

## Concerted Arbitration

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**ABSTRACT.** Companies have broad power to funnel employment disputes into individualized arbitration, thereby preventing employees from vindicating workplace rights in court. Recently, however, plaintiff-side lawyers discovered how to file thousands of individual arbitration claims simultaneously. Faced with this mass arbitration deluge, companies have shifted from encouraging arbitration to trying to thwart it. This Essay argues that mass arbitration is a concerted activity protected by the National Labor Relations Act and that many employer countermeasures therefore risk violating the statute. Even though, after *Epic Systems*, the NLRA no longer guarantees employees a right to bring class actions, it guarantees them a right to mass arbitration.

### INTRODUCTION

For decades, employers have sought to shift employment disputes out of the courts. Private arbitration, they claimed, offered speedier resolution, greater confidentiality, and the freedom to customize procedural rules.<sup>1</sup>

Labor advocates have pushed back. Despite the dismal odds of prevailing on employment-related claims in court,<sup>2</sup> arbitration is even less appealing to workers. Lower worker win rates and smaller awards mean that many employment claims are not worth pursuing in arbitration.<sup>3</sup> And unlike the unnamed class

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1. Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 165-66 (2015); Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 4.
  2. See Sean Captain, *Workers Win Only 1% of Federal Civil Rights Lawsuits at Trial*, FAST CO. (July 1, 2017), <https://www.fastcompany.com/40440310/employees-win-very-few-civil-rights-lawsuits> [<https://perma.cc/M9TE-AQJD>]; Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 556-57 (2001).
  3. See Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. 3, 10 (Apr. 6, 2018), <https://files.epi.org/pdf/144131.pdf> [<https://perma.cc/R4SD-9DU6>]; *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1647 (2018) (Ginsburg, J., dissenting).

members in class actions, workers who file arbitration claims must reveal their identities to their employers, opening themselves up to retaliation.<sup>4</sup>

By broadly interpreting the Federal Arbitration Act (FAA), the federal courts have made it increasingly difficult for workers to escape individualized arbitration proceedings.<sup>5</sup> Currently, most workers—including nearly two-thirds of low-wage workers—are subject to mandatory arbitration.<sup>6</sup>

But the tide has begun to turn. In the past few years, lawyers have discovered how to arbitrate disputes efficiently and on a massive scale. By leveraging new technology, novel solicitation methods, and arbitral forum rules that allow workers and consumers to file claims at little or no cost, plaintiff-side firms have inundated companies unaccustomed to dealing with more than a trickle of claims. Facing millions of dollars in upfront arbitration fees, companies are being pressured into settlements with thousands of workers who simultaneously file claims.<sup>7</sup>

The mass arbitration<sup>8</sup> deluge has sent companies backpedaling. In a stunning reversal, many are now seeking their day in court instead of arbitrating per

4. See *D. R. Horton, Inc.*, 357 N.L.R.B. 2277, 2279 & n.5 (2012).
5. *E.g.*, *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (holding that the Federal Arbitration Act (FAA) exempted only transportation workers, rather than all workers, from its terms); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (permitting employers to prohibit class arbitrations through arbitration waivers); *Epic Sys.*, 138 S. Ct. 1612 (permitting employers to prohibit class actions through arbitration waivers).
6. See 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 2 (June 2021), <https://www.nelp.org/publication/forced-arbitration-cost-workers-in-low-paid-jobs-9-2-billion-in-stolen-wages-in-2019> [<https://perma.cc/S6RD-ZKHY>]. This Essay uses “workers” as a blanket term and “employees” to refer to workers defined as employees under the common-law agency test, the current test for determining employment status under the National Labor Relations Act (NLRA). See *Supershuttle DFW, Inc.*, 367 N.L.R.B. No. 75, 2019 WL 342288 (Jan. 25, 2019); JON O. SHIMABUKURO, CONG. RSCH. SERV., R46756, *WORKER CLASSIFICATION: EMPLOYEE STATUS UNDER THE NATIONAL LABOR RELATIONS ACT, THE FAIR LABOR STANDARDS ACT, AND THE ABC TEST 2* (2021).
7. Michael Corkery & Jessica Silver-Greenberg, ‘Scared to Death’ by Arbitration: Companies Drowning in Their Own System, N.Y. TIMES (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/business/arbitration-overload.html> [<https://perma.cc/49E8-AKS6>].
8. “Mass arbitration” is the term most commonly applied to this phenomenon. See, e.g., J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. (forthcoming 2022), <https://ssrn.com/abstract=3575765> [<https://perma.cc/2HYQ-5ULH>]; Alison Frankel, *Mass Arbitration Ethics: Can One Firm Protect the Interests of Tens of Thousands of Clients?*, REUTERS (Dec. 3, 2019, 7:59 PM), <https://www.reuters.com/article/legal-us-otc-massarb/mass-arbitration-ethics-can-one-firm-protect-the-interests-of-tens-of-thousands-of-clients-idUSKBN1Y803N> [<https://perma.cc/AAB9-A6J2>]. Crucially, however, “mass” in this context does *not* mean class-based. See *infra* Section III.A. For this reason, some prefer to refer to “mass arbitration” as “mass individual arbitration.” See, e.g., Echo K.X. Wang, *More on Mass Individual Arbitration as an Alternative to Class Arbitration*, CPR SPEAKS (Feb. 15, 2019), <https://blog.cpradr.org/>

