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THE NEW YELLOW DOG CONTRACT: MANDATORY ARBITRATION AGREEMENTS AND COLLECTIVE ACTION WAIVERS IN THE AFTERMATH OF *EPIC SYSTEMS*

Eric Lundy*

Since the 1980s, the Supreme Court has consistently found arbitration agreements in employment contracts to be enforceable, citing a strong national policy favoring arbitration. This line of cases came to its apogee in 2018 with Epic Systems Corp. v. Lewis. The Court held that the statutory right to engage in concerted activities for the purpose of mutual aid or protection did not confer upon employees the right to bring class actions against their employer when they had signed an arbitration agreement with a collective action waiver. While the Court's decision was widely criticized in the academic community, it sent a clear message to employers: you can stay out of court simply by having employees sign an arbitration agreement.

Arbitration agreements and class action waivers call to mind the yellow dog contracts of the early twentieth century, which prohibited employees from joining a union as a condition of employment. Both arbitration clauses and yellow dog contracts significantly restrict an employee's bargaining power against his employer and run contrary to the free labor economy envisioned by the drafters of the Thirteenth Amendment. The current Court is unlikely to find that arbitration agreements and class action waivers create a system of involuntary servitude, but there are other measures state and local governments can take to help workers vindicate their statutory rights. For example, states and cities could pass laws similar to California's Private Attorneys General Act, which authorizes employees to sue on behalf of the state for labor-code violations committed against them and other employees. Whatever solutions are implemented, they must ensure that they combat the modern-day yellow dog contract and help bring the Thirteenth Amendment's vision of free labor closer to fruition.

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INTRODUCTION

Imagine that you have recently immigrated to the United States. You speak little English and desperately need a job. With some help, you fill out an application to clean theaters at a national cinema chain. You get the job and are happy to take your first step in pursuit of the American dream. But before you can start working, the theater gives you a sixty-page employee handbook to read and sign on your first day. You can barely read English, let alone understand the legalese that forms your employment agreement.¹ Neither anyone from human resources nor a lawyer is present to answer questions you may have. At the back of the handbook appears a heading entitled "Binding Arbitration Agreement and Waiver of Jury Trial" which reads in pertinent part:

NOTWITHSTANDING ANYTHING ELSE TO THE CONTRARY CONTAINED IN [THIS] AGREEMENT, ARBITRATION MUST BE ON AN INDIVIDUAL BASIS. AS A RESULT, NEITHER ASSIGNEE NOR [THE THEATER] MAY JOIN OR CONSOLIDATE CLAIMS IN AN ARBITRATION BY OR AGAINST OTHER CUSTOMERS, OR LITIGATE IN COURT OR ARBITRATE ANY CLAIMS AS A REPRESENTATIVE OR MEMBER OF A CLASS OR IN A PRIVATE ATTORNEY GENERAL CAPACITY.²

¹ Assume this hypothetical does not take place in California, which requires that a person be provided with a translated copy of a contract or agreement. See CAL. CIV. CODE § 1632(b) (Westlaw 2023).

² *Class Action Waiver Sample Clauses*, L. INSIDER, <https://www.lawinsider.com/clause/clas>

Assuming none of the above language will ever apply to you, you quickly sign the last page of the handbook and move on to the I-9 and tax forms. Things go smoothly and you enjoy your new job. But a few months later, you feel that something is not quite right. Your boss has been making you stay well after your shift, emptying trash and mopping floors. You would not mind the extra work except your boss makes you clock out thirty minutes to an hour before you leave. Fifty-hour weeks become normal, yet you are still only paid for your regular thirty-seven and a half. After speaking with your colleagues, you discover that they are being treated the same way. To reduce your individual costs and burdens, you decide to bring a collective action for wage theft under the Fair Labor Standards Act (“FLSA”).³ Your efforts are thwarted, however, when the theater presents the “Binding Arbitration and Waiver of Jury Trial” page of the employee handbook that you signed on day one. With your access to the courts now blocked and your ability to band together and litigate with your co-workers precluded, you each must now contemplate what individual arbitration would look like. Per the handbook, the theater is obligated to pay the arbitrator’s fees, but you still must find an attorney who is willing to take on all these individual cases—hopefully on contingency—where the amount at stake is relatively small. Additionally, the handbook says that if you lose at arbitration, you pay the theater’s attorney fees. Faced with these obstacles, you wonder if it is even worth it to try to assert your statutory rights and recover the money you worked so hard for.

This situation is familiar to workers across the country. As of 2018, 53.9 percent of non-union private-sector employers include mandatory-arbitration agreements (“MAAs”) in their employment contracts.⁴ The Economic Policy Institute estimates that by 2024, 83 percent of private-sector non-unionized workers will be subject to mandatory-arbitration agreements.⁵ As of 2020, over 30 percent of employers who require employees to sign mandatory-arbitration agreements also prohibited class actions in those agreements.⁶ This figure is likely to keep rising in the aftermath of *Epic Systems Corp. v. Lewis*, which held that collective action waivers in employment contracts are enforceable under the Federal Arbitration Act (“FAA”).⁷ This ruling

s-action-waiver [<https://perma.cc/T95S-8MB5>].

³ 29 U.S.C. § 202.

⁴ Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration: Access to the Courts is Now Barred for More than 60 Million American Workers*, ECON. POL’Y INST. (Apr. 6, 2018), <https://epi.org/144131> [<https://perma.cc/R7NK-554G>].

⁵ Matthew Janowiak, *Epic Systems Corp. v. Lewis: A Fatal Mistake for Employees*, 18 DEPAUL BUS. & COM. L.J. 127, 147 (2021).

⁶ John Bickerman, *Increase in Workers Subject to Arbitration Coincides with Supreme Court Rulings*, ABA PRAC. POINTS (Jan. 16, 2020), <https://www.americanbar.org/groups/litigation/about/committees/alternative-dispute-resolution/#:~:text=Of%20these> [<https://perma.cc/FV4Q-LJJU>].

⁷ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018).

should concern American workers, who on average logged 9.2 hours of unpaid overtime each week in 2021, up from 7.3 hours per week in 2020.⁸

The facts in the movie theater hypothetical are like those in *Murphy Oil U.S.A. v. National Labor Relations Board*,⁹ one of the cases consolidated into the litigation that later became *Epic Systems*. In *Murphy Oil*, a gas station employee attempted to bring a collective action alleging violations of the FLSA.¹⁰ She and her co-workers, however, had signed a mandatory-arbitration agreement that required employees to waive their right to pursue class or collective claims.¹¹ The Fifth Circuit found that Murphy Oil's motion to dismiss and compel arbitration did not constitute an unfair labor practice under Section 8 of the National Labor Relations Act ("NLRA"), reversing the Board's order awarding attorney fees to the employees.¹² The Supreme Court granted certiorari and consolidated *Murphy Oil* with two other cases¹³ that alleged misclassification and deprivation of overtime pay under the FLSA.¹⁴ In both cases, the employees had signed MAAs and collective-action waivers. Writing for a 5-4 majority, Justice Gorsuch held that the NLRA's Section 7 right of employees to engage in "concerted activities for the purpose of . . . mutual aid or protection"¹⁵ does not provide employees with a right to collective action that supersedes the applicability of the FAA.¹⁶

The academic community widely criticized Justice Gorsuch's opinion, with one commentator accusing the Associate Justice of being ignorant of the basic tenets of labor law.¹⁷ Others said that Justice Gorsuch "misconstru[ed]" the FAA and did not have a realistic grasp of what modern arbitration looks like.¹⁸ Whatever the academic community may think of *Epic Systems*, it sent

⁸ Kristin Stoller, *Employees Are Working an Extra Day in Unpaid Overtime Each Week*, FORBES (Apr. 28, 2021, 9:30 AM), <https://www.forbes.com/sites/kristinstoller/2021/04/28/employees-are-working-an-extra-day-in-unpaid-overtime-each-week/?sh=21e3fcc735cc> [https://perma.cc/56N4-JDP5].

⁹ *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1015–17 (2015).

¹⁰ *Id.* at 1015.

¹¹ *Id.* at 1016.

¹² *Id.* at 1021.

¹³ The two cases are *Morris v. Ernst & Young, LLP*, 894 F.3d 1093 (9th Cir. 2018) and *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016).

¹⁴ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1620 (2018).

¹⁵ 29 U.S.C. § 157.

¹⁶ *Epic Sys.*, 138 S. Ct. at 1632.

¹⁷ See Michael J. Yelnosky, *Labor Law Illiteracy: Epic Systems Corp. v. Lewis and Janus v. AFSCME*, 24 ROGER WILLIAMS U. L. REV. 104, 109–10 (2019) ("It is hornbook labor law that the NLRA's 'protection of "other concerted activities for mutual aid or protection" extends beyond . . . efforts to form a union and engage in collective bargaining.'" (quoting ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 397 (2d ed. 2004)).

