

*EPIC SYSTEMS CORP. V. LEWIS: INDIVIDUAL ARBITRATION
AND THE FUTURE OF TITLE VII DISPARATE IMPACT AND
PATTERN-OR-PRACTICE CLASS ACTIONS*

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I. INTRODUCTION

In May 2018, the Supreme Court of the United States overruled a recent precedent of the National Labor Relations Board (“NLRB”), and held that the National Labor Relations Act (“NLRA”) does not provide a means to supersede the Federal Arbitration Act (“FAA”) in regard to agreements to individually arbitrate claims, and therefore waive class actions, in employment contracts.¹ Since 2012, the NLRB had found the NLRA to void such class waivers due to the NLRA’s protections for employees engaged in activities for their “mutual aid or protection.”²

Writing for the majority, Justice Gorsuch upheld a class waiver on the grounds that: (1) the FAA requires arbitration and class waiver agreements to be enforced unless the agreements are void under general contract grounds or a federal statute expressly overrides the FAA; (2) the NLRA does not expressly override the FAA, and does not provide a means to void such agreements under the NLRA; and (3) even if the NLRA concerned the FAA, the NLRB does not have the authority to interpret the FAA because the NLRB is only granted judicial deference to interpret the NLRA.³ The decision narrowed the NLRA’s scope, and effectively excluded employees from voiding class action waivers under the NLRA outside of a collective-bargaining context.⁴

In dissent, Justice Ginsburg tried to limit the reach of the majority’s opinion: “I do not read the Court’s opinion to place in jeopardy [Title VII of the Civil Rights Act of 1964’s] discrimination complaints asserting disparate-impact and pattern-or-practice claims that call for proof on a groupwide basis.”⁵ In support of this proposition, Justice Ginsburg argued that since some courts do not allow individual employees to bring Title VII pattern-or-practice and disparate impact claims alone, without further evidence of intentional discrimination, a class waiver on such claims unlawfully limits employees’ rights under Title VII.⁶

1. *See Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1619 (2018).

2. *See D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012); *see also* 29 U.S.C.S. §157 (LexisNexis 2018).

3. *See generally, Epic Sys.*, 138 S.Ct. at 1612.

4. *See id.* at 1616-1617.

5. *Id.* at 1648 (Ginsburg, J., dissenting).

6. *See id.* (citing *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 146-50 (2d Cir. 2012)).

This note seeks to evaluate Justice Ginsburg's claim that—even assuming the validity of the *Epic Systems* decision—class action waivers are unenforceable against employees who bring pattern-or-practice and disparate impact claims under Title VII of the Civil Rights Act of 1964. This note will first discuss the background statutes of the *Epic Systems* decision: the FAA and the NLRA. This note will next include a discussion of disparate impact and pattern-or-practice claims under Title VII, followed by a discussion of *Epic Systems*' majority and dissenting opinions.

Then, this note argues that Title VII's plain language insufficiently discusses arbitration agreements or class action waivers to meet the *Epic Systems*' standard of voiding an arbitration agreement under a federal statute other than the FAA. Under this analysis, class waivers are still likely to be upheld in pattern-or-practice and disparate impact claims, as such claims are likely to be considered methods of proof for Title VII claims, rather than substantive statutory rights at contract or law that could void the agreement. Finally, this note will analyze Justice Ginsburg's argument that the unavailability of a class action disparate impact claim in individual arbitration effectively eliminate a substantive right under Title VII, and conclude that the argument insufficiently accounts for *Epic Systems*' broad reliance on a statute's plain language to override the FAA.

II. BACKGROUND

Epic Systems Corp. v. Lewis concerned arbitration agreements with class action waivers to prohibit employees' wage and hour claims to be brought as a class action under the National Labor Relations Act.⁷ This section will discuss (1) the breadth and enforceability of arbitration agreements under the Federal Arbitration Act, (2) claims and enforcement under the National Labor Relations Act, (3) the origin and nature of disparate impact claims under Title VII of the Civil Rights Act of 1964, and (4) *Epic Systems*. Within the discussion of *Epic Systems*, this section will examine both the majority's reasons for upholding the arbitration agreement in that case, and Justice Ginsburg's dissent and argument that the majority's reasoning cannot apply to Title VII disparate impact claims.

A. The Federal Arbitration Act

The FAA was passed with the intent to broadly favor parties' ability to

7. *Id.* at 1619-20.

contract, and to enforce agreements into which parties have entered.⁸ To those ends, Section 2 of the FAA provides:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an 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.*⁹

By its plain language, the FAA mandates arbitration unless the party seeking to void the agreement makes a showing that there is some common-law or other statutory reason to void the agreement.¹⁰ Moreover, Section 3 of the FAA provides that, upon the presence of a valid arbitration agreement:

If any suit or proceeding be brought in any of the courts of the United States . . . the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.¹¹

Additionally, Section 2 creates a “body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [FAA].”¹² In enacting Section 2, Congress made a national policy that favors arbitration and withdraws the power of the states to require judicial forum for claims in which the parties agreed to arbitrate.¹³ By giving the FAA the full scope of the Commerce Clause, Congress sought to preempt any substantive limitations by states on the effectiveness of arbitration clauses.¹⁴ In *Perry v. Thomas*, the Court distinguished between federal statutory arbitration exemptions and state laws that exempt parties from arbitration, and held that the Supremacy Clause preempts such attempts by the states.¹⁵ The case involved a dispute over commissions on the sale of securities, where a former employee refused to submit to arbitration on the grounds that California law specifically allowed

8. *S. Elec. Health Fund v. Kelley*, 308 F. Supp. 2d 847, 852 (M.D. Tenn. 2003) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985)).

9. 9 U.S.C.S. § 2 (LexisNexis 2018) (emphasis added).

10. *Byrd*, 470 U.S. at 218 (e.g. fraud, unconscionability, etc.).

11. 9 U.S.C.S. § 3 (LexisNexis 2018).

12. *Fox Int’l Rels. v. Fiserv Secs., Inc.*, 418 F. Supp. 2d 718, 722 (E.D. Pa. 2006) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

13. *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (citing *Southland Corp. v. Keating*, 465 U.S. 1, 11-12 (1984)).

14. *Id.* at 490-91.