their own agreements.<sup>9</sup> Companies are resisting mass arbitration by refusing to pay required arbitration fees, pressuring workers into signing revised arbitration agreements, and alleging that claimants' counsel are violating ethical rules or otherwise acting in bad faith.<sup>10</sup>

This Essay argues that many employer countermeasures risk violating the National Labor Relations Act (NLRA).<sup>11</sup> The NLRA protects employees' right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."<sup>12</sup> Notwithstanding the NLRA's statutory protections for concerted activities, the Supreme Court held in *Epic Systems Corp. v. Lewis* that the FAA requires courts to enforce arbitration policies prohibiting class actions and class arbitrations.<sup>13</sup> But the rise of mass arbitration can give the NLRA's "concerted activities" provision a new application: though the provision may not protect the right to *class* arbitrate, it does protect the right to *mass* arbitrate.

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2019/02/15/more-on-mass-individual-arbitration-as-an-alternative-to-class-arbitration [https://perma.cc/K54R-QHWM].

9. See, e.g., Corkery & Silver-Greenberg, *supra* note 7; Sara Randazzo, *Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us*, WALL ST. J. (June 1, 2021), <https://www.wsj.com/articles/amazon-faced-75-000-arbitration-demands-now-it-says-fine-sue-us-11622547000> [https://perma.cc/VG7E-Z2QB].
10. See *infra* Part I; Section III.B. The prevalence of this behavior cannot be measured with precision, but the fact that several major law firms have published advice on how to avoid mass arbitrations indicates that companies view mass arbitration as a serious threat. See, e.g., Michael Holecek, *As Mass Arbitrations Proliferate, Companies Have Deployed Strategies for Detering and Defending Against Them*, GIBSON DUNN (May 24, 2021), <https://www.gibsondunn.com/wp-content/uploads/2021/05/as-mass-arbitrations-proliferate-companies-have-deployed-strategies-for-detering-and-defending-against-them.pdf> [https://perma.cc/A8YZ-ASYE]; Andrew Soukup, Ashley M. Simonsen & Kanu Song, Covington & Burling LLP, *A Closer Look: Avoiding a "Mass"-ive Arbitration Problem*, LEXOLOGY (Mar. 2, 2022), <https://www.lexology.com/library/detail.aspx?g=cbc4039b-d35f-4b24-912c-3c5b25c29fcf> [https://perma.cc/73T8-94XZ]; Michael E. McCarthy, Jeff E. Scott & Robert J. Herrington, *Stemming the Tide of Mass Arbitration*, GREENBERG TRAURIG (June 2021), [https://www.gtlaw.com/-/media/files/insights/alerts/2021/6/gt-advisory\\_stemming-the-tide-of-mass-arbitration.pdf](https://www.gtlaw.com/-/media/files/insights/alerts/2021/6/gt-advisory_stemming-the-tide-of-mass-arbitration.pdf) [https://perma.cc/4E38-2K8W].
11. Of course, not every employer countermeasure is illegal. For example, some companies engaged in mass arbitration have successfully disqualified claimants' counsel for potential conflicts of interest. E.g., Alison Frankel, *DQ from Facebook Class Action Shows Risk of Keller Lenkner's Model*, REUTERS (July 21, 2021, 4:34 PM EDT), <https://www.reuters.com/legal/litigation/dq-facebook-class-action-shows-risk-keller-lenknerns-model-2021-07-21> [https://perma.cc/5UUF-ZLSN]; Alison Frankel, *Law Firm for Uber Drivers in Mass Arbitration Is Bounced from Federal Court Case*, REUTERS (Jan. 10, 2019, 4:09 PM), <https://www.reuters.com/article/otc-uber-frankel-idUKKCN1P42OH> [https://perma.cc/E5C2-PFS2]. These actions do not violate the NLRA.
12. 29 U.S.C. § 157 (2018).
13. 138 S. Ct. 1612 (2018).