¹⁸ Janowiak, *supra* note 5, at 142.

a clear signal to employers that they can stay out of court and avoid costly class actions just by inserting a few magic words in an employee handbook.¹⁹

This Note will argue that the holding in *Epic Systems*—that collective action waivers in employment contracts are enforceable under the FAA despite the NLRA’s protection of concerted activities for the purpose of mutual aid or protection—establishes a new form of involuntary servitude in violation of the Thirteenth Amendment of the United States Constitution. Part I will be a short discussion of the legislative history of the Thirteenth Amendment, highlighting how the amendment was meant to end more than just chattel slavery and to establish a system of free labor in the United States. The vision of free labor was slow to be materialized with the proliferation of peonage in the South and yellow dog contracts²⁰ nationwide. Part II will contain a brief overview of the Supreme Court’s arbitration jurisprudence before detailing the Supreme Court’s modern trend of favoring arbitration in the employment context, beginning with *Gilmer v. Interstate/Johnson Lane Corp.*²¹ Part III will discuss the Court’s holding and rationale in *Epic Systems*, as well as its effects on low-wage workers.

Part IV will discuss proposed solutions to the Court’s radical and capacious reading of the FAA beyond the Thirteenth Amendment defense. It will also discuss the recent case, *Viking River Cruises v. Moriana*, which technically upheld California’s Private Attorneys General Act (“PAGA”) while simultaneously holding that individual PAGA claims must be arbitrated separately from representative claims.²²

This Note will conclude by acknowledging the reality that mandatory-arbitration agreements and specifically collective-action waivers will proliferate in the aftermath of *Epic Systems*.²³ Because employees today have little individual bargaining power against their employers, and because of the various obstacles to collective bargaining, the Note will conclude by arguing that the best hope for workers will come via state and local action. States and cities should enact laws like PAGA, but that allow for injunctive relief, recovery of wages, and restitution funds for employees misclassified as independent contractors.

¹⁹ Sending the arbitration clause in the mail works too. See *Lang v. Burlington N. R.R. Co.*, 835 F. Supp. 1104, 1105–06 (D. Minn. 1993) (holding that it is acceptable to mail employees an arbitration agreement; their continued employment constituted acceptance of the terms of the agreement).

²⁰ A yellow dog contract is a “written promise[] in which a workman as a condition of employment obligates himself not to join a labor union.” Edwin E. Witte, “Yellow Dog” Contracts, 6 WIS. L. REV. 21, 21 (1930).

²¹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

²² *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1924–25 (2022).

²³ Janowiak, *supra* note 5, at 146.

I. THE SUPREME COURT HAS CONSISTENTLY INTERPRETED THE THIRTEENTH AMENDMENT NARROWLY, DESPITE LEGISLATIVE HISTORY

Ratified on December 6, 1865, the Thirteenth Amendment made the emancipation of slaves national policy.²⁴ Congressional floor debates reveal that the amendment was aimed at more than just ending chattel slavery.²⁵ It is almost certain that the drafters of the Thirteenth Amendment, at least the Radical Republicans, intended to address labor relations.²⁶ One of the most repeated phrases during floor debate was “the fruits of his labor.”²⁷ For the Radical Republicans, the end of involuntary servitude could only come by transforming the working relationship and the social status of workers.²⁸ Their vision of employment relations imagined real equality between employees and their employers as well as autonomy in employees’ work and personal lives.²⁹ They further believed it was the government’s responsibility to make this vision a reality.³⁰

Nonetheless, a legal formalist interpretation of the Thirteenth Amendment has limited its scope.³¹ This interpretation holds that the Thirteenth Amendment was merely meant to end chattel slavery of human beings.³² In so doing, this theory suggests that the systematic denial of free labor is beyond the scope of the Thirteenth Amendment.³³ This reading of the amendment is understandable because many scholars and the public at large are hesitant to refer to something as slavery unless it closely resembles antebellum chattel slavery.³⁴ But by linking slavery to the direct physical compulsion of labor, slavery becomes locked in the past and makes it easier to ignore current problems of labor exploitation.³⁵ If the Fourteenth Amendment were to be read this narrowly, equal protection would only apply in cases where laws similar to Jim Crow-era Black Codes denied people of color rights and liberties.³⁶

²⁴ *13th Amendment to the U.S. Constitution Is Passed*, NAT’L MUSEUM AFR. AM. HIST. & CULTURE, <https://nmaahc.si.edu/explore/stories/13th-amendment-us-constitution-passed> [<https://perma.cc/3GKB-WW2M>].

²⁵ Michael Scimone, *More to Lose than Your Chains: Realizing the Ideals of the Thirteenth Amendment*, 12 N.Y.C. L. REV. 175, 176 (2008).

²⁶ Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 437, 452 (1989) [hereinafter *Labor Vision*].

²⁷ *Id.* at 473 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 599 (599)).

²⁸ Scimone, *supra* note 25, at 176.

²⁹ *Labor Vision*, *supra* note 26, at 452.

³⁰ *Id.* at 460.

³¹ Lea VanderVelde, *The Thirteenth Amendment of Our Aspirations*, 38 U. TOL. L. REV. 855, 862 (2007) [hereinafter *Aspirations*].

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 859–60.

³⁵ *Id.* at 860.

³⁶ Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1461 (2012).

While the definition of slavery may be relatively straightforward, the definition of involuntary servitude has evolved since the Thirteenth Amendment was ratified. In 1867, Congress passed the Anti-Peonage Act, which outlawed forced labor in service of a debt.³⁷ It was not until the early twentieth century that the Department of Justice began prosecuting peonage cases. The most notable of these cases are *Bailey v. Alabama*³⁸ and *Pollock v. Williams*.³⁹ In *Bailey*, the Plaintiff contracted to perform labor and received a fifteen-dollar advance.⁴⁰ He did not perform the work or refund the money and was charged with violating Section 4370 of the Code of Alabama of 1896, which made it a crime to intentionally injure or defraud one's employer.⁴¹ In holding that the Alabama statute violated the Thirteenth Amendment, Justice Hughes wrote that "[t]he words involuntary servitude have a 'larger meaning than slavery.'"⁴² The purpose of the Thirteenth Amendment was "to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude."⁴³ *Bailey* marks an important moment in Thirteenth Amendment interpretation, because it identifies involuntary servitude as a threat to true freedom of labor.

Three decades later, the Court again considered peonage in *Pollock*. The facts in *Pollock* are much like those in *Bailey*. Pollock was arrested for intent to injure or defraud his employer under a Florida statute.⁴⁴ He had a contract to perform labor and service and received an advance of five dollars, but he did not perform any of the labor.⁴⁵ He was sentenced to sixty days in jail.⁴⁶ As in *Bailey*, the Supreme Court found the statute unconstitutional.⁴⁷ Writing for the Court, Justice Jackson hinted that freedom of contract was essential to the proscription against involuntary servitude: "Whatever of social value there may be, and of course it is great, in enforcing contracts and collection of debts, Congress has put it beyond debate that no indebtedness warrants a suspension of the right to be free from compulsory service."⁴⁸ Despite this lofty language, the Court noted that the primary defense against oppressive working conditions and forced labor was the right to change employers.⁴⁹

³⁷ Anti-Peonage Act of 1867, ch. 187, 14 Stat. 546 (codified as amended at 42 U.S.C. § 1994).

³⁸ *Bailey v. Alabama*, 219 U.S. 219 (1911).

³⁹ *Pollock v. Williams*, 322 U.S. 4 (1944).

⁴⁰ *Bailey*, 219 U.S. at 228–29.

⁴¹ *Id.* at 227, 229.

⁴² *Id.* at 241.

⁴³ *Id.*

⁴⁴ *Pollock*, 322 U.S. at 6.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 25.

⁴⁸ *Id.* at 18.

⁴⁹ *Id.*

This right to “vote with your feet” may have had some value in an era before noncompete clauses and mandatory-arbitration agreements were prevalent. But in a labor environment where 53.9 percent of private sector workers are subject to mandatory arbitration agreements,⁵⁰ the right to change employers does little to remedy long hours, low pay, and wage theft.

Around the time *Bailey* was decided, yellow dog contracts profoundly affected free labor. A yellow dog contract is an agreement between an employee and an employer that states that the employee will not join a union as a condition of employment.⁵¹ Yellow dog contracts pervaded all sectors of the economy but were particularly common in the coal and railroad industries, as well as in boot and shoe factories of the northeastern United States.⁵²

The Supreme Court considered a state law that banned yellow dog contracts in the landmark case *Coppage v. Kansas*.⁵³ The state of Kansas had a statute that made it a misdemeanor for employers to “coerce, require, demand, or influence” an employee to avoid union membership.⁵⁴ Hedges, a railroad worker, joined the Switchmen’s Union of North America.⁵⁵ Coppage, his boss, requested Hedges to sign a letter acknowledging his withdrawal from the union as a condition of his employment.⁵⁶ Hedges was terminated when he refused to sign the letter.⁵⁷

Writing for the Court, Justice Pitney held that the Kansas statute violated the Due Process Clause of the Fourteenth Amendment.⁵⁸ The Court found that Coppage was not acting coercively and that Hedges was acting as a “free agent” who was given the choice to act in his own best interests⁵⁹—a decision typical of the Lochner Era’s adherence to freedom of contract and *laissez-faire* economics.⁶⁰ The Court also broadly declared that any legislation that upsets the balance between employer and employee is an “arbitrary interference with the liberty of contract” even when bargaining power is unequal.⁶¹

Justice Holmes wrote a short dissent, arguing that nothing in the Constitution prevents states from making laws that attempt to equalize bargaining power between employers and employees.⁶² Justice Day also dissented, arguing that there are cases where the government can limit freedom of contract

⁵⁰ Colvin, *supra* note 4.