15. *Id.* at 491.

employees to maintain actions for wages despite the existence of an arbitration agreement.¹⁶ The Court reasoned that since the FAA provided for a broad, federal policy of arbitration, contracts that are a part of interstate commerce are subject to the FAA, which preempts state limitations on arbitration.¹⁷

Even common-law contractual reasons for voiding arbitration agreements may be difficult to litigate.¹⁸ In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, the parties entered into a consulting agreement with a broad arbitration clause which provided that “any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration.”¹⁹ When one party alleged that the contract was induced by fraud and tried to void the arbitration clause of the contract wholesale, the Court had to determine whether a fraud claim on the contract itself had to be referred to arbitration or could remain in federal court.²⁰ Reasoning that the FAA intended to broadly enforce arbitration agreements, and that while the district court could consider the fraudulent nature of the arbitration clause itself, the Court held that the issue of fraud as a barrier to contract enforcement had to be referred to arbitration.²¹

Since the FAA created a federal substantive policy for arbitration, the FAA has been applied broadly to many areas of federal law, even those that provide private rights of action.²² When a party seeks to void an arbitration agreement to enforce a federal statutory right, the burden is placed on that party to show congressional intent to have that claim heard in a judicial forum.²³ Absent plain language to the contrary, this can be an exceptionally difficult burden to meet; arbitration agreements have been upheld against claims under a number of federal statutes, including the Age Discrimination in Employment Act of 1967,²⁴ the Sherman Antitrust

16. *Id.* at 485-86.

17. *Id.* at 491.

18. *See* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

19. *Id.* at 397-98.

20. *Id.* at 402.

21. *Id.* at 404; *see also* *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (holding that arbitration agreements are severable from their contracts, and therefore a claim of an illegal contract with a valid arbitration clause must still go to arbitration).

22. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (“Although all statutory claims may not be appropriate for arbitration, having made the bargain to arbitrate, the party should be held to it unless Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”) (internal quotations omitted).

23. *Id.* Courts presume arbitration clauses are valid, and the party seeking to void it bears the burden to do so.

24. *See id.* at 35.

Act,²⁵ the Magnuson-Moss Warranty Act,²⁶ the Truth in Lending Act,²⁷ the Racketeer Influenced and Corrupt Organizations Act,²⁸ the Americans with Disabilities Act,²⁹ and—perhaps most critically for purposes of the Article—Title VII of the Civil Rights Act of 1964.³⁰ Without express Congressional approval, the FAA makes arbitration agreements enforceable in order to “advance the objective of allowing claimants a broader right to select the forum for resolving disputes,” and to give parties the ability to trade “the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”³¹

Gilmer v. Interstate/Johnson Lane Corp. is illustrative of the Court’s deference to arbitration agreements in employment contracts and the difficult burden employees bear in voiding them.³² The issue in *Gilmer* was whether a claim under the Age Discrimination in Employment Act of 1967 (“ADEA”) could be subject to arbitration under an arbitration agreement in a securities registration application.³³ The defendant company hired the plaintiff-employee as a financial services professional, which required the employee to register with a number of stock exchanges.³⁴ This registration process included an application which provided that the employee “agreed to arbitrate any dispute, claim, or controversy” between him and the company.³⁵ When the employee was terminated at age sixty-two, the employee filed an age discrimination charge with the Equal Employment Opportunity Commission (“EEOC”) and subsequent ADEA claim in federal court.³⁶

Writing for the majority, Justice White noted the Court’s clear jurisprudence, which allowed many claims to be arbitrated despite private rights of action provided for in the statutes at issue.³⁷ Justice White argued that “by agreeing to arbitrate a statutory claim, a party does not forgo the

25. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985).

26. See *Richardson v. Palm Harbor Homes, Inc.*, 254 F.3d 1321, 1327-28 (11th Cir. 2001).

27. See *Pleasants v. Am. Express Co.*, 541 F.3d 853, 859 (8th Cir. 2008).

28. See *Mayaja, Inc., S.A. v. Bodkin*, 824 F.2d 439, 439-40 (5th Cir. 1987).

29. See *Siebert v. Amateur Ath. Union of the U.S., Inc.*, 422 F. Supp. 2d 1033, 1035 (D. Minn. 2006).

30. See *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 4 (1st Cir. 1999); see also *Sapiro v. VeriSign*, 310 F. Supp. 2d 208, 212 (Dist. D.C. 2004); *Hughes v. CACI, Inc.*—Commercial, 384 F. Supp. 2d 89, 91 (Dist. D.C. 2005).

31. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

32. See generally *id.* at 29.

33. *Id.* at 23.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum.”³⁸ Once the parties have agreed to arbitrate, the agreement should be valid unless Congress has clearly intended to void such agreements for the statutory right at issue.³⁹ The burden is on the employee to show such intention—and the intention may be found through the statutory text, its legislative history, or some inherent conflict between arbitration and the statute’s underlying purpose.⁴⁰

Justice White held that the employee did not meet this burden, as neither the ADEA’s text, history, nor structure was incompatible with arbitration.⁴¹ Justice White—and the employee—acknowledged that the text of the ADEA does not mention arbitration or a requirement for claims to be brought in a judicial forum.⁴² While noting that the ADEA furthers important social policies, those policies were not inherently inconsistent with arbitration; indeed, claims under many federal statutes are fit for arbitration.⁴³ Moreover, by having the EEOC involved in the ADEA’s enforcement structure, Justice White found that Congress intended more than just judicial action for resolution of ADEA claims.⁴⁴ Arbitration agreements do not prevent administrative action, and do not preclude the EEOC “from bringing actions seeking class-wide and equitable relief” on behalf of employees—a major policy goal of the ADEA.⁴⁵

As *Gilmer* and other cases illustrate, courts grant broad deference to arbitration agreements, and place a significant burden on those seeking to void them.

B. The National Labor Relations Act

The primary purpose of the National Labor Relations Act was to guarantee employees’ rights to act collectively in forming a union against state actions prohibiting such collective action.⁴⁶ To those ends, Section 7 of the NLRA provides that “[e]mployees 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 *or*

38. *Id.*

39. *Id.*

40. *Id.* (citing *Shearson/American Express v. McMahon*, 482 U.S. 220, 227 (1987)).

41. *Id.* at 26-27.

42. *Id.* at 29.

43. *Id.* at 27-28.

44. *Id.* at 28-29.

45. *Id.* at 32.