Part I of this Essay describes the development of arbitration in labor law and the recent emergence of mass arbitration. Part II draws on the NLRA's text, history, and surrounding doctrine to argue that the NLRA protects employees' right to engage in mass arbitration, and it explains how bringing mass arbitration claims under the NLRA would work in practice. Finally, Part III addresses potential objections.

## I. THE EMERGENCE OF MASS ARBITRATION

Arbitration is a method of alternative dispute resolution featuring a private, streamlined proceeding and arbitrators—typically one to three—instead of a judge.<sup>14</sup> The resulting decision binds both parties, with limited prospects for appeal.<sup>15</sup> The key federal statute governing arbitration is the Federal Arbitration Act of 1925, which provides that arbitration contracts “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>16</sup>

Proponents of arbitration characterize it as more economical, private, and flexible than litigation.<sup>17</sup> Disputes typically resolve in a matter of months rather than years, but the quicker pace is offset by fewer procedural protections.<sup>18</sup> Opponents argue that arbitration's initial aim—to provide a neutral, efficient forum for experienced parties of roughly equal bargaining power<sup>19</sup>—has morphed into an asymmetrical, opaque process imposed on weaker parties, one that strips courts of their constitutional power to redress injuries.<sup>20</sup> Over the past few

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14. JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON & HELEN HERSHKOFF, *CIVIL PROCEDURE* 1333 (12th ed. 2018); Stephen K. Huber, *The Role of Arbitrator: Conflicts of Interest*, 28 *FORDHAM URB. L.J.* 915, 920 n.24 (2001).
  15. See Sarath Sanga, *A New Strategy for Regulating Arbitration*, 113 *NW. U. L. REV.* 1121, 1145 (2019).
  16. 9 U.S.C. § 2 (2018).
  17. See FRIEDENTHAL ET AL., *supra* note 14, at 1327, 1335; Matthew A. Shapiro, *Distributing Civil Justice*, 109 *GEO. L.J.* 1473, 1504 & nn.121-24 (2021).
  18. *Six Key Differences Between Litigation and Arbitration*, LEXISNEXIS INSIGHTS (Feb. 22, 2021), <https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/six-key-differences-between-litigation-and-arbitration> [<https://perma.cc/E66Q-SKLP>]; Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 *OHIO ST. J. ON DISP. RESOL.* 843, 850-51 (2010); 81 *AM. JUR. TRIALS* § 214, Westlaw (database updated Apr. 2022); Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 *IND. L.J.* 425, 433-52 (1988).
  19. See Margaret M. Harding, *The Redefinition of Arbitration by Those with Superior Bargaining Power*, 1999 *UTAH L. REV.* 857.
  20. See, e.g., Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 *YALE L.J.* 2804, 2809-11 (2015).

decades, employers have imposed arbitration agreements with greater frequency and breadth.<sup>21</sup> The share of firms requiring employees to arbitrate their disputes shot up tenfold between 1991 and 2007 and has continued to grow since then.<sup>22</sup> Moreover, the diminished procedural protections and small potential awards at stake in individualized proceedings meant that few potential plaintiffs actually took advantage of arbitration.<sup>23</sup>

In an attempt to avoid mandatory individualized arbitration, some employees turned to the NLRA. Section 7 of the NLRA guarantees employees’ “right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>24</sup> For a time, employees successfully argued that “other concerted activities” should cover class and joint actions.<sup>25</sup> After all, a group action brought by employees against their employer—for example, an action collectively vindicating the right to overtime pay under the Fair Labor Standards Act (FLSA), or to work in a discrimination-free workplace under Title VII—could surely promote employees’ “mutual aid or protection.”<sup>26</sup>

But in *Epic Systems*, the Supreme Court held that employers’ right to enforce arbitration agreements under the FAA trumped employees’ right to engage in “other concerted activities” under the NLRA.<sup>27</sup> After *Epic Systems*, the NLRA no longer kept employers from forcing putative class actions into individualized arbitration proceedings.<sup>28</sup>