⁵¹ Witte, *supra* note 20, at 21.

⁵² *Id.* at 21–22.

⁵³ *Coppage v. Kansas*, 236 U.S. 1 (1915).

⁵⁴ *Id.* at 6.

⁵⁵ *Id.* at 7.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 26.

⁵⁹ *Id.* at 8–9.

⁶⁰ See Michael J. Phillips, *How Many Times Was Lochner-Era Substantive Due Process Effective?*, 48 MERCER L. REV. 1049, 1086 n.197 (1997).

⁶¹ *Coppage*, 236 U.S. at 11.

⁶² *Id.* at 27 (Holmes, J., dissenting).

to promote public health, safety, and welfare.⁶³ Justice Day's dissent also argued that a state legislature's finding that yellow dog contracts are not coercive should merit deference.⁶⁴

While the exact rule from *Coppage* is hard to discern, three main points can be taken away. First, "the individual non-union contract is legal."⁶⁵ Second, any employee who signs a yellow dog contract may still join a union but must immediately inform his employer of this decision.⁶⁶ Third, unions can have signers of yellow dog contracts amongst their membership, but they cannot take on these members with the goal of unionizing those members' workplaces.⁶⁷ By dismissing the inequality of bargaining power as insignificant, *Coppage* privileged employer's rights over employee's rights and marked a major setback for organized labor.

Two years after *Coppage*, the Supreme Court considered another case involving yellow dog contracts: *Hitchman Coal and Coke Co. v. Mitchell*.⁶⁸ In that case, a West Virginia coal mine made every employee sign an "employment card" stating that they understood that the mine was non-union and that joining a union would result in dismissal.⁶⁹ United Mine Workers secretly persuaded some of the employees to join their union hoping that if enough of them became union members, the mine would be forced to either recognize the union or close down.⁷⁰ The company obtained an injunction restraining the union from its activities and the case reached the Supreme Court ten years later.⁷¹ In a 6-3 decision, Justice Pitney wrote that the union's "unlawful and malicious methods" induced employees to breach their contracts with the mine through misrepresentation and deception.⁷² The Court agreed that the mine was entitled to an injunction.⁷³

Decisions like those in *Coppage* and *Hitchman* solidified the yellow dog contract as a reliable weapon employers could use to combat organized labor's growing economic strength.⁷⁴ Lower courts followed the direction of the Supreme Court and consistently granted injunctions embracing practically every type of activity in which unions engaged.⁷⁵ Unions argued that yellow

⁶³ *Id.* at 28 (Day, J., dissenting).

⁶⁴ *Id.* at 40 (Day, J., dissenting).

⁶⁵ Cornelius Cochrane, *Why Organized Labor Is Fighting "Yellow Dog" Contracts*, 15 AM. LAB. LEGIS. REV. 227, 229 (1925).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917).

⁶⁹ *Id.* at 239-40.

⁷⁰ *Id.* at 233.

⁷¹ *Id.*

⁷² *Id.* at 259.

⁷³ *Id.* at 260.

⁷⁴ Cochrane, *supra* note 65, at 230.

⁷⁵ *Id.*

dog contracts violated the right of free association.⁷⁶ For example, in two Ohio cases, courts granted injunctions that prohibited all “social intercourse” between union organizers and employees.⁷⁷ A Georgia court granted an injunction against a union because the employer had posted a notice that it would be a strictly non-union shop.⁷⁸ The court found that this notice formed part of an employment contract, even though the employees had signed nothing.⁷⁹ This practice of freely granting injunctions led unions to believe that the courts were not neutral.⁸⁰ By 1930, public opinion had “damned” the yellow dog contract.⁸¹

One of the main arguments against yellow dog contracts is that they create a coercive environment where the employee has no bargaining power.⁸² Non-compete agreements and MAAs present similar problems and can rightly be considered a new type of yellow dog contract.

A non-compete agreement is a clause in an employment contract that prevents an employee from obtaining similar employment with a competitor both during and after the employee’s current employment.⁸³ Non-compete agreements were originally intended to keep trade secrets and other confidential information from being released to competitors.⁸⁴ Now, they are increasingly used to keep low-wage workers from changing jobs.⁸⁵

Professor Ayesha Hardaway has compared the modern non-compete agreement with wage contracts of the Jim Crow era.⁸⁶ The term “wage contract” refers to a system that former slave owners used to oppress freed African-Americans.⁸⁷ These contracts were often unwritten,⁸⁸ but those that were had tyrannical clauses that extended far beyond work requirements and controlled every aspect of the worker’s life.⁸⁹ They rarely included voluntary

⁷⁶ *Id.* at 232.

⁷⁷ Witte, *supra* note 20, at 25.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 28.

⁸¹ Cornelius Cochrane, *Public Opinion Flays Judicial Approval of “Yellow Dog” Contracts*, 20 AM. LAB. LEGIS. REV. 181, 181 (1930).

⁸² Barry Cushman, *Doctrinal Synergies and Liberal Dilemmas: The Case of the Yellow-Dog Contract*, 1992 SUP. CT. REV. 235, 248–49 (1993).

⁸³ Najah A. Farley, *How Non-Competes Stifle Worker Power and Disproportionately Impede Women and Workers of Color*, NAT’L EMP. L. PROJECT (May 18, 2022), <https://www.nelp.org/publication/faq-on-non-compete-agreements> [https://perma.cc/9E8B-4EQP].

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Ayesha Bell Hardaway, *The Paradox of the Right to Contract: Noncompete Agreements as Thirteenth Amendment Violations*, 39 SEATTLE U. L. REV. 957, 959 (2016).

⁸⁷ *Id.*

⁸⁸ *Id.* at 968.

⁸⁹ See Robyn N. Smith, *Freedmens Bureau Labor Contracts*, RECLAIMING KIN (July 18, 2014), <https://reclaimingkin.com/freedmens-bureau-contracts/#> [https://perma.cc/6MTB-ME5H] (explaining how wage contracts included clauses that prohibited freedmen from

consent,⁹⁰ and some of these contracts even provided for the full forfeiture of wages if the employer felt the worker's performance merited such a measure.⁹¹ Furthermore, landowners would often work together to create agreements amongst themselves establishing classes of workers and corresponding wage rates for all employers in the area.⁹² This kept landowners from competing with each other and ensured that employees would not change employers in search of better wages.⁹³

Analogizing these wage contracts to today's non-compete agreements is not difficult. While almost all modern non-compete agreements are written down, they go further than merely controlling an employee's on-the-clock activity. They tell an employee where they can and cannot seek employment years after their current employment has ended.⁹⁴ True consent is also absent from most non-compete agreements. These agreements are often buried in employee handbooks and prospective employees sign them without understanding them, usually outside the presence of legal counsel or human resources.⁹⁵ Even if the employee understands the non-compete agreement, the choice of whether to sign it is illusory because the choice between making some money and no money is not an option for most low-wage workers.⁹⁶ If most employers in the same industry in the same area all have non-compete agreements, the employees have no bargaining power. Hardaway argues that this amounts to legal coercion and an infringement on free labor, thus violating the Thirteenth Amendment.⁹⁷ If the purpose of the Thirteenth Amendment was to create and maintain a system of free and voluntary labor,⁹⁸ and free labor only exists when employees have the power to control their employment conditions,⁹⁹ it follows that non-compete agreements violate the Thirteenth Amendment by preventing low-wage workers from exploring the benefits of working in a free-labor society.¹⁰⁰

Mandatory-arbitration agreements violate the Thirteenth Amendment in similar ways. Like the non-compete agreement, the arbitration clause is often buried deep in an employee handbook and is not understood by the average

leaving the plantation without their employer's consent or from having visitors without their employer's consent).

⁹⁰ Hardaway, *supra* note 86, at 968.

⁹¹ *Id.* at 971.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Farley, *supra* note 83.

⁹⁵ Dennis M. Haffey & James F. Hermon, *Noncompete Agreements Under Michigan Law*, 95 MICH. BAR J. 24, 25 (2016).

⁹⁶ Hardaway, *supra* note 86, at 978.

⁹⁷ *Id.* at 959.

⁹⁸ *Pollock v. Williams*, 322 U.S. 4, 17 (1944).