46. *Int’l Union, U.A.W.A. v. Wis. Empl. Rel. Bd.*, 336 U.S. 245, 258 (1949).

other mutual aid or protection.”⁴⁷ While originally interpreted narrowly to prohibit private and state action to violently suppress union organizing, the NLRA has grown to protect peaceful actions that impact organizing efforts as well.⁴⁸ Thus, the NLRA protects activity not only expressly protected by Section 7, but also “when it was an activity that Congress intended to be ‘unrestricted by *any* governmental power to regulate.’”⁴⁹ The NLRA therefore seeks to protect employees from hostile employers when those employees seek—through union membership or otherwise—to act collectively for mutual aid or protection.⁵⁰

Courts will generally give deference to the National Labor Relations Board (“NLRB”) rulings in construing the NLRA’s “concerted activities . . . for mutual aid or protection.”⁵¹ When the NLRB makes a decision interpreting the NLRA, the decision must be upheld unless it is found to be “arbitrary, capricious, or manifestly contrary to the statute.”⁵² This deference to the NLRB grants the NLRB the responsibility to adapt the NLRA to the ever-changing workplace environments and disputes that fall within its “special competence.”⁵³ Essentially, when the NLRB reaches a “fair and reasoned balance upon a question within its special competence, its newly arrived at construction of [Section] 7 does not exceed the reach of that section.”⁵⁴

Thus, the NLRB assumed considerable authority under the NLRA to extend protections to workers’ collective and class action rights, and prohibited employers from preempting employees from filing federal class and collective actions.⁵⁵

In *D.R. Horton, Inc.*,⁵⁶ the NLRB considered whether an employer violates the NLRA when it requires covered employees to sign an arbitration agreement that precluded them from filing class or collective action claims addressing wages and hours against the employer.⁵⁷ There, the employer required employees to agree, as a condition of employment,

47. 29 U.S.C.S. § 157 (LexisNexis 2018) (emphasis added).

48. *See Int’l Ass’n of Machinists & Aero. Workers v. Wis. Empl. Rel. Comm’n.*, 427 U.S. 132, 141 (1976) (“[earlier holdings] that state power is not pre-empted as to peaceful conduct neither protected by [the NLRA] nor prohibited . . . [were] undercut by subsequent decisions of this Court.”)

49. *Id.* (quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 488 (1960)).

50. *Yesterday’s Children v. NLRB*, 115 F.3d 36, 45 (1st Cir. 1997).

51. *USPS v. NLRB*, 969 F.2d 1064, 1070 (D.C. Cir. 1992) (citing *NLRB v. J.Weingarten, Inc.*, 420 U.S. 251, 266 (1975)).

52. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-44 (1984).

53. *J.Weingarten*, 420 U.S. at 266-67 (finding that the NLRB did not abuse its discretion when it upheld the presence of union representatives in employee-disciplinary meetings despite no express grant of authority to do so under Section 7) (internal citations omitted).

54. *Id.* at 267.

55. *See D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2277-78 (2012).

56. This was an administrative law case, heard by the NLRB.

57. *D.R. Horton*, 357 N.L.R.B. at 2277.

that “they [would] not pursue class or collective litigation of claims in any forum, arbitral or judicial,” instead requiring the disputes to be resolved individually.⁵⁸ The NLRB struck down the arbitration agreement, holding that employers violated employees’ Section 7 rights by requiring employees to waive the right to pursue any claim as a collective or class action in any forum.⁵⁹ The NLRB first reasoned that pursuing a claim as a collective does fall within the rights protected under Section 7’s broad “other concerted activities” language.⁶⁰ Moreover, the NLRB found that no conflict existed between the NLRA and the FAA where collective claims are completely barred by the arbitration agreement since the FAA requires arbitration only so long as the parties’ substantive rights under other federal statutes are still protected.⁶¹ Since the NLRB found collective and class action to be substantively protected action under federal statute, and that the arbitration agreement at issue to completely bar access to any form of that action, the NLRB held class and collective action waivers to all forums invalid.⁶²

Since the NLRA protects employees’ rights to act collectively, the NLRB found that the NLRA includes some opportunity to pursue employment remedies through class and collective litigation.⁶³ The ensuing circuit split surrounding the NLRA’s effect on class waivers in employment agreements found its way to the Supreme Court in the spring term of 2018.⁶⁴

C. Title VII of the Civil Rights Act of 1964⁶⁵

By enacting Title VII of the Civil Rights Act of 1964, “Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin.”⁶⁶ Title VII seeks to “make persons whole for injuries suffered on account of unlawful employment discrimination.”⁶⁷ To those ends, Title VII provides several enforcement

58. *Id.*

59. *Id.* at 2288.

60. *Id.* at 2278 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978)) (“Section 7 ‘protects employees from retaliation by their employer when they seek to improve their working conditions through resort to administrative and judicial forums.’”).

61. *Id.* at 2284-85 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

62. *Id.* at 2288.

63. *See id.*

64. *Epic Sys. Corp. v. Lewis*, 137 S.Ct. 809 (2017) (certiorari granted).

65. 42 U.S.C.S. § 2000e et al (LexisNexis 2018).

66. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)).

67. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

mechanisms to aggrieved employees. First, the Equal Employment Opportunity Commission (“EEOC”) may investigate allegations of employment discrimination and, if such allegations are true, “shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”⁶⁸ Second, if the EEOC is unable to secure a resolution with an employer, the EEOC may file a civil suit in federal court, and the Attorney General may bring such a suit against a government employer.⁶⁹ Third, Title VII grants individuals a private right of action should the EEOC dismiss a filed charge or not resolve a filed charge within the statutory reference period.⁷⁰

In addition to outlawing intentional or overt employment discrimination, Title VII also prohibits employment practices that are discriminatory in consequence, if not in form. Through Title VII, Congress intended to focus on the consequences of employment policies, not just employer motivations.⁷¹ This disparate impact theory permits challenges to employment practices that cause a disparate impact on the basis of race, religion, sex, or national origin, and that are not related to the position in question or a business necessity.⁷² This type of claim “is primarily intended to lighten the [employee’s] heavy burden of proving intentional discrimination after employers learned to cover their tracks.”⁷³ Instead of having to prove the employer had a discriminatory state of mind, employees can show that the employer’s practices had a discriminatory impact, regardless of the employer’s motives.⁷⁴

Disparate impact claims were initially a judicially-created evidentiary standard.⁷⁵ In a landmark 1971 decision, *Griggs v. Duke Power Co.*, the Court held that Title VII “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”⁷⁶ Noting that employers, in response to Title VII’s introduction in 1964, began implementing facially neutral policies that discriminated in practice, the Court allowed employees to challenge such policies if the employees made a showing that the policy bears no reasonable

68. 42 U.S.C.S. § 2000e-5(b) (LexisNexis 2018).

69. § 2000e-5(f)(1).

70. *Id.*

71. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (finding an employer is prohibited under Title VII from requiring a standardized intelligence test as a condition of employment when there was no discernable relationship between performance and employment success and the test operated to disqualify people of color at a substantially higher rate than white employees).

72. 42 U.S.C.S. § 2000e-2(k)(1)(A) (LexisNexis 2018).

73. *Lewis v. City of Chicago, Ill.*, 560 U.S. 205, 215 (2010) (quoting *Lewis v. City of Chicago*, 528 F.3d 488, 491-92 (7th Cir. 2008)).