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21. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1644 (2018) (Ginsburg, J., dissenting).
  22. Resnik, *supra* note 20, at 2872. See generally Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL’Y INST. (Apr. 6, 2018), <https://files.epi.org/pdf/144131.pdf> [<https://perma.cc/HLL2-6RUB>] (documenting an increase in the share of workers subject to mandatory arbitration since 1991).
  23. See Resnik, *supra* note 20, at 2812-15.
  24. 29 U.S.C. § 157 (2018). Section 8 gives teeth to this guarantee by making it illegal for employers to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed” in section 7. *Id.* § 158.
  25. See *e.g.*, *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *rev’d*, 138 S. Ct. 1612; *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *rev’d sub nom. Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Murphy Oil USA, Inc.*, 361 N.L.R.B. 774 (2014), *enforcement denied*, 808 F.3d 1013 (5th Cir. 2015), *aff’d sub nom. Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).
  26. Brief of Respondents at 15-18, *Ernst & Young, LLP v. Morris*, 138 S. Ct. 1612 (2018) (No. 16-300); see 29 U.S.C. § 207 (FLSA overtime pay provision); 42 U.S.C. § 2000e-2(a) (2018) (Title VII antidiscrimination provision).
  27. 138 S. Ct. 1612.
  28. *Id.* The Court held the same for class arbitrations, a similar aggregate litigation tool, seven years earlier in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

But everything changed once a few advocates developed strategies to efficiently arbitrate individual claims on a massive scale.<sup>29</sup> In 2018, Teel Lidow founded FairShake, a website that allows consumers to quickly and cheaply file arbitration claims.<sup>30</sup> And file they did. Since 2018, FairShake has facilitated tens of thousands of claims, overwhelming companies accustomed to dealing with few, if any, arbitrations and a system that, in Lidow's words, "wasn't prepared" to handle the volume.<sup>31</sup>

One year later, the plaintiff-side law firm Keller Postman (then Keller Lenkner)<sup>32</sup> began to coordinate mass filings of worker-arbitration claims, focusing on gig workers at Uber, Lyft, and Postmates.<sup>33</sup> In May 2019, Keller Postman coordinated over 6,000 arbitration claims against DoorDash, 2,250 of which were filed in a single day.<sup>34</sup> DoorDash's initial bill for the 6,000 claims – that is, before the claims even went through the arbitration process – came to \$9 million.<sup>35</sup>

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29. Though many of the most active mass arbitration players are plaintiff-side lawyers, nonlawyer advocates have also coordinated mass filings of arbitration claims. See Judith Resnik, Stephanie Garlock & Annie J. Wang, *Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledge*, 24 LEWIS & CLARK L. REV. 611, 663 (2020).

30. *FairShake*, PITCHBOOK, <https://pitchbook.com/profiles/company/279616-78> [<https://perma.cc/9CMJ-WE62>].

31. Corkery & Silver-Greenberg, *supra* note 7; *FairShake Hiring Senior Software Engineer*, VENTURELOOP (Sept. 19, 2021), <https://www.ventureloop.com/ventureloop/job/1798344/fairshake/senior-software-engineer> [<https://perma.cc/Z8H4-54HM>].

32. The firm rebranded as Keller Postman in 2022. See Andrew Strickler, *'Mass Action' Firm Keller Lenkner Becomes Keller Postman*, LAW360 (Apr. 25, 2022, 4:54 PM EDT), <https://www.law360.com/articles/1486969> [<https://perma.cc/EJ3M-BWTC>].

33. Corkery & Silver-Greenberg, *supra* note 7; Alison Frankel, *Uber Tells Its Side of the Story in Mass Arbitration Fight with 12,500 Drivers*, REUTERS (Jan. 16, 2019, 2:42 PM), <https://www.reuters.com/article/legal-us-otc-uber-idINKCN1PA2PD> [<https://perma.cc/EZH3-WWMR>]; Frankel, *supra* note 8; Jon Steingart, *9th Circ. Says Postmates Can't Duck \$10M in Arbitration Fees*, LAW360 (Sept. 29, 2020, 1:06 PM EDT), <https://www.law360.com/articles/1314818/9th-circ-says-postmates-can-t-duck-10m-in-arbitration-fees> [<https://perma.cc/2A5L-KLBF>].