⁹⁹ *Id.*

¹⁰⁰ Hardaway, *supra* note 86, at 978.

employee.¹⁰¹ But even if the employee understands it, the choice of whether to sign it is again illusory. If the employee decides not to sign the arbitration clause, his or her alternative may be not working at all. Given the growing ubiquity of MAAs and collective-action waivers,¹⁰² job applicants are left with few options of employers to choose from if they want to litigate their wage disputes in court instead of at arbitration. If the employee does choose to sign the arbitration contract, he is unlikely to have success in arbitration.¹⁰³ Since employees stand little chance of winning money at arbitration, the reality is that many workers end up working excess hours for free.¹⁰⁴ Most low-wage workers cannot afford an attorney to arbitrate their individual cases nor afford the arbitrator's fees (if required to pay them), so employers end up facing few to no consequences for wage theft.¹⁰⁵ Professor Leah VanderVelde's definition of modern slavery consists of ten factors, which include (1) no right to wages or the fruits of one's labor, and (2) no right to bring a legal action.¹⁰⁶ The current regime of forced arbitration seems to satisfy these two factors. While forced arbitration does not implicate VanderVelde's other eight factors (such as being subject to corporal punishment or recapture for running away¹⁰⁷) the fact that two factors are satisfied still raises Thirteenth Amendment concerns.

The current Court is unlikely to recognize these concerns. The Court most recently examined the meaning of the Thirteenth Amendment in 1988. In *United States v. Kozminksi*, county officials found two men with intelligence quotients of sixty and sixty-seven laboring on a Michigan dairy farm.¹⁰⁸ The men initially made fifteen dollars per week but eventually earned nothing.¹⁰⁹ The farm owners directed the men not to leave the farm.¹¹⁰ The men

¹⁰¹ *Could This Be the End of Noncompetes?*, WALL ST. J. PODCASTS (Jan. 13, 2023, 4:16 PM), <https://www.wsj.com/podcasts/the-journal/could-this-be-the-end-of-noncompetes/e5035303-8e21-4bf6-9f3e-fd733c5911b8> [<https://perma.cc/72ZK-6B4H>].

¹⁰² Colvin, *supra* note 4.

¹⁰³ See Abha Bhattarai, *As Closed-Door Arbitration Soared Last Year, Workers Won Cases Against Employers Just 1.6 Percent of the Time*, WASH. POST (Oct. 27, 2021, 7:00 AM), <https://www.washingtonpost.com/business/2021/10/27/mandatory-arbitration-family-dollar/> [<https://perma.cc/8HVB-DYPD>] (highlighting that employees were awarded money in just 1.6% of arbitration cases in 2020).

¹⁰⁴ Alexia Fernández Campbell & Joe Yerardi, *Ripping Off Workers Without Consequences*, CTR. FOR PUB. INTEGRITY (May 4, 2021), <https://publicintegrity.org/inequality-poverty-opportunity/workers-rights/cheated-at-work/ripping-off-workers-with-no-consequences/> [<https://perma.cc/8GVN-CMTW>].

¹⁰⁵ Chris Hacker et al., *Wage Theft Often Goes Unpunished Despite State Systems Meant to Combat It*, CBS NEWS, <https://www.cbsnews.com/news/owed-employers-face-little-accountability-for-wage-theft/> [<https://perma.cc/7WAD-JHWNd>] (June 30, 2023, 8:00 AM).

¹⁰⁶ *Aspirations*, *supra* note 31, at 122–23.

¹⁰⁷ *Id.* at 122.

¹⁰⁸ *United States v. Kozminksi*, 487 U.S. 931, 934 (1988).

¹⁰⁹ *Id.* at 935.

¹¹⁰ *Id.*

attempted to leave several times but other employees of the farm brought them back and told the men not to leave again.¹¹¹

The Government did not rely solely on the use of physical force to argue that involuntary servitude had taken place, instead pointing to other coercive measures such as the denial of pay, substandard living conditions, and social isolation.¹¹² Yet the Court adopted an extremely narrow reading of the Thirteenth Amendment, holding that involuntary servitude was labor enforced by the use or threatened use of physical or legal coercion.¹¹³ Labor forced by other means, such as psychological coercion, did not count.¹¹⁴ Justice O'Connor's rationale for such a narrow holding was that the Thirteenth Amendment was intended to prohibit only forms of compulsory labor akin to African slavery as it existed in the United States antebellum.¹¹⁵

Given this precedent and the current makeup of the Court, it seems unlikely that it would find that the enforcement of arbitration agreements in employment contracts constitutes involuntary servitude. In *Kozminksi*, the Court was unwilling to accept the argument that involuntary servitude could exist when the "victim" felt that there was no tolerable alternative but to submit to the conditions imposed on him or that he had been deprived of the opportunity to make a rational choice.¹¹⁶ This is exactly the type of coercion that employees are faced with when giving away their right to a judicial forum and collective action. If the Court was unwilling to call such coercion involuntary servitude in the context of forcing farm labor on the intellectually disabled, the prospect of it finding involuntary servitude in "bargained-for" employment contracts is dim.

II. THE SUPREME COURT HAS OVERWHELMINGLY FAVORED THE ENFORCEMENT OF ARBITRATION AGREEMENTS TO THE DETRIMENT OF EMPLOYEES' STATUTORY RIGHTS

The Supreme Court's recent jurisprudence has shown a strong preference for arbitration over litigating in court.¹¹⁷ The preference toward arbitration in the employment context can be analyzed via a line of major cases beginning with *Gilmer v. Interstate/Johnson Lane Corp.*¹¹⁸ and continuing through *Epic Systems*.¹¹⁹ To understand these cases, however, one must first understand the

¹¹¹ *Id.*

¹¹² *Id.* at 936.

¹¹³ *Id.* at 944.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 942.

¹¹⁶ Kenneth T. Koonce Jr., *United States v. Kozminksi: On the Threshold of Involuntary Servitude*, 16 PEPP. L. REV. 689, 701 (1989).

¹¹⁷ See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (Holding that Congress intended a "liberal federal policy favoring arbitration agreements.").

¹¹⁸ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

¹¹⁹ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

history of the Federal Arbitration Act and the Court's pre-*Gilmer* arbitration decisions.

Before the enactment of the FAA, courts rarely enforced pre-dispute arbitration agreements.¹²⁰ Merchants, fed up with judicial refusal to enforce these agreements, sought to enact a law that would remedy the issue.¹²¹ In 1922, the American Bar Association's Committee on Commerce, Trade, and Commercial Law introduced what would ultimately become the FAA to Congress.¹²² Although the FAA passed unanimously in the House and Senate, at least one Senator expressed concerns about forced arbitration agreements:

The trouble about the matter is that a great many of these contracts that are entered into are really not voluntar[y] things at all. . . . A man says "These are our terms. All right, take it or leave it." Well, there is nothing for the man to do except sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.¹²³

These concerns largely went unheeded. Section 2 of the FAA states that "an agreement in writing to submit to arbitration an existing controversy arising out of" a contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."¹²⁴ If a party fails or refuses to abide by the terms of the arbitration agreement, Section 4 authorizes courts to issue orders compelling arbitration.¹²⁵

The enforceability of an agreement to arbitrate a customer's statutory claims came before the Court in the 1953 case of *Wilko v. Swan*.¹²⁶ The arbitration provision in controversy required the customer of a securities firm to waive his rights under Section 14 of the Securities Act of 1933 ("Securities Act").¹²⁷ The Court held that the customer's right to select the judicial forum cannot be waived under Section 14.¹²⁸ The Court was also concerned that arbitration would weaken the effectiveness of the Securities Act because the statute would be applied by arbitrators who might not be well-versed in the law, who do not explain their reasoning, and who do not produce a complete record of the proceedings.¹²⁹ The Court adhered to this precedent for at least

¹²⁰ Ronald Turner, *The FAA, the NLRA, and Epic Systems' Epic Fail*, 98 TEX. L. REV. ONLINE 17, 19 (2019).

¹²¹ *Id.*

¹²² *Id.*

¹²³ See *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing Before the Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 1, 9 (1923) (statement of Sen. Walsh).

¹²⁴ 9 U.S.C. § 2.

¹²⁵ 9 U.S.C. § 4.

¹²⁶ *Wilko v. Swan*, 346 U.S. 427, 430 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

¹²⁷ *Id.*; Securities Act of 1933, 15 U.S.C. § 77a *et seq.*

¹²⁸ *Wilko*, 346 U.S. at 435.