74. *Id.* at 217.

75. *See generally Griggs*, 401 U.S. at 424.

76. *Id.* at 431.

relationship to the job.⁷⁷

Congress confirmed the legitimacy of disparate impact claims with the Civil Rights Act of 1991, which added several provisions to Title VII—notably, the circumstances in which disparate impact claims may be available and proven.⁷⁸ These amendments provide that employees may make a prima facie case by showing a defendant makes use of a policy that has a disparate impact on a class protected under Title VII.⁷⁹ Once this showing is made, the employer has the burden to prove that the practice is job related for the position in question.⁸⁰

After the 1991 amendments, there was some question as to the applicability of class actions for Title VII claims, and also whether arbitration agreements were viable for individual claims given the expanded specificity of private employee actions in the amendments.⁸¹ In addition to adding a statutory method of proof for disparate impact, the 1991 amendments also included a right to a jury trial for Title VII claims, as well as punitive damages for successful claims.⁸² Some courts were hesitant to find common, class-wide remedies to employment discrimination class actions when punitive damages might require more individualized fact-finding.⁸³ The right to a jury trial—as opposed to a bench trial prior to the 1991 amendments—cast some doubt upon the validity of arbitration agreements after the 1991 amendments.⁸⁴ In particular, the Ninth Circuit held that arbitration could not be compelled for individual Title VII claims after the 1991 amendments.⁸⁵ In a separate case, the Supreme Court overruled the Ninth Circuit and held that the

77. *Id.* at 428 (prior to the passage of Title VII, the defendant employer openly discriminated against job applicants on the basis of race, and then added an aptitude test requirement on the very day that Title VII became effective; the job in question was for low-level positions at a coal-fired power plant).

78. 42 U.S.C.S. § 2000e-2 (LexisNexis 2018); *see also* 2 LEX K. LARSON, LARSON ON EMPLOYMENT DISCRIMINATION § 20.01 (Matthew Bender & Company, Inc. 2018), LexisNexis (2018).

79. *Id.*

80. *Id.*

81. Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 814 (2004); *see also* 4 LEX K. LARSON, LARSON ON EMPLOYMENT DISCRIMINATION § 77.02 (Matthew Bender & Company, Inc. 2018), LexisNexis (2018) (explaining that until the Supreme Court ruled otherwise, some federal courts began invalidating arbitration agreements for Title VII claims).

82. 42 U.S.C.S. § 1981a(c)(1); *see also* Hart, *supra* note 81, at 821 (“Both the additional damages provisions and the jury trial right have led courts and numerous commentators to debate about the continued viability of class litigation in claims alleging intentional discrimination.”).

83. *See* Hart, *supra* note 81 at 826 (finding the Fifth Circuit to be most hostile to Title VII class actions after the 1991 amendments).

84. *See* *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 3-4 (1st. Cir. 1999) (upholding the district courts denial of motion to compel arbitration, but on grounds separate from the district court. The district court denied employer’s motion on the ground that the 1991 amendments do not allow arbitration of discrimination claims; the First Circuit—while agreeing to deny arbitration in that particular case—held, “as a matter of law that application of pre-dispute arbitration agreements to federal claims arising under Title VII . . . is not precluded” by the 1991 amendments).

85. *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1185 (9th Cir. 1998).

1991 amendments encourage, rather than prohibit, arbitration.⁸⁶ The Ninth Circuit later reversed its position in a 2003 en banc opinion, bringing all circuit courts into agreement that the 1991 amendments do not prohibit arbitration of Title VII claims.⁸⁷

Normally, disparate impact claims are brought as class actions, which subject that aspect of the claim to all requirements of Fed.R.Civ.P. 23.⁸⁸ In such cases, the plaintiff will generally bear the burden of providing some evidence to show an inference that an employment decision was based on an illegal discriminatory criterion under Title VII.⁸⁹ While individual discrimination claims may be subject to a formal framework discussed in *McDonnell Douglas Corp. v. Green*⁹⁰ and its progeny, disparate impact claims are different. In disparate impact class actions, plaintiff-employees may make a prima facie case of discrimination by demonstrating the “existence of a discriminatory hiring pattern or practice,” which may create a reasonable inference that individual class members were subject to discriminatory hiring decisions.⁹¹ Under this framework, employers may then rebut the presumption that individual plaintiffs were negatively impacted by the pattern-or-practice at issue.⁹² Evidence of a disparate impact may be supplemented by the impact on individual class plaintiffs.⁹³

Despite disparate impact claims normally being litigated as class actions, they are also brought as individual claims.⁹⁴ However, many courts prohibit individuals from bringing pattern-or-practice claims when seeking equitable relief; rather, individuals may use an employer’s practices as evidence in support of a disparate impact theory of recovery.⁹⁵ Without alleging a disparate impact on the individual,

86. *Circuit City Stores v. Adams*, 532 U.S. 105, 123 (2001).

87. *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 744-45 (9th Cir. 2003) (en banc).

88. *See E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 401 (1977) (finding plaintiffs were not proper class representatives in a disparate impact class action).

89. *Int’l Broth. of Teamsters v. U.S.*, 431 U.S. 324, 358-59 (1977) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)).

90. 411 U.S. 792, 807 (1973) (finding that individual plaintiff-employees must first show a prima facie case of discrimination, which creates a presumption that employers may rebut with a legitimate reason for its conduct, which plaintiff-employees may then rebut by showing the proffered reason is merely a cover for actual discrimination).

91. *Teamsters*, 431 U.S. 358-59 (citing *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 748 (1976)).

92. *Id.*

93. *Id.*

94. *See Gregory v. Litton Systems, Inc.*, 472 F.2d 631 (9th Cir. 1972) (finding that individual employee may bring a disparate impact Title VII claim for damages, but that prospective equitable relief is inappropriate when the claim is not brought as a class action and the prospective relief would benefit nonparties).

95. *See Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 146-50 (2d Cir. 2012) (distinguishing Title VII’s express pattern-or-practice right of action granted to the Attorney General from disparate

individual employees are generally not able to recover by merely alleging an employer's pattern-or-practice exists without more; pattern-or-practice evidence as a prima facie case of a disparate impact claim is reserved for the class-context.⁹⁶

In short, Title VII allows employees to bring claims against their employers for both intentional discrimination and facially neutral employment practices that have a disparate and discriminatory impact in violation of the law. Claims brought as disparate impact and pattern-or-practice claims are frequently, though not exclusively, litigated as class action lawsuits.