34. Corkery & Silver-Greenberg, *supra* note 7.

35. *Id.*

State-sanctioned arbitration predates the Founding Era,<sup>36</sup> and Congress passed the FAA nearly a century ago.<sup>37</sup> But mass arbitration is only four years old.<sup>38</sup> In the words of Destiny's Child, "Why the sudden change?"<sup>39</sup>

Two things were necessary to set the mass arbitration revolution in motion. First, the *Epic Systems* decision placed new pressure on plaintiff groups to find alternative channels for aggregate redress. After the Court held that employers could require employees to waive their right to engage in both class actions and class arbitrations,<sup>40</sup> plaintiff-side lawyers had to find another economical way to bring worker claims. Second, modern technology made the rise of mass arbitration possible. For consumer mass arbitrations, the importance of technology is obvious: startups like FairShake allow users to file arbitration claims themselves through an automated online system.<sup>41</sup> Technology is just as integral to non-consumer mass arbitrations. To recruit enough claimants for a mass arbitration to be cost effective, firms must rely heavily on social media and targeted internet advertising.<sup>42</sup>

What followed the mass arbitration revolution came as no surprise. Companies bombarded with mass arbitration claims tried to escape arbitration agreements by any means available: refusing to pay the required fees, forcing employees to sign updated arbitration agreements that make it more difficult to mass arbitrate, and seeking to disqualify opposing counsel or cast doubt on the legitimacy of their methods.<sup>43</sup> Ironically, it is now the claimants moving to compel arbitration – and the defendant companies trying to fight it.

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36. See Daniel Centner & Megan Ford, *A Brief History of Arbitration*, ABA (Sept. 19, 2019), [https://www.americanbar.org/groups/tort\\_trial\\_insurance\\_practice/publications/the\\_brief/2018-19/summer/a-brief-history-arbitration](https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2018-19/summer/a-brief-history-arbitration) [<https://perma.cc/Q566-STG3>].
37. See United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925). In 1947, the statute was "reenacted without any material change," and it is now commonly known as the Federal Arbitration Act. See Resnik, *supra* note 20, at 2836-37.
38. See Glover, *supra* note 8 (manuscript at 48).
39. DESTINY'S CHILD, *Say My Name, on THE WRITING'S ON THE WALL* (Columbia Records 1999).
40. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018) (class action); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (class arbitration).
41. Corkery & Silver-Greenberg, *supra* note 7; Scott Medintz, *How Consumers Are Using Mass Arbitration to Fight Amazon, Intuit, and Other Corporate Giants*, CONSUMER REPS. (Aug. 13, 2021), <https://www.consumerreports.org/contracts-arbitration/consumers-using-mass-arbitration-to-fight-corporate-giants-a8232980827> [<https://perma.cc/E42H-G8P7>].
42. See Patrick J. Bannon, Anthony S. Califano, Molly C. Mooney & John Ayers-Mann, *Is Arbitration the Answer: What About Mass Arbitration?*, SEYFARTH (Mar. 30, 2021), <https://www.seyfarth.com/news-insights/is-arbitration-the-answer-what-about-mass-arbitration.html> [<https://perma.cc/Z3NR-KCNB>].
43. *Id.*; Corkery & Silver-Greenberg, *supra* note 7; see *supra* note 10 and accompanying text.

So far, courts have not been particularly sympathetic to employers' sudden change of heart on arbitration. In the case against DoorDash, a district-court judge ordered the company to pay the applicable arbitration fees, notwithstanding DoorDash's plea for a class-action lawsuit instead.<sup>44</sup> The judge appeared to relish the irony, telling DoorDash's counsel:

You made the agreement. Your law firm and all the defense law firms have tried for 30 years to keep plaintiffs out of court in employment cases. And you've gotten a lot of success in the courts. After so finally somebody says: Okay, we'll take you to arbitration. And suddenly it's not in your interest any more. And now you're wiggling around trying to figure some way to squirm out of your own agreement. . . . [T]here is a lot of poetic justice here.<sup>45</sup>

A few months later, Keller Postman filed over 10,000 individual arbitration demands alleging state and federal wage-and-hour law violations against Postmates.<sup>46</sup> Postmates claimed the claimants' demands were in bad faith, questioned whether Keller Postman properly vetted the claims or could adequately represent so many claimants, and, like DoorDash, attempted to "short-circuit" the campaign by negotiating a class action.<sup>47</sup>

Corporations have engaged in similar evasive tactics in many other worker mass arbitrations.<sup>48</sup> Due to the novelty of mass arbitration, these countermeasures are still in the trial-and-error phase; defendants are throwing different arguments at the wall to see what sticks.<sup>49</sup> Even if many or all of these strategies ultimately fail, however, they needlessly draw out disputes, pressure claimants into lowball settlements, and deter the initiation of mass arbitration actions in future cases.