¹²⁹ *Id.* at 436.

three years, again noting the shortcomings of arbitration in *Bernhardt v. Polygraphic Co. of America* which included: no right to a jury trial, the rules of evidence not applying, arbitrators not knowing the substantive law and not having to justify their awards, and little to no opportunity for judicial review.¹³⁰

The Burger Court of the 1980s saw arbitration in an entirely different way. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Court read into Section 2 of the FAA a “liberal federal policy favoring arbitration,” instructing courts to resolve arbitrable issues in favor of arbitration when the contract language was vague or ambiguous or when defenses to arbitration, such as waiver, were raised.¹³¹ In an antitrust case two years later, the Court held that while the intentions of the parties control the question of whether the parties consented to arbitration, those intentions should be construed generously in favor of binding the parties to arbitration.¹³² The Court was careful to note that a party did not give up all of its statutory rights by agreeing to arbitrate, but that it merely agreed to assert those statutory rights in an arbitral, rather than judicial, forum.¹³³ Painting a somewhat idyllic picture of arbitral proceedings, the Court opined that the parties were trading the procedures and opportunity for review of the courtroom for the “simplicity, informality, and expedition” of arbitration.¹³⁴

Wilko was finally overruled by the Court’s 1989 decision in *Rodriguez de Quijas v. Shearson/American Express, Inc.*¹³⁵ That case concerned an arbitration agreement in a customer agreement between an individual and a securities broker.¹³⁶ The Court found that the arbitration agreement was enforceable and that the customer had to submit his claims of federal securities violations to arbitration.¹³⁷ In so doing, the Court held that *Wilko* was incorrectly decided and inconsistent with the prevailing construction of federal statutes governing arbitration agreements.¹³⁸

With a preference for arbitration of statutory claims now firmly enconced in Supreme Court jurisprudence, the Court turned its attention to arbitration agreements in employment contracts in *Gilmer v. Interstate/Johnson Lane Corp.*¹³⁹ *Gilmer*, a financial-services manager, was required to sign an arbitration agreement in his registration application with the New York

¹³⁰ *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 & n.4 (1956).

¹³¹ *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

¹³² *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

¹³³ *Id.* at 628.

¹³⁴ *Id.*

¹³⁵ *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

¹³⁶ *Id.* at 478.

¹³⁷ *Id.* at 483.

¹³⁸ *Id.* at 484.

¹³⁹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

Stock Exchange.¹⁴⁰ His employer, a brokerage firm, fired him at the age of sixty-two and Gilmer filed a charge with the Equal Employment Opportunity Commission.¹⁴¹ Gilmer then sued in federal district court under the Age Discrimination in Employment Act ("ADEA") and his employer moved to compel arbitration.¹⁴² Gilmer brought up several concerns with arbitration: biased arbitrators, limited discovery, no issuance of written opinions which stunts the development of the law, and unequal bargaining power between employers and employees.¹⁴³

The Court was not persuaded by any of Gilmer's arguments, holding that arbitration is an appropriate forum for resolving ADEA claims because nothing in the text or history of the ADEA expressly excludes arbitration.¹⁴⁴ Generally speaking, parties should be held to arbitration agreements unless Congress itself intended to preclude a waiver of judicial remedy for statutory rights.¹⁴⁵ Regarding Gilmer's argument about unequal bargaining power, Justice White wrote that "[m]ere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."¹⁴⁶ Justice Stevens dissented, arguing for a liberal construction of the FAA's Section 1 provision that "[n]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," thus absolving Gilmer of the requirement to arbitrate.¹⁴⁷

The "contracts of employment" issue resurfaced in *Circuit City Stores, Inc. v. Adams*, in which the Court held that Section 1 only exempts transportation workers from the reach of the FAA.¹⁴⁸ As a condition of employment with Circuit City, Adams had signed an employment application that included a provision that he would resolve all "claims, disputes, or controversies" exclusively through binding arbitration.¹⁴⁹ After two years on the job, Adams filed an employment-discrimination lawsuit in state court.¹⁵⁰ Circuit City then filed suit in federal court, seeking to enjoin the state court action and compel arbitration.¹⁵¹

Adams argued that the phrase "workers engaged in foreign or interstate commerce" expressed the intent of Congress to exercise its full commerce

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 23–24.

¹⁴³ *Id.* at 30–33.

¹⁴⁴ *Id.* at 30–32.

¹⁴⁵ *Id.* at 26.

¹⁴⁶ *Id.* at 33.

¹⁴⁷ *Id.* at 36 (Stevens, J., dissenting) (quoting 9 U.S.C. § 1).

¹⁴⁸ *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

¹⁴⁹ *Id.* at 109–10.

¹⁵⁰ *Id.* at 110.

¹⁵¹ *Id.*

power and thus exclude all employment contracts from the FAA.¹⁵² The Court's 7-2 opinion, authored by Justice Kennedy, applied the *ejusdem generis* canon, meaning that "where general words follow specific words in statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."¹⁵³ Armed with this tool of statutory interpretation, the Court reasoned that construing the residual phrase "any other class of workers engaged in . . . commerce" to exclude all employment contracts "fails to give independent effect to the statute's enumeration of the specific categories of workers which precedes it."¹⁵⁴

In 2009, the Court considered arbitration clauses in the context of collective-bargaining agreements ("CBAs") in *14 Penn Plaza v. Pyett*.¹⁵⁵ Management reassigned unionized night watchmen to allegedly less desirable positions as night porters and cleaners.¹⁵⁶ Pursuant to their CBA, the watchmen submitted their claims to a grievance and arbitration procedure.¹⁵⁷ The union arbitrated the watchmen's seniority and overtime claims, ultimately without success.¹⁵⁸ The watchmen then sued in federal court alleging violations of the ADEA and local anti-discrimination laws and their employer moved to compel arbitration.¹⁵⁹

The district court denied the motion and the court of appeals affirmed, holding that under *Alexander v. Gardner-Denver Co.*,¹⁶⁰ courts could not compel arbitration because a CBA could not waive the covered workers' rights to a judicial forum.¹⁶¹ The Supreme Court reversed the Second Circuit, holding that an explicit mandatory-arbitration clause in a CBA is indeed enforceable.¹⁶² According to Justice Thomas, who wrote the majority opinion, negotiations between a union and an employer are just like other contract negotiations in that the union may agree to a mandatory arbitration clause in return for other concessions from the employer.¹⁶³ Therefore, the CBA's arbitration provision must be honored unless the ADEA itself requires a judicial forum.¹⁶⁴ But evidence suggests that Congress chose to allow arbitration of

¹⁵² *Id.* at 112–14 (quoting 9 U.S.C. § 1).

¹⁵³ *Id.* at 114–15 (quoting 2A N. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 47.17 (1991)).

¹⁵⁴ *Id.* at 114 (quoting 9 U.S.C. § 1).

¹⁵⁵ 514 Penn Plaza v. Pyett, 556 U.S. 247, 251 (2009).

¹⁵⁶ *Id.* at 252–53.

¹⁵⁷ *Id.* at 253.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 253–54.

¹⁶⁰ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

¹⁶¹ *14 Penn Plaza*, 556 U.S. at 254.

¹⁶² *Id.* at 274.

¹⁶³ *Id.* at 257.

¹⁶⁴ *Id.* at 258.

ADEA claims, a decision the Court should honor.¹⁶⁵ Justice Souter dissented, arguing that *Gardner-Denver* established a clear rule that while an individual may waive his own right to a judicial forum, his union may not waive that right for him.¹⁶⁶

In *AT&T Mobility LLC v. Concepcion*, the Court once again examined arbitration clauses in consumer contracts, considering a California judicial rule declaring arbitration clauses in adhesive consumer contracts unconscionable.¹⁶⁷ Concepcion entered into a cell phone-service contract with AT&T, which included an arbitration clause prohibiting class actions.¹⁶⁸ AT&T advertised that a free phone came with the cell phone service but charged Concepcion \$30.22 in sales tax.¹⁶⁹ Concepcion filed a complaint, which was later consolidated into a putative class action alleging that AT&T had engaged in false advertising and fraud.¹⁷⁰ AT&T moved to compel arbitration under the terms of the contract while Concepcion argued that the arbitration agreement was unconscionable and unlawfully exculpatory under California law.¹⁷¹ The district court ruled in favor of Concepcion and the Ninth Circuit affirmed.¹⁷²

Writing for the Court, Justice Scalia considered whether Section 2 of the FAA's savings clause comports with California's rule classifying most collective-action waivers in consumer contracts as unconscionable.¹⁷³ In holding that the California rule was not protected by the FAA's savings clause, the Court observed that "[a]lthough § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."¹⁷⁴ The Court went on to note the disadvantages of class arbitration compared to bilateral arbitration.¹⁷⁵ Class arbitration makes the process slower, more expensive, and more likely to generate confusion than a clear final judgment.¹⁷⁶ Bilateral arbitration, in contrast, is cheap, efficient, and fast, and has the advantage of choosing expert adjudicators to resolve specialized disputes.¹⁷⁷ At any rate, class arbitration is too risky for corporate defendants

¹⁶⁵ *Id.* at 260.

¹⁶⁶ *Id.* at 281 (Souter, J., dissenting).

¹⁶⁷ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336 (2011).

¹⁶⁸ *Id.* at 336.

¹⁶⁹ *Id.* at 337.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 337–38.

¹⁷² *Id.* at 338.

¹⁷³ *Id.* at 340.