*D. Epic Systems Corp. v. Lewis*⁹⁷

1. Background

After the NLRB nullified the arbitration provision in *D.R. Horton*, a circuit split developed between circuits that either (1) agreed with the NLRB's decision to void class action waivers; (2) deferred to the NLRB in interpreting the NLRA's reach, thus upholding the NLRB's decision; or (3) disagreed with the NLRB and upheld class action waivers.⁹⁸ The Seventh Circuit agreed with the NLRB, holding that waivers of any class-based claim for wage and hour claims under the Fair Labor Standards Act (either in a judicial or arbitral forum) violated the NLRA and was also unenforceable under Section 2 of the FAA.⁹⁹ Months later, the Ninth Circuit reached the same conclusion on a nearly identical case.¹⁰⁰

In contrast, the Fifth Circuit found that requiring employees to "relinquish their right to pursue class or collective claims in all forums" does not constitute an unfair labor practice.¹⁰¹ In that case, *Murphy Oil USA, Inc. v. NLRB*, the employer revised a previously-struck class-waiver agreement to include express notice that employees could still bring individual claims outside of arbitration directly to the NLRB.¹⁰² The Fifth Circuit found the additional notice under the revised class waiver to

impact class action litigation) ("A pattern or practice case is not a separate and free-standing cause of action . . . , but is really merely another method by which disparate treatment can be shown").

96. *See id.*

97. 138 S.Ct. 1612 (2018).

98. *Id.* at 1619.

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

100. *See Morris v. Ernst & Young, LLP*, 834 F.3d 975, 989-90 (9th Cir. 2016) ("The NLRA establishes a core right to concerted activity. Irrespective of the forum in which disputes are resolved, employees must be able to act in the forum *together*. . . Arbitration, like any other forum for resolving disputes, cannot be structured so as to exclude all concerted employee legal claims.").

101. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015).

102. *Id.* at 1020.

sufficiently clarify the employee’s rights under the NLRA such that employees would no longer interpret the agreement to prohibit filing of individual unfair labor-practices charges.¹⁰³ The Supreme Court consolidated the appeals and granted certiorari.¹⁰⁴

2. Justice Gorsuch’s Majority Opinion

Writing for a 5-4 majority, Justice Gorsuch found that the NLRA secures employees’ rights to “organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum.”¹⁰⁵ Moreover, Justice Gorsuch refused to read a right to class actions into Section 7 of the NLRA, and took specific issue with the NLRB’s decision in *D.R. Horton*.¹⁰⁶

Justice Gorsuch began with Congress’s intent in enacting the FAA—“to abandon [judicial] hostility and instead treat arbitration agreements as valid, irrevocable, and enforceable.”¹⁰⁷ By requiring courts to respect and enforce arbitration agreements, Congress also instructed courts to enforce the parties’ contractually chosen arbitration procedures, except for reasons that exist to void any contract.¹⁰⁸ Opponents of the FAA may find this broad deference to private, contractual arbitration agreements to be bad policy, but the FAA still applies.¹⁰⁹

While the employees suggest that Section 7 of the NLRA provides an argument to void the arbitration agreement, Justice Gorsuch found the NLRA did not provide any plain-meaning support for the proposition, let alone a substantive legal right that would provide grounds to void the agreement under Section 2 of the FAA.¹¹⁰ Even if the NLRA provided a substantive right to class and collective action, the FAA only provides exceptions for defenses that apply to any contract, such as fraud, duress, or unconscionability.¹¹¹ Since the employees did not argue that their arbitration agreements were signed under fraud or duress—and instead argue that the agreements require individualized rather than collective action—the agreements could not be excepted under Section 2 of the FAA.¹¹²

103. *Id.*

104. *Epic Sys. Corp. v. Lewis*, 137 S.Ct. 809 (2017) (certiorari granted).

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

106. *Id.*

107. *Id.* at 1621 (internal quotations omitted).

108. *Id.* at 1621-22.

109. *Id.*

110. *Id.* at 1622.

111. *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)).

112. *Id.*

Furthermore, arguments that a separate federal statute requires courts to void an otherwise valid arbitration agreement “face a stout uphill climb.”¹¹³ While noting that the Court should try to give effect to both the FAA and the NLRA, Justice Gorsuch admonished the employees that they have a heavy burden of showing a “clearly expressed congressional intention” that the NLRA should displace the FAA.¹¹⁴ Further, the Court has a strong presumption against “repeals by implication,” and generally considers that Congress will expressly address a preexisting statute in a later one if it wants to amend the normal operation of the preexisting statute.¹¹⁵

After recognizing that burden, Justice Gorsuch found that Section 7 of the NLRA does not meet the necessary standard to preclude the FAA’s operation on the contract at issue. First, Section 7 does not contain any express mention of arbitration, class or collective action procedures; it focuses on the right to organize unions and to collectively bargain.¹¹⁶ Class and collective action procedures were not codified by Rule 23 of the Federal Rules of Civil Procedure until more than thirty years after the NLRA’s passage.¹¹⁷ And, while Section 7 includes “other concerted activities for the purpose of . . . mutual aid or protection,” that clause is contained within a list under the general topic of union organizing.¹¹⁸ Moreover, the Court has heard and rejected efforts to override arbitration agreements dealing with a number of federal statutes—including class action waivers and statutes providing for collective legal actions.¹¹⁹

Turning to the employees’ argument that *Chevron, U.S.A., Inc. v. NRDC, Inc.*,¹²⁰ requires courts to defer to administrative agencies, Justice Gorsuch found the NLRB overreached its administrative role by interpreting not just the NLRA, but also the FAA when the NLRB decided *D.R. Horton*.¹²¹ Agencies may seek to advance their own statutory mission at the expense of the competing statute; conflicting statutes require a judicial decision.¹²² Only where a court finds ambiguity while

113. *Id.* at 1623-24.

114. *Id.* at 1624 (quoting *Vimar Seguros y Reaseguors, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995)).

115. *Id.* (citing *United States v. Fausto*, 484 U.S. 439, 452-53 (1988) (overruled on separate grounds)).

116. *Id.*

117. *Id.* at 1624-25.

118. *Id.* at 1625 (quoting 29 U.S.C. § 157 (2018)).

119. *Id.* at 1627 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991)).

120. 467 U.S. 837, 844 (1984) (standing for the proposition that administrative agencies deserve deference from courts when interpreting statutes the agencies are tasked with enforcing; the details of *Chevron* are not particularly relevant to the discussion at issue here, yet in this instance shows hostility for agencies interpreting and voiding the FAA).

121. *Epic Sys.*, 138 S.Ct. at 1629.