But claimants in employment mass arbitrations may hold a trump card. In the next Part, I argue that employers in these mass arbitrations are not just

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44. *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062, 1066-67 (N.D. Cal. 2020).

45. Transcript of Proceedings at 27, *Abernathy*, 438 F. Supp. 3d 1062 (No. 19-7545).

46. *See Postmates Inc. v. 10,356 Individuals*, No. 20-2783, 2021 WL 540155, at \*3 (C.D. Cal. Jan. 19, 2021).

47. Alison Frankel, *After Postmates Again Balks at Arbitration Fees, Workers Seek Contempt Order*, REUTERS (Dec. 2, 2019), <https://www.reuters.com/article/legal-us-otc-massarb/after-postmates-again-balks-at-arbitration-fees-workers-seek-contempt-order-idUSKBN1Y62E8> [<https://perma.cc/Y5UB-FD4D>].

48. *Id.*; Alison Frankel, *Beset by Arbitration Demands, Postmates Resorts to Class Action to Settle Couriers' Claims*, REUTERS (Nov. 19, 2019), <https://www.reuters.com/article/us-otc-massarb/beset-by-arbitration-demands-postmates-resorts-to-class-action-to-settle-couriers-claims-idUSKBN1XT2UV> [<https://perma.cc/A8VJ-XMVY>].

49. Bannon et al., *supra* note 42.



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obligated to honor the terms of their own agreements as a matter of contract law but are also prohibited from obstructing arbitration as a matter of labor law. Under the NLRA, employers may not retaliate against employees who join a mass arbitration or interfere with mass arbitrations—for instance, by requiring employees, as a condition of continued employment, to agree not to mass arbitrate.

### II. MASS ARBITRATION AS CONCERTED ACTIVITY

#### A. *Why Mass Arbitration Is a Concerted Activity*

The National Labor Relations Act of 1935 is the centerpiece of American labor law.<sup>50</sup> The National Labor Relations Board (NLRB), an independent federal agency, is responsible for administering and enforcing the NLRA.<sup>51</sup> The NLRB may investigate charges of unfair labor practices, order employers to cease unlawful practices, and impose remedies.<sup>52</sup> Section 7 of the NLRA guarantees employees’ right to engage in concerted activities for the purpose of mutual aid or protection, and section 8 forbids employers from interfering with, restraining, or coercing employees engaged in protected concerted activities.<sup>53</sup> Though the statute does not define the term “concerted activities,” courts and the NLRB have interpreted these activities to include participating in walkouts,<sup>54</sup> expressing grievances about company policy during meetings,<sup>55</sup> and signing petitions,<sup>56</sup> among other actions aimed at employees’ mutual aid or protection.<sup>57</sup>

*Epic Systems* held that the NLRA does not guarantee employees a right to bring class actions, just as *Concepcion* held the same for class arbitrations seven

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50. See *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969) (“To the extent that there exists today any relevant corpus of ‘national labor policy,’ it is in the law developed during the more than 30 years of administering our most comprehensive national labor scheme, the National Labor Relations Act.”); NICHOLAS S. FALCONE, *LABOR LAW* 245 (1962) (“The Wagner Act has been characterized justifiably as the worker’s Magna Charta.”).
  51. 51A C.J.S. *Labor Relations* § 689, Westlaw (database updated May 2022); Revision of Statement of Organization and Functions, 44 Fed. Reg. 34,215 (June 14, 1979).
  52. 29 U.S.C. § 160 (2018); 51A C.J.S. *Labor Relations*, *supra* note 51, §§ 821-822, 824-825.
  53. National Labor Relations Act, Pub. L. No. 74-198, §§ 7-8, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. §§ 157, 158).
  54. *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 15-17 (1962).
  55. *MCPC Inc. v. NLRB*, 813 F.3d 475, 484 (3d Cir. 2016) (citing cases).
  56. *Liberty Nat. Prods., Inc.*, 314 N.L.R.B. 630, 630 (1994).
  57. 29 U.S.C. § 157. See generally 2 GUIDE TO EMPLOYMENT LAW AND REGULATION § 17:69, Westlaw (June 2022 Update) (listing examples of concerted activity).

years prior.<sup>58</sup> But even after *Epic Systems*, the NLRA’s concerted-activity protections guarantee employees’ right to engage in mass arbitration.