¹⁷⁴ *Id.* at 343; *cf. Brewer v. Mo. Title Loans*, 364 S.W. 3d 486, 492–93 (Mo. 2012) (en banc) (holding that post-*Concepcion*, state courts can still apply state law defenses to the issue of contract formation and therefore deem arbitration agreements unconscionable and unenforceable).

¹⁷⁵ *Concepcion*, 563 U.S. at 348–50.

¹⁷⁶ *Id.* at 348.

¹⁷⁷ *Id.*

because there is too little discovery and no mechanism to correct errors with large amounts of money at stake.¹⁷⁸

In his dissent, Justice Breyer challenged the majority's distaste for class arbitration.¹⁷⁹ He noted that class proceedings have several advantages, namely that they entice attorneys to take small-dollar cases that would otherwise not be worth their time.¹⁸⁰ Justice Breyer also argued that California law is consistent with Section 2 of the FAA, as California law "falls directly within the scope of the Act's exception permitting courts to refuse to enforce arbitration agreements on grounds that exist 'for the revocation of *any* contract.'"¹⁸¹ Justice Breyer's point was that by failing to apply basic contract defenses to arbitration agreements, the Court elevated arbitration agreements over all other types of contracts.¹⁸²

III. *EPIC SYSTEMS* SIGNALS THE ZENITH OF THE COURT'S PRO-ARBITRATION DOCTRINE AND HIGHLIGHTS THE COURT'S IGNORANCE OF BASIC LABOR LAW PRINCIPLES

Before discussing *Epic Systems* and its impact on the workplace, it is important to examine a National Labor Relations Board ("NLRB") decision, *In re D.R. Horton, Inc.*¹⁸³ The Board found that a home-building company violated Section 7 of the NLRA by requiring employees to sign an MAA that prohibited them from filing joint, class, or collective claims in any forum, arbitral or judicial.¹⁸⁴ The Fifth Circuit rejected the Board's analysis, holding that arbitration agreements had to be enforced according to their terms.¹⁸⁵ This decision created a circuit split where the Second,¹⁸⁶ Fifth,¹⁸⁷ and Eighth¹⁸⁸ Circuits disagreed with the Board and enforced arbitration agreements with collective action waivers, while the Sixth¹⁸⁹ and Ninth¹⁹⁰ Circuits refused to enforce such provisions.

¹⁷⁸ *Id.* at 350.

¹⁷⁹ *Id.* at 357 (Breyer, J., dissenting).

¹⁸⁰ *Id.* at 365 (Breyer, J., dissenting).

¹⁸¹ *Id.* at 359 (Breyer, J., dissenting) (quoting 9 U.S.C. § 2).

¹⁸² *Id.* at 366 (Breyer, J., dissenting).

¹⁸³ *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012).

¹⁸⁴ *Id.* at 2277.

¹⁸⁵ *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 361 (5th Cir. 2013).

¹⁸⁶ *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 (2d Cir. 2013).

¹⁸⁷ *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1021 (5th Cir. 2015), *aff'd*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

¹⁸⁸ *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1054 (8th Cir. 2013).

¹⁸⁹ *NLRB v. Alt. Ent., Inc.*, 858 F.3d 393, 408 (6th Cir. 2017).

¹⁹⁰ *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 983 (9th Cir. 2016), *rev'd*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

This circuit split was resolved by *Epic Systems*. *Epic Systems* was a consolidation of three cases,¹⁹¹ all of which dealt with unpaid overtime and misclassification claims under the FLSA. Justice Gorsuch characterized the issue before the Court as a question of whether employees and employers could bind each other to individualized arbitration or whether employees should be able to bring class or collective actions regardless of any preexisting agreement between them and their employer.¹⁹² Justice Gorsuch found that this conflict sprung from conflict between the FAA and the NLRA: the former requiring arbitration agreements to be enforced according to their terms,¹⁹³ and the latter protecting the right to engage in concerted activities for mutual aid or protection.¹⁹⁴ Justice Gorsuch found that the FAA's saving clause did not save the respondents from their agreements to arbitrate.¹⁹⁵ Contract defenses like illegality and unconscionability did not apply to collective-action waivers because such defenses are outside the scope of the savings clause and interfere with the fundamental attributes of arbitration—namely by permitting any party to an arbitration to demand class proceedings.¹⁹⁶

In interpreting Section 7 of the NLRA, Justice Gorsuch, like Justice Kennedy in *Circuit City*, applied the *ejusdem generis* canon to construct a narrow reading of exactly what types of concerted activities were protected.¹⁹⁷ The general term “concerted activities” was limited by the specific terms before it, namely the right to self-organization and collective bargaining.¹⁹⁸ Thus, Justice Gorsuch stated that “other concerted activities” should only be read as things that employees “just do” for themselves as opposed to the “highly regulated, courtroom-bound ‘activities’ of class and joint litigation.”¹⁹⁹ Justice Gorsuch did not explain what he meant by “just do for themselves.” It is unclear how opting into a class action is not something you “just do” for yourself to recover lost wages. At any rate, Justice Gorsuch found no “textually sound reason” to give “concerted activities” a “radically different” meaning than the terms preceding it.²⁰⁰

Justice Gorsuch also found it unlikely that Section 7 would confer a right to class action because the NLRA was adopted in 1935, thirty-one years before

¹⁹¹ *Morris v. Ernst & Young LLP*, 834 F.3d 975 (9th Cir. 2016); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *aff'd*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *rev'd*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

¹⁹² *Epic Sys. Corp.*, 138 S. Ct. at 1619.

¹⁹³ 9 U.S.C. § 2.

¹⁹⁴ 29 U.S.C. § 157.

¹⁹⁵ *Epic Sys. Corp.*, 138 S. Ct. at 1622.

¹⁹⁶ *Id.* at 1622–23.

¹⁹⁷ *Id.* at 1625.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* (quoting *NLRB v. Alt. Ent., Inc.*, 858 F.3d 393, 414–15 (6th Cir. 2017) (Sutton, J., concurring in part and dissenting in part)).

²⁰⁰ *Id.*

Federal Rule of Civil Procedure 23 established the modern class action.²⁰¹ He acknowledged that group litigation did exist before the NLRA's enactment, but Section 7's failure to mention it is proof that the NLRA did not mean to confer a right to such procedures.²⁰²

Justice Gorsuch applied much of *Concepcion's* reasoning to defend the holding that the NLRA does not provide employees with a right to collective action that supersedes the FAA. Echoing Justice Scalia, Justice Gorsuch opined that collective arbitration is too formal, slows the process down, and increases costs.²⁰³ Ubiquitous class arbitration would destroy the virtues Congress originally saw in arbitration and transform it into something identical to the litigation it was meant to displace.²⁰⁴ What this analysis ignores is the fact that modern arbitration is no longer informal, speedy, simple, or cheap.²⁰⁵ Instead, it is very formal and resembles litigation in both procedure and cost.²⁰⁶ Modern arbitration practice is as equipped to handle class-wide arbitration as it is to handle individualized proceedings.²⁰⁷ At any rate, *Concepcion* dealt with adhesive consumer contracts, where a class would be composed of thousands of members.²⁰⁸ In the employment context, the class would be limited to employees of a single company. While the company may be large, the putative class members would at least have a defined relationship with the defendant which would, in theory, expedite certification.²⁰⁹

Justice Ginsburg wrote a vigorous dissent in which she disagreed with the majority's assertion that there was no contract defense to a collective-action waiver.²¹⁰ She argued that the employer-dictated collective-action waivers should be unenforceable due to illegality.²¹¹ The waivers required employees to surrender their NLRA Section 7 rights, as well as their right to bring a collective action under the FLSA.²¹² By giving such deference to "freedom of contract," the Court has reverted to *Lochner* Era thinking and has created a new type of yellow dog contract that employers can use to prevent employees from taking concerted action.²¹³

Justice Gorsuch was widely criticized for what many felt was a faulty reading of Section 7 of the NLRA.²¹⁴ An oft-repeated refrain was that Section

²⁰¹ *Id.* at 1624.

²⁰² *Id.* at 1625.

²⁰³ *Id.* at 1623.

²⁰⁴ *Id.*

²⁰⁵ Janowiak, *supra* note 5, at 143.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ AT&T Mobility LLC v. *Concepcion*, 563 U.S. 333, 350 (2011).

²⁰⁹ Janowiak, *supra* note 5, at 143.

²¹⁰ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1633 (2018) (Ginsburg, J., dissenting).

²¹¹ *Id.* at 1641 (Ginsburg, J., dissenting).

²¹² *Id.*

²¹³ *Id.* at 1648–49 (Ginsburg, J., dissenting).

²¹⁴ *See, e.g., Turner, supra* note 120, at 19.

