



An *Epic* Decision from the Supreme Court: The Supreme Court Rules Employee Class Action Waivers Are Enforceable

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Can agreements between employers and employees to arbitrate their disputes in lieu of class action lawsuits and other collective actions be enforced in court? In *Epic Systems Corp. v. Lewis*, decided on May 21, 2018, the Supreme Court answered in the affirmative, holding that the [Federal Arbitration Act of 1925](#) (FAA) generally requires the enforcement of arbitration agreements between employers and employees, even when such agreements preclude actions brought collectively by employees against their employer. *Epic Systems*, although focused on employment contracts, implicates a broader debate about the efficacy of arbitration agreements, particularly in the class action context. The case is the latest in a [series of 5-4](#) decisions from the Court applying the FAA to enforce the application of a bilateral arbitration clause waiving class or collective proceedings. Each of these cases turned on the Court's view that arbitration is fundamentally an informal, bilateral procedure, and that the FAA is generally not displaced by other federal statutes without explicit statutory language to the contrary. In this vein, *Epic Systems* has potentially important implications for Congress across many of the fields in which Congress legislates. As discussed in more detail below, the case's broad view of the FAA's reach, the Court's interpretation of how the 1925 statute interacts with other federal statutes, and the case's implications for how arbitration agreements can be used to limit the availability of collective legal action all underscore the significance of arbitration agreements that preclude litigation (including class litigation) in a court of law.

Background of the FAA and Collective Litigation. An [arbitration agreement](#) is a contract between two parties to arbitrate all disputes between those parties before a neutral third party. Typically, an arbitration agreement is a part of a larger contract establishing a business relationship, with the agreement calling for all disputes arising out of that contract to be submitted to a particular arbitrator, subject to specific rules. Prior to 1925, U.S. courts routinely [refused](#) to enforce arbitration agreements. Seeking to reverse this

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policy, Congress passed the FAA, which states in relevant part that an agreement in commerce that evidences a desire to settle disputes by arbitration “shall be valid, irrevocable, and enforceable.” The provision, however, contains an exception to this general principle in its “savings clause,” allowing for the nonenforcement of an arbitration agreement “upon such grounds as exist at law or in equity for the revocation of any contract.”

The Supreme Court has recognized that the purpose of the FAA was to increase the enforcement of arbitration clauses and “place arbitration agreements upon the same footing as other contracts.” As a result, for many years the Court has stated that the FAA “establishes a liberal federal policy favoring arbitration agreements.” The Supreme Court has cited to the FAA to enforce arbitration agreements across a wide range of commercial contexts, including securities registration, employment, and consumer contracts.

Enforceable arbitration agreements raise the possibility that private arbitration will displace other avenues for relief, including class actions. As is often the case in consumer and employment contexts, it is entirely possible to have an arbitration agreement require arbitration as the exclusive forum for a claim too small to be usually worth pursuing—after all, as the Seventh Circuit explained: “only a lunatic or a fanatic sues for \$30.” Normally, a class action or other collective procedure might allow a group of plaintiffs with similar claims to combine them and sue collectively, thereby making up for the high cost of a suit with the potential for a large reward. Class actions, however, have also been subject to substantial criticism for arguably encouraging frivolous litigation and benefiting plaintiffs’ attorneys at the expense of the economy as a whole. Given these criticisms and the potential of class actions to “raise the stakes,” arbitration clauses often exclude, by their terms, class or collective action and require bilateral arbitration of disputes.

In two relatively recent cases, the Supreme Court concluded that arbitration agreements under which the parties agree to forgo class or collective action litigation are generally enforceable. First, the Court in the 2011 case of *AT&T Mobility v. Concepcion* considered whether the “savings clause” of the FAA, which allows for the nonenforcement of arbitration agreements on “such grounds as exist at law or in equity for the revocation of any contract,” could allow California courts to void bilateral arbitration agreements on grounds of “unconscionability.” In *Concepcion*, the Court held, in a 5-4 decision, that the FAA preempted a California state rule that had voided collective action waivers as unconscionable, allowing parties to arbitration agreements to demand classwide proceedings in certain circumstances. The California Supreme Court had concluded that bilateral arbitration clauses could be unconscionable because they undermine “the policy at the very core of the class action mechanism”: “the problem that small recoveries do not provide the incentive for any individual to bring a solo action.”