At present, the First, Eighth, and Ninth Circuits are the only federal courts of appeals to address the meaning of “concerted activities” after *Epic Systems* in any detail.<sup>59</sup> Under the First Circuit’s approach, concerted activity includes activity “engaged in with or on the authority of other employees,” but it can also include individual action.<sup>60</sup> The activity need not be “specifically authorized by others.”<sup>61</sup> Instead, the “critical inquiry” is “whether the employee’s actions were in furtherance of a group concern.”<sup>62</sup> Similarly, the Eighth and Ninth Circuits consider whether “the employee intends or contemplates, as an end result, group activity which will also benefit some other employees.”<sup>63</sup>

Under either of these tests, mass arbitration qualifies as concerted activity. Each employee individually files an arbitration claim, but crucially, filing occurs in tandem with hundreds or thousands of fellow employees. The synchronized nature of the action benefits all employees and furthers their shared interest in obtaining relief by helping collectively pressure the employer to settle through the prospect of massive arbitration fees.<sup>64</sup> Mass arbitration also lowers per-claimant costs by pooling fees for discovery, research, and the attorneys themselves.<sup>65</sup> These tactics work precisely *because* employees can file en masse.<sup>66</sup>

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58. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

59. To the extent other circuits have weighed in, their views also accord with an understanding of mass arbitration as concerted activity. See, e.g., *Cap. Med. Ctr. v. NLRB*, 909 F.3d 427, 430 (D.C. Cir. 2018).

60. *NLRB v. Me. Coast Reg’l Health Facilities*, 999 F.3d 1, 9 (1st Cir. 2021).

61. *Id.*

62. *Id.*

63. *St. Paul Park Refin. Co. v. NLRB*, 929 F.3d 610, 616 (8th Cir. 2019) (brackets and internal quotation marks omitted); accord *Moreno v. UtiliQuest, LLC*, 29 F.4th 567, 576 (9th Cir. 2022) (“The term ‘concerted activity’ . . . embraces the activities of employees who have joined together in order to achieve common goals, but can also include actions of a single employee. . . . It is the backdrop of other group activity that transforms it into concerted action.” (brackets and internal quotation marks omitted)).

64. See Glover, *supra* note 8 (manuscript at 68).

65. See Telephone Interview with Joseph M. Sellers, Partner, Cohen Milstein (Nov. 8, 2021); Telephone Interview with Shannon Liss-Riordan, Partner, Lichten & Liss-Riordan, P.C. (Nov. 23, 2021).

66. See Corkery & Silver-Greenberg, *supra* note 7.

### B. Concerted Activity After *Epic Systems*

Although *Epic Systems* refused to guarantee employees' right to participate in class actions,<sup>67</sup> its reasoning supports recognizing *mass* arbitration as concerted activity protected by the NLRA. Indeed, interpreting mass arbitration as protected concerted activity aligns with all three *Epic Systems* opinions: Justice Gorsuch's majority opinion, Justice Thomas's concurrence, and Justice Ginsburg's dissent. The majority and concurring opinions represent versions of what this Essay terms the "FAA-priority approach," which construes the FAA broadly and the NLRA narrowly. Ginsburg's dissent, on the other hand, represents the "NLRA-priority approach," which favors a broad construction of the NLRA and a narrow construction of the FAA.

Though the Supreme Court has not yet addressed the status of mass arbitration, the three opinions in this landmark employment-law case collectively span the range of views on arbitration and concerted activity. Despite their differing approaches and conclusions about the scope of the FAA, the meaning of the NLRA, and the status of class actions, each opinion supports an interpretation of mass arbitration as concerted activity.

#### 1. The FAA-Priority Approach

Adherents of the FAA-priority approach read the FAA to establish a strong presumption that courts must enforce arbitration agreements according to their terms.<sup>68</sup> When it comes to arbitration agreements containing class-and-collective-action waivers, the FAA-priority approach does not interpret section 7 of the NLRA to override this strong presumption in favor of arbitration.<sup>69</sup> Both Justice Gorsuch and Justice Thomas followed this approach in *Epic Systems*, with Justice Thomas advancing an even more expansive interpretation of the FAA.<sup>70</sup> Their views are therefore instructive in determining how mass arbitration would fare under the FAA-priority approach.