7 collective employee action encompasses far more than just unionization and collective bargaining.²¹⁵ Many labor law scholars assumed that employee class actions were the very definition of concerted activities carried out for the mutual benefit and protection of employees.²¹⁶ After all, the NLRA was intended to address “[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract.”²¹⁷ It seems that Justice Gorsuch ignored the Court’s prior holding in *Eastex v. NLRB* that Section 7 protects concerted activities for the broader purpose of mutual aid or protection as well as the narrower purposes of self-organizing and collective bargaining.²¹⁸

Epic Systems was widely seen as a major victory for employers, with worker’s rights advocates claiming that the decision gave employers a free pass to break the law.²¹⁹ The largest effect will likely be on non-unionized workers. As of 2018, 53.9 percent of non-union employees were subject to mandatory arbitration agreements.²²⁰ Of those MAAs, 30 percent require class action waivers.²²¹ By effectively denying millions of Americans the ability to bring collective actions against their employers, employees are left with no choice but to try to prove their claims in individualized settings. This will be difficult, as most attorneys simply cannot afford to take, for example, a \$2,000 wage theft case. The cost of arbitrating is simply more than the recoverable sum. This leaves employees to represent themselves against corporate attorneys in front of an arbitrator who may well have a similar background as the defendant’s counsel and is probably familiar with counsel as they have arbitrated in front of him or her tens if not hundreds of times before.²²² It is an uphill battle for the individual employee. A battle that resembles the same loss of agency that peonage or being subject to a yellow dog contract entails.

IV. THE BEST WAY TO COMBAT THE COURT’S CAPACIOUS READING OF THE FAA IS THROUGH STATE AND LOCAL ACTION

It does not appear that the Supreme Court is going to reverse course on arbitration any time soon. The “liberal federal policy favoring arbitration” is firmly entrenched and the Court is unlikely to find any Thirteenth Amendment concerns with arbitration under *Kozminski*. Thus, it is important to

²¹⁵ Yelnosky, *supra* note 17, at 110.

²¹⁶ Lise Gelernter, *The Impact of Epic Systems in the Labor and Employment Context*, 2019 J. DISP. RESOL. 115, 121 (2019).

²¹⁷ 29 U.S.C. § 151.

²¹⁸ *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–68 (1978).

²¹⁹ Janowiak, *supra* note 5, at 146.

²²⁰ Colvin, *supra* note 4.

²²¹ Bickerman, *supra* note 6.

²²² For a nuanced discussion of this “repeat-player effect” in employment arbitration, see generally Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189 (1997).

think of other solutions to curb the implementation of employer-dictated MAAs and collective-action waivers. One solution with some intuitive appeal is collective bargaining. After all, public support for unions in the United States is at a fifty-seven year high.²²³ Another solution could come via legislation passed in Congress or, more likely, state legislatures. Finally, state statutory schemes like California's Private Attorneys General Act ("PAGA") may be the most effective way to counter the Supreme Court's arbitration-friendly holdings.

A. *Collective Bargaining*

One may think that unions would be reluctant to give away their right to collective actions. This may be true in some cases, but the Supreme Court has held that unions can waive their members' right to a judicial forum for some statutory claims.²²⁴ *Epic Systems* likely does not present a very good organizing opportunity anyway. First, it would be difficult for unions to figure out where workers have felt the impact of class action waivers.²²⁵ Second, it is difficult to explain on a handbill why MAAs and collective-action waivers diminish workers' rights and why it would be better for workers to have union representation in a grievance-arbitration system.²²⁶

B. *Congressional and State Action*

Another solution is congressional action. Congress could do what the Court cannot and pass legislation saying that binding arbitration agreements cannot be a condition of employment. Congress could also pass legislation making worker protection statutes (Title VII, ADEA, FLSA, etc.) non-waivable. It could revisit the contract of employment exception in Section 1 of the FAA and give it a broader reading to hold that all contracts of employment in interstate commerce are exempt. Congress could also establish a mechanism for judicial review of arbitration decisions. The potential issue with these solutions is Congress's struggle to pass legislation, due in large part to the Senate filibuster which stymies most major legislation.²²⁷

With meaningful congressional action unlikely, state action may be a more effective way of giving workers a way to vindicate their rights. At least thirty states have their own versions of the Thirteenth Amendment or similar

²²³ Jaclyn Diaz, *Support for Labor Unions in the U.S Is at a 57-Year High*, NPR (Aug. 31, 2022, 5:30 AM), <https://www.npr.org/2022/08/31/1120111276/labor-union-support-in-us> [<https://perma.cc/47XE-93FR>].

²²⁴ 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 274 (2009).

²²⁵ Gelernter, *supra* note 216, at 118.

²²⁶ *Id.*

²²⁷ Alex Tausanovitch & Sam Berger, *The Impact of the Filibuster on Federal Policymaking*, CTR. FOR AM. PROGRESS (Dec. 5, 2019), <https://www.americanprogress.org/article/impact-filibuster-federal-policymaking/> [<https://perma.cc/ZV6Y-NL4H>].

provisions prohibiting involuntary servitude written into their constitutions and criminal codes.²²⁸ Nevada's Constitution is representative of most states: "Neither Slavery nor involuntary servitude unless for the punishment of crimes shall ever be tolerated in this State."²²⁹ While this provision is unarguably a good thing to have in a state constitution, the issue is that a definition for involuntary servitude is not provided. Worse, there are very few Nevada cases in which the Thirteenth Amendment or involuntary servitude are litigated.

There is, however, one recent federal case in the District of Nevada that examined the Thirteenth Amendment. In *Chehade Refai v. Lazaro*, a German citizen (Chehade) was detained at an international airport after being mistakenly placed on a terrorism watchlist.²³⁰ He was interrogated, strip-searched, placed in a cell with no heat, bed, or blankets, and denied his heart medication.²³¹ At one point, he was also asked to spy for the U.S. government and was told that his ability to obtain an entry visa was conditioned on his cooperation.²³² Chehade claimed that this amounted to involuntary servitude in violation of the Thirteenth Amendment.²³³ The U.S. District Court for the District of Nevada held that there was no involuntary servitude because Chehade never commenced spying for the United States.²³⁴ The court's rationale was that when the employee has a choice, there is no involuntary servitude, even if the choice is painful.²³⁵ Given this logic, it seems that the District of Nevada would not find a lack of consent in employees signing MAAs, as that seems like more of a choice than choosing between being a spy and being denied entry into a country. One might assume that a state court would follow this lead and hold similarly given the opportunity.

Hawaii on the other hand, has passed a statute that may work in favor of employees. The statute reads, "Nothing in this chapter shall be construed to require an individual employee to render labor or service without the individual employee's consent, nor shall anything in this chapter be construed to make the quitting of the individual employee's labor or service by an individual employee an illegal act."²³⁶ Hawaii's statute seems to acknowledge the intuitive notion that lack of consent is an element of involuntary servitude. This

²²⁸ *Survey Report for "Involuntary Servitude"*, WESTLAW, [https://1.next.westlaw.com/v1/jurisdictionalSuveys/bac4baa50e6b41888be9a064fdb6b17b?transitionType=CategoryPage-Item&contextData=\(sc.Default\)&originationContext=Builder](https://1.next.westlaw.com/v1/jurisdictionalSuveys/bac4baa50e6b41888be9a064fdb6b17b?transitionType=CategoryPage-Item&contextData=(sc.Default)&originationContext=Builder) [<https://perma.cc/EM8U-U5S8>].

²²⁹ NEV. CONST. art. I, § 17.

²³⁰ *Chehade Refai v. Lazaro*, 614 F. Supp. 2d 1103, 1108–10 (2009).

²³¹ *Id.* at 1108–09.

²³² *Id.* at 1119.

²³³ *Id.* at 1117.

²³⁴ *Id.*

²³⁵ *Id.* at 1119.

²³⁶ HAW. REV. STAT. § 381-12.

squares with one of Professor VanderVelde's elements of modern slavery: no right to bring a legal action, sign a contract, or control one's property.²³⁷

Hawaii's law would have even more force if a case was litigated in which an employment contract was signed without the employee's consent. A case like this could define consent whether it be because of a language barrier, no ability to ask human resources what was being signed, no ability to have legal counsel present, language that no layperson could understand, or the simple fact that the choice between signing an MAA and not working is no choice at all. Such cases could redefine what consent means and allow a state like Hawaii to be a leader in establishing that employees do not actually consent to mandatory arbitration agreements and collective action waivers even when they do sign them. Hawaii's lead could compel other states to enact statutes or amend their constitutions to say that lack of consent to a contract equals involuntary servitude. States could also enact statutes that simply state that MAAs and collective-action waivers are unenforceable on public-policy grounds—though the Supreme Court might find that such laws are preempted by the FAA.

C. *Private Attorneys General Acts*

Another way to possibly circumvent the Supreme Court's broad reading of the FAA is state statutory schemes that allow for non-waivable qui tam actions. The most notable example is PAGA in California.²³⁸ PAGA authorizes employees to sue for California Labor Code violations committed against them and other employees.²³⁹ PAGA essentially deputizes workers to sue for penalties on behalf of the state. In so doing, it enables employees to recover substantial penalties that would not otherwise be available.²⁴⁰ However, PAGA requires that 75 percent of recovered civil penalties go to the state, with all employees in the action splitting the remaining 25 percent.²⁴¹

Since PAGA was enacted in 2004, it seemed settled law that plaintiffs could not bring individual PAGA claims, but that they must sue on behalf of all affected employees.²⁴² Unfortunately, in *Viking River Cruises, Inc. v. Moriana*, the Court held that the FAA preempted PAGA insofar as PAGA precluded the division of PAGA actions into individual and non-individual

²³⁷ *Aspirations*, *supra* note 31, at 876–77.