Justice Scalia, writing for the majority in *Concepcion*, however, concluded that the FAA’s savings clause could not apply to rules that stood as obstacles to the achievement of the FAA’s objectives. The savings clause, the Court explained, exempts agreements from the FAA where those agreements are subject to “generally applicable contract defenses”—such as duress or unconscionability. But, as Justice Scalia reasoned, this rule does not apply where a generally applicable defense is being applied “in a fashion that disfavors arbitration.” As the Court explained: “[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.” Because allowing parties to agree to arbitrate individually is a “fundamental attribute” of arbitration, the Court reasoned that the California Supreme Court’s rule would create a scheme “inconsistent with the FAA.”

Two years after *Concepcion*, the Court considered a related question as to the scope of the FAA: whether implicit policies embodied in other federal statutes, which might be undermined by the lack of access to class actions, could override or form an exception to the 1925 law. In *American Express Co. v. Italian Colors Restaurant*, in another opinion by Justice Scalia, the Court held that an arbitration agreement that precluded classwide proceedings was enforceable, notwithstanding the fact that the plaintiffs had no cost-

effective remedy to their alleged violation of the antitrust laws. The plaintiffs [argued](#) that requiring them to litigate their antitrust claims individually—as their contracts with American Express required them to do—would contravene the policies of various antitrust laws because it would cost far more for them to prove their case than they could ever receive in damages. The Court [concluded, however](#), that this concern was insufficient to overcome the FAA, which could only be overridden in the event of a “contrary congressional command.” The mere existence of the antitrust laws, which had not incorporated class actions as an intrinsic part of their remedial schemes, did not amount to a legislative command sufficient to override the policy of enforcing arbitration agreements according to their terms.

Background of *Epic Systems*. In 2012, before the Court decided *Italian Colors*, the National Labor Relations Board (NLRB) [ruled](#) that [Section 7](#) of the National Labor Relations Act of 1935 (NLRA), which guarantees to workers “the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” guaranteed workers the right to pursue grievances collectively in litigation, including through class actions. As such, the NLRB found that a class action waiver in an arbitration agreement was unlawful under the NLRA. The NLRB further [concluded](#) that its ruling did not create a conflict with *Concepcion* because (1) the FAA, as evidenced by its savings clause, was not intended to mandate the enforcement of “illegal” agreements, and (2) the FAA could “not require a party to forgo the substantive rights afforded by statute.” In 2017, the Supreme Court agreed to hear several consolidated cases, including *Epic Systems*, from various federal circuits on the questions raised by the NLRB’s opinion.

The Opinions of the Court. In an [opinion](#) by Justice Gorsuch, the Court rejected the view of the NLRB and the appellate courts that had agreed with it. The first question the Court considered was whether the NLRB had correctly concluded that the FAA’s savings clause excluded agreements that were “illegal” for requiring bilateral arbitration. The Court concluded that, with respect to this question, the case was indistinguishable from *Concepcion*. Although *Concepcion* concerned a conflict between the FAA and state law and *Epic Systems* concerned a conflict between the FAA and another federal statute, the Court found this difference to be legally inconsequential. Applying *Concepcion*’s holding that the savings clause only applied to “generally applicable contract defenses” and did not apply to any policies that interfered with the “fundamental attributes” of arbitration, Justice Gorsuch [concluded](#) “courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties’ consent.” To hold otherwise, ruled the Court, would allow the savings clause to be used to “[destroy](#)” the Act itself.

Given the Court’s conclusion that the FAA required enforcement of the arbitration agreement, the next question the Court faced was how to reconcile the FAA with the NLRA and whether there was a conflict between these federal statutes. Justice Gorsuch began by [observing](#) that where two statutes address similar topics, federal courts must strive to “give effect to both” and are bound by the “strong presumption that repeals by implication are disfavored.” Applying this principle, the Court concluded that [Section 7](#) of the NLRA could be reasonably interpreted to not conflict with the FAA. Specifically, [Section 7](#)’s language about concerted activities, the Court [determined](#), did not protect the workers’ rights to *litigate* as a collective entity, but instead “focuses on the right to organize unions and bargain collectively.” The Court [noted](#) that the Section 7 provision at issue was a “catchall term” that followed a number of other provisions dealing with collective bargaining and union organization, reasoning that Congress would not have “tucked into the mousehole” of this term “an elephant” of collective litigation rights serving to overrule the FAA’s presumption and the parties’ contracted-for dispute resolution procedures. In this vein, the Court analogized the case to other rejected efforts to “conjure conflicts between the [FAA] and other federal statutes.” In *Italian Colors*, for example, the parties had argued—as they did in *Epic Systems*—that without a class action procedure, they could not vindicate their rights under other federal statutes, raising a conflict between those laws and the FAA. Rejecting this argument, Justice Gorsuch noted that just like the antitrust statutes at issue in the 2013 case, the NLRA was passed

before the development of the modern class action rules in 1966—as such, any rights afforded by the NLRA did not incorporate those class action rules.