122. *Id.* (citing *Gordon v. New York Stock Exchange*, 422 U.S. 659, 685-86 (1975)).

using traditional methods of statutory interpretation should an administrative agency receive judicial deference.¹²³ Thus, Justice Gorsuch found that the NLRB incorrectly interpreted Section 7 of the NLRA to void class and collective action waivers in contradiction to the FAA.¹²⁴

3. Justice Ginsburg's Dissent and Exception for Title VII Disparate Impact Class Actions.

In dissent, Justice Ginsburg took exception to the idea that the NLRA exists only for purposes of union organizing. She stated that “employees have a fundamental right to join together to advance their common interests and that Congress, in lieu of ignoring that right, had elected to safeguard it.”¹²⁵ Justice Ginsburg noted the broad language of Section 7’s “other concerted activities,” as well as the broad ability to the NLRB to interpret the NLRA to account for changing industrial and economic conditions.¹²⁶ The majority’s use of the *ejusdem generis* cannon¹²⁷ confusingly narrows the scope of the NLRA; collective litigation clearly fits within “other concerted activities” in the collective employment sphere.¹²⁸ The NLRB’s continuing expansion of activities protected by the NLRA without Congressional interference should be evidence that the NLRA does not provide for specific regulatory guidance so as to exclude collective litigation from the NLRA’s protection.¹²⁹ Justice Ginsburg also criticized what she sees as the Court’s decisions that have expanded the scope of the FAA away from an original “intent simply to afford merchants a speedy and economical means of resolving commercial disputes.”¹³⁰ Because Justice Ginsburg would hold that Section 7 provides a right to collective litigation, and illegality is a common-law contract defense, Section 2 of the FAA should invalidate collective action

123. *Id.* at 1630 (citing *Chevron*, 467 U.S. at 843).

124. *Id.*

125. *Id.* at 1635 (Ginsburg, J., dissenting) (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33-34 (1937)) (internal quotations omitted).

126. *Id.* at 1637 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978) (“‘The 74th Congress’, this Court has noted, ‘knew well enough that labor’s cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context.’”)).

127. A clause appearing at the end of a detailed list should be read to embrace only activities similar in nature.

128. *Id.* at 1638.

129. *Id.* at 1639.

130. *See id.* at 1643-45 (“It is, therefore, this Court’s exorbitant application of the FAA—stretching it far beyond contractual disputes between merchants—that led the NLRB to confront . . . the precise question whether employers can use arbitration agreements to insulate themselves from collective employment litigation.”).

waivers.¹³¹

Justice Ginsburg concluded with the following exception to the majority opinion:

In stark contrast to today's decision, the Court has repeatedly recognized the centrality of group action to the effective enforcement of antidiscrimination statutes. With Court approbation, concerted legal actions have played a critical role in enforcing prohibitions against workplace discrimination based on race, sex, and other protected characteristics. In this context, the Court has comprehended that government entities charged with enforcing antidiscrimination statutes are unlikely to be funded at levels that could even begin to compensate for a significant dropoff in private enforcement efforts. That reality, as just noted, holds true for enforcement of wage and hour laws. *I do not read the Court's opinion to place in jeopardy discrimination complaints asserting disparate-impact and pattern-or-practice claims that call for proof on a groupwide basis . . .* which some courts have concluded cannot be maintained by solo complaints. It would be grossly exorbitant to read the FAA to devastate Title VII of the Civil Rights Act of 1964 and other laws enacted to eliminate, root and branch, class-based employment discrimination[.]¹³²

Essentially, Justice Ginsburg asserts that even if the majority opinion correctly resolves the statutory interpretation dispute between the FAA and the NLRA, collective actions using pattern-or-practice or disparate impact claims under Title VII may not be voided by individual arbitration agreements.¹³³

III. DISCUSSION

When the Court decided *Epic Systems*, it expanded more than three decades of pro-arbitration jurisprudence to overturn the NLRB's working interpretation of the NLRA.¹³⁴ While the actual merits of this decision may be debated, its significance to the applicability and enforceability of arbitration agreements and class waivers cannot be understated. And while the decision may be read narrowly—especially given the questions

131. *Id.* at 1645.

132. *Id.* at 1648 (emphasis added) (internal citations and quotations omitted).

133. *See id.*

134. *See e.g.* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991); *see also* Leading Case, *Epic Systems Corp. v. Lewis*, 132 HARV. L. REV. 427, 427-28 (2018) (“*Epic Systems* is a vivid illustration of the declining power of workers in the U.S. political system.”).

surrounding the relationship of the parties’ underlying cause of action to the plain language of the NLRA—many of the same characteristics of the NLRA that led the Court to uphold a class waiver in the face of claims under the NLRA also exist under Title VII’s plain language.

This section will argue that *Epic Systems* will be applied to Title VII disparate impact and pattern-or-practice class action claims if a valid class waiver exists, upholding a class waiver against a claim seeking to void it. After an evaluation of the similarities and differences between potential claims under the NLRA and a potential Title VII claim, this section will conclude with an evaluation of class-waivers for Title VII claims under *Epic Systems*’ analytical framework for implied congressional intent to void arbitration agreements. Finally, this section will examine Justice Ginsburg’s argument and outline a possible challenge to the *Epic Systems* decision. Regardless of the merits of *Epic Systems*, the jurisprudence has reached the point to be so extensive as to require congressional action should Congress desire to limit the applicability of class waivers.

A. Title VII—similar to the NLRA—is silent on arbitration and the FAA, and must be considered under Epic Systems.

Justice Gorsuch’s opinion focused on three major characteristics when searching for a reason to void a class-waiver—and thus supersede the FAA—through another federal statute: (1) express discussion in the statute of arbitration, or intent to override the FAA; (2) a substantive legal right to class or collective action, granted in the statute; or (3) grounds within the FAA to void the class waiver.¹³⁵ At issue in *Epic Systems*—whether class action waivers are per se void under the NLRA—is a statute that fails to meet all three of these markers. Similarly, the NLRA fails to meet these markers as it does not mention arbitration, does not grant an express right to a class or collective legal action, and the arbitration agreement at issue likely is not voidable on common-law contract grounds.¹³⁶

The plain language of Title VII is similarly silent on these issues critical to the Court’s reasoning in *Epic Systems*. Title VII does not mention arbitration or class action waivers—neither in its prohibited acts sections nor in its enforcement procedures sections.¹³⁷ The FAA is not mentioned in Title VII.¹³⁸ Additionally, while Title VII provides several remedies for employer violations—including EEOC enforcement,

135. *See Epic Sys.*, 138 S.Ct. at 1624 (internal citations and quotations omitted).

136. Or under the NLRA, assuming the NLRA covers employment action outside of collective bargaining activities.

137. *See* 42 U.S.C.S. §§ 2000e-2-2000e-6 (LexisNexis 2018).