²³⁸ CAL. LAB. CODE § 2698 *et seq.*

²³⁹ Aaron Blumenthal, *Why Justices' PAGA Ruling May Not Be Real Win for Cos.*, LAW360 (July 12, 2022, 6:26 PM), <https://www.law360.com/articles/1509801/why-justice-s-paga-ruling-may-not-be-real-win-for-cos> [<https://perma.cc/7RTA-NQB7>].

²⁴⁰ *Id.*

²⁴¹ Robert Iafolla & Erin Mulvaney, *Justices' Arbitration Ruling Allows California Law Survival*, BLOOMBERG L. (June 15, 2022, 5:57 PM), <https://news.bloomberglaw.com/us-law-week/justices-partially-block-california-law-used-to-avoid-arbitration> [<https://perma.cc/73RS-YPQ4>].

²⁴² Blumenthal, *supra* note 239.

claims through an agreement to arbitrate.²⁴³ The Plaintiff had signed an employment contract that contained an MAA and collective action waiver.²⁴⁴ After her employment ended, she filed a PAGA action alleging a Labor Code violation along with other violations sustained by other employees.²⁴⁵ Writing for the Court, Justice Alito noted that the Court's FAA precedent treated bilateral arbitration as the ideal form of arbitration and was therefore protected against state laws that disfavored bilateral arbitration.²⁴⁶ Since a PAGA suit is essentially a representative action in which an aggrieved employee sues as an agent or proxy of the state, it discriminates against arbitration in violation of the FAA.²⁴⁷ PAGA imposed class arbitration upon unwilling parties, which is at odds with arbitration's traditional form and thus inconsistent with the FAA.²⁴⁸

Despite this blow to the "collective action" attribute of PAGA, the Court did not strike down PAGA altogether. The Court held that pre-dispute waivers of *representative* PAGA claims do not violate the FAA.²⁴⁹ Wholesale waivers of PAGA claims are not allowed, however.²⁵⁰ PAGA lives to see another day, although in a very different form.²⁵¹

While the Court's holding in *Viking River* may initially appear to be a win for employers, plaintiffs have found some silver linings. While companies will face less exposure to PAGA court cases, determined plaintiff's attorneys can still pursue individualized arbitration on a mass scale, filing hundreds, even thousands, of claims for unpaid wages against a single employer. This tactic is known as mass arbitration and means that employers will owe massive amounts of arbitration fees, as arbitrators are paid by the hour.²⁵² This pressure, in turn, encourages companies to settle to avoid paying all the fees.²⁵³

Given PAGA's survival, it could be a good model for other states to follow. There is also room to improve PAGA. States looking to follow

²⁴³ *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1911 (2022).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 1912.

²⁴⁷ *Id.* at 1916–17.

²⁴⁸ *Id.* at 1918.

²⁴⁹ *Id.* at 1924–25.

²⁵⁰ *Id.*

²⁵¹ Justice Sotomayor, although joining the Court's opinion in full, emphasized that state courts have the last word in determining whether a PAGA plaintiff still has statutory standing to litigate her non-individual claims once her individual claims have been committed to arbitration. *Id.* at 1925–26 (Sotomayor, J., concurring). The California Supreme Court subsequently held that "where a plaintiff has filed a PAGA action comprised of individual and non-individual claims, an order compelling arbitration of individual claims does not strip the plaintiff of standing to litigate the non-individual claims in court." *Adolph v. Uber Techs., Inc.*, 532 P.3d 682, 692 (Cal. 2023).

²⁵² J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1340–41 (2022).

²⁵³ Blumenthal, *supra* note 239.

California's lead could add elements to the California scheme that allows workers to vindicate their rights in more meaningful ways. For example, PAGA does not allow for injunctive relief.²⁵⁴ Additionally, PAGA does not allow for the recovery of lost wages.²⁵⁵ Rather, plaintiffs split the 25 percent of the penalty that does not go to the state.²⁵⁶ This is usually a very small sum, especially in the gig economy/rideshare employee misclassification cases where the class is very large and the settlement is proportionally small.²⁵⁷ While the penalties may look huge, 25 percent of the penalty spread across thousands of workers makes for very small slices of the pie. One way for other states to solve this problem is by setting up a restitution fund for misclassified workers, despite courts' philosophical opposition.²⁵⁸

In states that lack the political will to enact PAGA-like statutes, cities could pass their own PAGA-like laws. This is a particularly useful solution for blue cities in red or purple states. Las Vegas would be a good example of such a city where a local PAGA scheme might work. While most resort and casino workers on the Las Vegas Strip belong to unions, there are some non-unionized casinos whose workers could certainly benefit from a PAGA-type scheme.²⁵⁹

The main concern with other states enacting PAGA schemes is potential Supreme Court review. While *Viking River* kept PAGA alive, the Court has indicated that *stare decisis* is "not an inexorable command."²⁶⁰ Justice Barrett's concurrence in *Viking River* noted that she only agreed with Part III of the opinion, which reversed the holding in *Iskanian v. CLS Transportation Los Angeles, LLC*,²⁶¹ a case that upheld PAGA's claim-joinder mechanism.²⁶² If Justice Barrett were to write the opinion in a future case challenging a PAGA-

²⁵⁴ Jennifer Kramer, *Why PAGA Still Matters*, PLAINTIFF MAG. (Mar. 2023), <https://plaintiffmagazine.com/recent-issues/item/why-paga-still-matters> [<https://perma.cc/VZ94-UCU5>].

²⁵⁵ ZB, N.A. v. Superior Ct. of San Diego, 448 P.3d 239, 241 (Cal. 2019).

²⁵⁶ P. Dustin Bodaghi et al., *California Supreme Court Holds Plaintiffs with Arbitration Agreements Retain Standing to Pursue Non-Individual PAGA Claims in Court*, LITTLER (July 18, 2023), <https://www.littler.com/publication-press/publication/california-supreme-court-holds-plaintiffs-arbitration-agreements> [<https://perma.cc/497V-P93Y>].

²⁵⁷ See, e.g., Ord. Granting Plaintiffs' Motion for Final Approval of Class Action Settlement at 2, 5, James v. Uber Techs., Inc, No. 19-CV-06462-EMC (N.D. Cal. Aug. 3, 2022) (approving an \$8.4 million total settlement split amongst 1,329 class members).

²⁵⁸ See Huff v. Securitas Sec. Servs. USA, Inc., 23 Cal. App. 5th 745, 753 (2018) (holding that because the purpose of PAGA is to benefit the general public, restitution is not available to PAGA claimants).

²⁵⁹ See McKenna Ross, *Venetian, Palazzo Employees Have Chance to Unionize*, L.V. REV. J. (June 28, 2023, 5:27 PM), <https://www.reviewjournal.com/business/casinos-gaming/venetian-palazzo-employees-have-chance-to-unionize-2800519/> [<https://perma.cc/4YWF-Q46H>].

²⁶⁰ Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2237 (2022).

²⁶¹ Iskanian v. CLS Transp. L.A., 327 P.3d 129, 158 (Cal. 2014).

²⁶² Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1926 (2022) (Barrett, J., concurring).

like statute, it would be hard to say how she would decide on the overall legality of the statute.

CONCLUSION

Employers are likely to increase their use of MAAs and collective action waivers in the aftermath of *Epic Systems*. This trend is cause for concern considering that in 2019 alone, \$9.27 billion in wages were stolen from workers making less than thirteen dollars per hour and who were subject to MAAs.²⁶³ Statistics like these suggest that wage and hour violations are becoming the norm in the low-wage labor market. Individual employees do not have a lot of bargaining power against their employers. Given the prevalence of right-to-work laws and the probability that MAAs and collective action waivers do not present a good organizing opportunity, collective bargaining is likely not the answer. Rather, action should come at the state level. States can enact statutes that say that MAAs are unenforceable as a matter of public policy and that a contract is not valid without consent. States and cities can also follow California's lead and enact PAGA-like legislation, provided it is drafted in a way that does not violate the FAA. By taking these steps, states can combat these modern-day yellow dog contracts and can assure Thirteenth Amendment protections for their citizens.

²⁶³ Hugh Baran & Elisabeth Campbell, *Forced Arbitration Helped Employers Who Committed Wage Theft Pocket \$9.2 Billion in 2019 from Workers in Low-Paid Jobs*, NAT'L EMP. L. PROJECT, <https://s27147.pcdn.co/wp-content/uploads/Data-Brief-Forced-Arbitration-Wage-Theft-Losses-June-2021.pdf> [<https://perma.cc/S3AZ-ZWL4>] (June 2021).