Lastly, the Court [rejected](#) the argument that it was bound to defer to the NLRB’s interpretation under the administrative deference doctrine known as the *Chevron* rule. Justice Gorsuch stated that the case largely turned on the interpretation of the FAA, not the NLRA. The Court indicated that it only owed deference under *Chevron* to an agency’s statutory interpretation when the agency administered the statute in question, which was not the case with the NLRB and the FAA. Furthermore, the Court [noted](#), the “reconciliation” of distinct statutory regimes “is a matter for the courts,” not the agencies. Lastly, the Court [stated](#) that the statute at issue was not meaningfully ambiguous after it had applied the traditional canons of statutory construction.

The Court’s opinion elicited a dissent from Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, which disagreed with the majority on almost every point. [According](#) to the dissenters, the text, structure, and history of the NLRA left no doubt that the “other concerted activities” mentioned in Section 7 include the right to pursue joint, collective and class suits. [Furthermore](#), the dissent argued that the FAA’s legislative history suggested that it was not intended to apply to employment contracts. [According](#) to the dissenters, the Court since the 1980s has “veered away” from the original intent of the FAA and expanded its application to contracts where it was not intended to apply. Lastly, even if the FAA did apply, and even if it conflicted with the NLRA, the dissenters asserted the Court should have concluded that the NLRA implicitly repealed the FAA in the case of a conflict.

In Justice Ginsburg’s [conclusion to her dissent](#), she focused on possible policy consequences of the Court’s decision. The majority opinion declined to address these policy concerns, [stating](#) that these questions were “debatable” but the “law was clear.” The dissent disagreed, emphasizing a number of alleged problems arising from the Court’s decision, including, among other things, under-enforcement of federal and state statutes designed to protect workers and potential threats to the viability of class actions in other contexts, such as in antidiscrimination lawsuits.

Takeaways. The Court’s opinion [garnered much attention in the days following its issuance](#). One article [called](#) the opinion “a frontal attack on the New Deal,” while [another](#) argued that it would threaten sexual harassment claims by potentially “strengthen[ing] legal arguments that employment contracts that impose mandatory arbitration . . . do not violate constitutional rights.” Others have [disagreed](#), stating that the decision represents a “victory for freedom of contract.” Regardless of the validity of the concerns raised, it is undisputed that arbitration clauses of the type the Court upheld are ubiquitous. At oral argument, in response to a question from the Chief Justice, counsel for the respondent [asserted](#) that about 25 million employees are subject to similar contracts. And beyond the context of employment relations, there are countless arbitration agreements that govern disputes in other commercial settings. *Epic Systems*, building on *Concepcion* and *Italian Colors*, signals a [growing body](#) of case law from the Supreme Court adopting a broad construction of the FAA’s general directive to enforce arbitration agreements and more narrow construction of the 1925 statute’s savings clause and any potentially conflicting federal laws. More broadly, the Court’s opinion contained much of interest beyond its application of the FAA—including its [commentary](#) on the *Chevron* doctrine and its downplaying of the [usefulness](#) of using legislative history—that will likely interest commentators far into the future.

Both the [majority](#) and [dissent](#) noted the primacy of Congress in resolving the underlying policy issues. The entire dispute in *Epic Systems* centered on the application of two allegedly conflicting federal statutes. Congress has the power to rewrite the rules in this sphere, and sometimes expressly [exempts](#) certain disputes from the reach of the FAA. In addition, [some bills](#) have already been proposed in this specific context, prohibiting arbitration of employment disputes entirely. Another possible proposal would be to permit arbitration, but require that some form of collective or class procedure be available. Regardless of whether Congress decides to take action or not, it is likely that the debate surrounding collective action and arbitration clauses will continue for some time.