138. §§ 2000e-2-2000e-6 (LexisNexis).

litigation by the Attorney General, and a private right of action to individual employees—it does not provide for a specific right to class or collective action in its remedies.¹³⁹ All of this is to say that there is little in the plain language of Title VII that would distinguish it from the NLRA when it comes to arbitration agreements—and would likely subject a challenge to an arbitration agreement under Title VII to the same kind of analysis that the Court evaluated the NLRA in *Epic Systems*.

Furthermore, the *Epic Systems* opinion is so broadly stated that courts would have to strain to not apply it: “[j]ust as judicial antagonism toward arbitration before the Arbitration Act’s enactment manifested itself in a great variety of devices and formulas declaring arbitration against public policy . . . we must be alert to new devices and formulas that would achieve much the same result today. [A] rule seeking to declare individualized arbitration proceedings off limits is . . . just such a device.”¹⁴⁰ The Court has declared a strong suspicion of any doctrine that overrides an otherwise valid class waiver, and Title VII disparate impact claims are likely not an exception.

Some clear distinctions exist—employment policies with a disparate, discriminatory impact are expressly outlawed under Title VII, and individuals are expressly granted a private right of action, unlike under the NLRA.¹⁴¹ Yet the absence of any text on arbitration or outside employment agreements, coupled with an extensive history of arbitrating other Title VII claims, gives little room to argue that *Epic Systems* is not the current law to apply to any challenge to an arbitration agreement.

B. A claim to void a class-waiver under Title VII does not meet Epic Systems’ strict standard for implied intent to override the FAA.

As mentioned above, the Court views implied challenges to the FAA with deep suspicion.¹⁴² The Court looks to several factors. As an initial matter, when “confronted with two Acts of Congress allegedly touching on [arbitration agreements], this Court is not at ‘liberty to pick and choose among congressional enactments’ and must instead strive ‘to give effect to both.’”¹⁴³ The party seeking to void the FAA must find a “clearly expressed congressional intention” to do so.¹⁴⁴ The intention must be

139. §§ 2000e-2-2000e-6 (LexisNexis).

140. *Epic Sys.*, 138 S.Ct. at 1623 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011)).

141. *See* § 2000e-2(k); *see also* § 2000e-5.

142. *Epic Sys.*, 138 S.Ct. at 1624.

143. *Id.* (quoting *Morton v. Mancari*, 417 U.S. 535, 551(1974) (finding an implied repeal of a federal hiring preference statute did not occur when Congress made no affirmative showing to repeal the older statute under a subsequent statute)).

144. *Id.* (quoting *Vimar Seguros y Reaseguors, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995)).

“clear and manifest.”¹⁴⁵ Further, courts should have a strong presumption against repeals by implication and assume that Congress will specifically address the FAA should it wish to suspend its operation under a later statute.¹⁴⁶

The factors derived from the above principles—which the Court relied upon—are also instructive: (1) whether the statute expresses approval or disapproval of arbitration; (2) whether the statute discusses class or collective action procedures; and (3) whether there is any hint, either express or by implication, of a desire to suspend the FAA.¹⁴⁷ In addition, if there is to be an implied exception, the claim to void the arbitration agreement should have some basis in a substantive right protected in the subsequent statute.¹⁴⁸

Title VII does not carry *Epic Systems*’ high burden to void arbitration agreements in the absence of explicit statutory instruction to do so. Like the NLRA, there is neither approval nor disapproval of arbitration in Title VII’s text.¹⁴⁹ Like the NLRA, several remedies are provided—including an extensive discussion of a private right of action—but class or collective action are not mentioned as potential remedies or substantive rights under the statute. Without any discussion of arbitration agreements or a clear intent to discuss them, Title VII does not hint at a wish to void class waivers, let alone to do so “clearly and manifestly” as the Court has demanded.¹⁵⁰

While there is a discussion of disparate impact in Title VII, it is not in the remedies section of the statute.¹⁵¹ The only place where disparate impact or pattern-or-practice is discussed as a remedy on its own is in the Attorney General’s enforcement powers—the unlawful employment practice section discusses a method of proof, not necessarily a discussion of how such an action can or should be brought.¹⁵² For instance, Title VII specifically grants the Attorney General the right to bring a civil suit when the Attorney General “has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured” by Title VII.¹⁵³ In contrast,

(upholding arbitration in face of challenge under the Carriage of Goods By Sea Act)).

145. *Id.* (quoting *Morton*, 417 U.S. at 551).

146. *Id.* (citing *United States v. Fausto*, 484 U.S. 439, 452 (1988)).

147. *See id.* at 1625-26.

148. *See id.* at 1626 (“Still another contextual clue yields the same message. The employees’ underlying causes of action involve their wages and arise not under the NLRA but under an entirely different statute, the Fair Labor Standards Act.”).

149. *See* 42 U.S.C.S. § 2000e-5 (LexisNexis 2018).

150. *See Epic Sys.*, 138 S.Ct. at 1624.

151. *See* 42 U.S.C.S. § 2000e-5(f) (granting private right of action and enforcement by the EEOC).

152. § 2000e-2; § 2000e-6.

153. § 2000e-6 (this reference to pattern-or-practice is a general reference to employers’ practices

the enforcement provisions outlining private actions do not mention pattern-or-practice, or disparate impact claims as specific enforcement mechanisms.¹⁵⁴

C. Justice Ginsburg's contention that pattern-or-practice and disparate impact class actions are unaffected by arbitration agreements fails to offer a substantive reason for the claims' exclusion.

As discussed above, Justice Ginsburg stresses that *Epic Systems* should not apply to Title VII pattern-or-practice and disparate impact class action cases even if *Epic Systems* was otherwise correctly decided. This argument hinges on three factors: (1) Title VII granted pattern-or-practice and disparate impact class actions as substantive rights that must be available to any plaintiff who can make such claims; (2) such claims are unavailable to plaintiffs outside of the class action; and (3) the elimination of the pattern-or-practice and disparate impact class action results in a devastation of Title VII's ultimate purpose. Following this argument, the FAA must be superseded in these claims because the arbitration agreement unlawfully restricts a substantive right provided by federal law.

Two possible sources support Justice Ginsburg's assertion of a substantive right to a class action under a pattern-or-practice/disparate impact claim: the enumeration of proving disparate impact within the text of Title VII's prohibited employment practices,¹⁵⁵ and legislative intent for litigation of these claims through a private right of action and the well-established class action mechanism. Indeed, in *Griggs v. Duke Power Co.*,¹⁵⁶ the Court noted, "Congress provided, in Title VII of the Civil Rights Act of 1964, for class actions for enforcement of provisions of the Act."¹⁵⁷ Through this ban of disparate impact practices, and the development of a pattern-or-practice class action, Justice Ginsburg finds a substantive right to bring these claims.

