Most states have arbitration statutes that are based, more or less, on the Uniform Arbitration Act (UAA),<sup>70</sup> that provide for the enforcement of arbitration agreements.<sup>71</sup> The UAA does not exempt any type of employment contract from the law and neither do most state statutes.<sup>72</sup> However, a state's legal doctrines concerning contract enforcement might still preclude enforcement of a truck driver's arbitration agreement. For example, a state contract doctrine that considered pre-dispute class action waivers to be unconscionable and unenforceable could apply to FAA-exempt workers and would render a class action waiver a nullity.<sup>73</sup>

Even if a state arbitration law covered an FAA-exempt worker's arbitration agreement, it could be preempted by the FAA's exemption for certain "contracts of employment." After all, the Supreme Court has taken an expansive view of the FAA's preemptive effect with respect to state legal doctrines or statutes that are perceived as disfavoring the enforceability of arbitration agreements.<sup>74</sup> However, the Third Circuit Court of Appeals has found that the FAA preemption doctrine does not reach as far as state laws that allow for the enforcement of more arbitration agreements than the FAA. In *Palcko v. Airborne Express*, the Third Circuit ruled that the FAA did not preempt the enforcement of an arbitration agreement pursuant to Washington state's arbitration law in a case involving an employee who was FAA-exempt but who was not exempt from the Washington arbitration law.<sup>75</sup>

In its January 15, 2019 decision in *New Prime, Inc. v. Oliveira*,<sup>76</sup> the Supreme Court ducked the issue of whether parties can use state arbitration laws to enforce FAA-exempt arbitration agreements. One of the two questions presented to the Supreme Court in that case was whether the FAA § 1 exemption for "contracts of employment" applied to transportation workers who were independent contractors. The Supreme Court agreed with the First Circuit Court of Appeals and held that the arbitration agreement between a trucking company and a truck driver who was an independent contractor was exempt from the FAA pursuant to

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70. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM ARBITRATION ACT §§ 1-19 (2000).

71. 2 MERRICK T. ROSSEIN, EMPLOYMENT LAW DESKBOOK FOR HUMAN RESOURCE PROFESSIONALS § 39:18 (2017).

72. *Id.*

73. California has a "*Discover Bank*" rule that considers pre-dispute class action waivers in consumer contracts of adhesion to be unconscionable and unenforceable. *Discover Bank v. Super. Ct. of L.A.*, 113 P.3d 1100, 1111 (2005). In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2013), the Supreme Court held that the FAA preempted the "*Discover Bank*" rule for an agreement covered by the FAA. However, that preemptive effect would not apply to an agreement that is FAA-exempt. Although *Discover Bank* addressed consumer transactions only, its reasoning could easily be extended to employee contracts of adhesion in which signing a class action waiver is required in order to get a job.

74. See *AT&T Mobility v. Concepción*, 563 U.S. 333 (2011).

75. *Palcko*, 372 F.3d at 596.

76. *New Prime Inc. v. Oliveira*, No.17-349, 2019 WL 189342 (U.S. Jan. 15, 2019).

FAA § 1.<sup>77</sup> But the Supreme Court was completely silent on the possibility of using state arbitration laws to enforce the agreement, even though the First Circuit had raised it in its *New Prime* lower court decision, stating: “We emphasize that our holding is limited: It applies only when arbitration is sought under the FAA, and it has no impact on other avenues (such as state law) by which a party may compel arbitration.”<sup>78</sup>

### CONCLUSION

The most immediate and direct impact of the *Epic Systems* ruling falls largely on non-unionized non-transportation workers who have been required to waive their right to bring a class or collective action against their employers. It is now clear that those workers cannot rely on NLRA § 7 to void their waivers. Further, the Supreme Court’s earlier decisions in *AT&T Mobility* and *Italian Colors* establish that those workers cannot rely on any state law or doctrine that bars the enforcement of the waivers. The increasing use of class action waivers will only heighten the impact of *Epic Systems*. The only types of non-unionized workers who should feel little of the *Epic Systems* effect are transportation workers, who are exempted from the FAA.

Whether enforcement of class action waivers will be beneficial for all employers is an open question. Some employers may find that something like class action procedures looks good if they have to deal with multiple individual claims and the costs associated with paying multiple arbitrators to decide those disputes in potentially inconsistent ways. In addition, some union activists are hopeful that they can use an employer’s class action waivers as an organizing tool by offering the alternative of union representation in all types of arbitration proceedings, including class actions.

*Epic Systems* also narrowed the breadth of the rights protected under Section 7 of the NLRA when it ruled out Section 7 protection for the procedural options of class or collective actions. However, the decision should not be read to do more than address class and collective actions; Justice Gorsuch appeared to be careful to limit his decision.

Finally, because it is based on the FAA, *Epic Systems* carries forward the differing treatment of transportation workers and all other workers under the FAA that the Supreme Court announced in the *Circuit City* case. Since *Circuit City* established that contracts of employment of transportation workers were exempt from the FAA, *Epic Systems* and all the other Supreme Court decisions concerning the enforceability of arbitration agreements and class action waivers under the FAA do *not* apply to them. However, all other workers are subject to the FAA jurisprudence that allows for enforcement of almost any agreement having to do with arbitration. This is not consistent with federal labor and employment policy embodied in anti-discrimination, worker protection, and collective bargaining laws, which do not treat transportation workers differently

77. *Id.* at 6-10. The other question at issue in the case was whether a court or an arbitrator should decide the issue of whether the arbitration agreement was exempt from the FAA when there was a clause delegating arbitrability and jurisdictional questions to an arbitrator. The Supreme Court also agreed with the First Circuit on that issue and held that only a court could decide that issue. *Id.* at 4-6.

78. *Oliveira v. New Prime, Inc.*, 857 F.3d 7, 24, *reh’g and reh’g en banc denied* (1<sup>st</sup> Cir. 2017).

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from non-transportation workers. The *Epic Systems* case only heightens that inconsistency.