Further, these claims on their own, brought by individual plaintiffs outside of a class action, are not allowed in some courts. Justice Ginsburg pointed to *Chin v. Port Auth. of N.Y. & N.J.*, in which individual plaintiffs could not bring a pattern-or-practice claim—standing alone—outside of a class action.¹⁵⁸ By denying plaintiffs, as individuals, from seeking a

in violation of Title VII, and indeed mentions actions where the employer intends to discriminate; this is distinct from the *per se* finding of discrimination in a disparate impact claim, where intent is irrelevant to the finding of discrimination).

154. See § 2000e-5.

155. See § 2000e-2.

156. 401 U.S. 424, 424 (1971).

157. 401 U.S. at 426.

158. 685 F.3d at 147.

legal remedy available to others wholesale through a class waiver, the FAA should not apply to such claims.

This line of reasoning considers the elimination of pattern-or-practice class actions through private contract so antithetical to the very purpose of Title VII that it should not be allowed to stand. Noting the Court's broad interpretation of Title VII's intent—and mission to root out all forms of class-based employment discrimination—the use of an arbitration agreement to neutralize one of the employees' greatest weapons against individual discrimination cannot be upheld.¹⁵⁹ Indeed, one of the main prongs of *Epic Systems'* predecessor case, *Gilmer*, was for arbitration agreements to be overruled when the agreement is antithetical to the purpose of the statute, even if that statute does not explicitly mention arbitration or the FAA.¹⁶⁰ *Epic Systems* largely ignores this major prong of prior arbitration jurisprudence, in favor of a cursory glance at the plain text of the statute.¹⁶¹

Yet this argument flounders at each point; pattern-or-practice claims are not mentioned as private rights of action or in a class action context.¹⁶² While disparate impact employment policies are outlawed, a disparate impact claim is merely a method of proof. The Court noted as much in *Franks v. Bowman Transportation Co.*, finding that pattern-or-practice in the class context was a common question of fact in the class certification analysis, and using it as an application of individual Title VII burden-shifting.¹⁶³ Even if pattern-or-practice claims are substantive rights under Title VII, using pattern-or-practice evidence is not necessarily precluded by arbitration or in an individual setting. Proof that an employer engaged in discriminatory pattern-or-practice may be relevant evidence to an individual's case, and offering that evidence is not precluded outside of the class setting, even if that employee cannot make a *prima facie* Title VII discrimination case exclusively out of that evidence.¹⁶⁴

Further, even if an arbitration agreement precludes class action—and therefore makes it harder for individual plaintiffs to bring a disparate impact claim—Title VII contains other remedies for the same problem.¹⁶⁵ Namely, employees can still file with the EEOC, who can then bring an administrative action against the employer, or the Attorney General may

159. This final, intent point in Justice Ginsburg's argument relies heavily upon the Court's decision in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975), which focused largely on the broad ability of judges to fashion equitable remedies under Title VII.

160. *See* 500 U.S. at 26.

161. *See* Leading Case, *supra* note 134 at 435 (“But the omissions do affect the tone of the opinion, and suggest a lack of sympathy for workers.”).

162. *See* 42 U.S.C. § 2000e-5 (LexisNexis 2018).

163. *See* 424 U.S. 747, 773 (1976).

164. *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 149 (2nd Cir. 2012).

165. 42 U.S.C.S. § 2000e-5 (LexisNexis 2018); § 2000e-6.

bring a disparate impact claim against the employer.¹⁶⁶ While arbitration and class waivers may limit an individual's options, the substantive right for disparate impact claims—if there is one—still exists through other remedies and all that is limited is the judicial forum.

IV. CONCLUSION

While *Epic Systems* directly upheld class waivers under the NLRA, its broad language likely applies to other federal statutes, such as Title VII. This raises the issue of whether such waivers—which in some jurisdiction may eliminate the disparate impact method of proof for private actions—may be voided as an unlawful limitation of available remedies. Though Title VII class waivers bear a closer resemblance to the actual cause of action than the employees in *Epic Systems*, the majority's reliance on plain language and clear Congressional intent to override the FAA make such waivers likely applicable to disparate impact claims.

The strongest argument for suspending the class waivers for disparate impact claims—that the disparate impact method of proof is a substantive right under the statute and is otherwise unavailable—falls short under this analysis because of (1) the absence of any discussion of disparate impact claims within Title VII's remedies; and (2) the availability of disparate impact enforcement through the EEOC and Attorney General, regardless of whether the individual employee must bring private claims through individual arbitration.

District courts have already expanded *Epic Systems* to begin covering Title VII class waivers.¹⁶⁷ Regardless of whether there is a substantive right to bring a disparate impact claim, there is no debate as to the extent of the nearly three decades of jurisprudence liberally applying the FAA to any number of federal statutes.¹⁶⁸ Indeed, Justice Ginsburg noted as much, although she vehemently disagreed with those cases.¹⁶⁹

Going forward, *Epic Systems* clearly gives employers cover to include increasingly broad waivers of the judicial forum within their employee contracts—and many are likely to do so. For employees, individual arbitration does not come with many of the benefits of a disparate impact class action, including the ability to change an arguably discriminatory employment practice through a single action, with limited time

166. § 2000e-5; § 2000e-6.

167. See, e.g., *Williams v. Dearborn Motors 1, LLC*, Case No. 17-12724, 2018 U.S. Dist. LEXIS 137825, *1, *3 (E.D. Mich. Aug. 15, 2018) (citing *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1632 (2018)) (“Although Title VII . . . authorize[s] class or collective actions . . . the statutes allow parties to contract for individual bilateral arbitration because the statutes do not make collective or class action procedures mandatory”).

168. See *Epic Sys.*, 138 S.Ct. at 1618.

169. *Id.* at 1643-44 (Ginsburg, J., dissenting).

commitment to litigate. By requiring individual employees to arbitrate each claim they have, employees must take the time and energy to bring their individual claims against their employer—not a small cost for hourly workers.

All of this is to say that, regardless of the relative merits of class waivers and arbitration agreements, the Court has shown an ever-increasing acceptance of such alternative dispute resolution, even in the face of conflict from statutory rights, which any number of renowned legal minds have found to be substantive. *Epic Systems* takes that jurisprudence and narrows the margin even further: without statutory language explicitly discussing an intent to override the FAA, courts will not override an arbitration agreement. With that as the going standard, Congress needs to address the issue should it want to limit the effectiveness of class waivers going forward.