Writing for the majority in *Epic Systems*, Justice Gorsuch emphasized prior Court decisions that interpreted the FAA expansively. At the same time, Justice Gorsuch minimized the scope of the NLRA. For the FAA, his opinion looked to prior cases interpreting statutes where the Court had enforced arbitration agreements according to the FAA, notwithstanding language in each statute

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67. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018).

68. See, e.g., *id.* at 1619, 1623.

69. *Id.* at 1623-30.

70. See *infra* notes 87-91.

suggesting that plaintiffs could bring class actions.<sup>71</sup> For the NLRA, Justice Gorsuch took the opposite tack by insisting that the Court's section 7 cases "have usually involved just what you would expect from the statute's plain language: efforts by employees related to organizing and collective bargaining in the workplace, not the treatment of class or collective actions in court or arbitration proceedings."<sup>72</sup>

Though the *Epic Systems* majority opinion is widely regarded as an antilabor decision,<sup>73</sup> it contains a silver lining for employees. Class actions and class arbitrations may not be protected from the FAA's strictures as "concerted activities," but mass arbitration is *doubly* protected under the FAA-priority approach of *Epic Systems*. The FAA instructs courts to enforce the outcomes of mass arbitration and respect their legitimacy, and the NLRA prohibits employers from retaliating against or interfering with employees who engage in mass arbitration.

Turning first to the FAA: as described above, *Epic Systems*'s central holding is that the NLRA fails to override the FAA's strong presumption in favor of arbitration.<sup>74</sup> "Congress," Justice Gorsuch wrote, "has instructed federal courts to enforce arbitration agreements according to their terms" through the FAA regardless of policy considerations, such as the relative merits of arbitration versus alternative methods of dispute resolution.<sup>75</sup> Indeed, several prior Supreme Court cases – cited by the *Epic Systems* majority – followed the FAA-priority approach to hold that the FAA protects employers' right to arbitrate.<sup>76</sup> It would be inconsistent with this position to deny employees that same right through mass arbitration. After all, the FAA has no provision barring enforcement of an arbitration agreement because of the actions of third-party claimants.<sup>77</sup> If individualized arbitration claims are recognized under the FAA, so are individualized arbitration claims filed alongside other individualized arbitration claims.

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71. See *Epic Sys.*, 138 S. Ct. at 1628.

72. *Id.*

73. See, e.g., Terri Gerstein & Sharon Block, Opinion, *Supreme Court Deals a Blow to Workers*, N.Y. TIMES (May 21, 2018), <https://www.nytimes.com/2018/05/21/opinion/supreme-court-arbitration-forced.html> [<https://perma.cc/PJP4-8ZRW>]; David Freeman Engstrom, *An Epic Loss for Workers*, LEGAL AGGREGATE (May 27, 2018), <https://law.stanford.edu/2018/05/27/an-epic-loss-for-workers> [<https://perma.cc/S3PV-24ZH>].

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

75. *Id.* at 1619; see *id.* at 1621, 1632.

76. *Id.* at 1627-28 (first citing *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); then citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); and then citing *Compu-Credit Corp. v. Greenwood*, 565 U.S. 95 (2012)).

77. Section 5(c) of the FAA permits an aggrieved third party to seek vacatur of an arbitration award, but this provision applies only to agency proceedings, not private employment arbitrations. See 9 U.S.C. § 10(c) (2018).

Importantly, mass arbitration is not class action or joint action. Since the 1990s, federal courts have raised the bar for obtaining relief through aggregate litigation.<sup>78</sup> By holding that class-action waivers in arbitration agreements were enforceable, *Epic Systems* is no exception to this trend. Justice Gorsuch characterized class and joint litigation as “highly regulated, courtroom-bound ‘activities,’” unlike protected concerted activities that “employees ‘just do’ for themselves.”<sup>79</sup> If a company wants to make its employees sign class-action waivers or arbitrate their disputes out of court, the NLRA cannot stop the company from doing so.

Unlike class or joint litigation, mass arbitration qualifies as concerted activity under this reading of the NLRA. In mass arbitration, employees file *individual* claims as part of a *concerted* push by the same set of lawyers. Arbitration is neither “highly regulated” – indeed, its appeal stems in part from its *lack* of procedural regulations – nor “courtroom-bound.”<sup>80</sup> One court of appeals opinion is especially illuminating in this respect: Judge Ikuta’s dissent from the later-overturned Ninth Circuit decision that had granted relief to one set of the *Epic Systems* plaintiffs.<sup>81</sup> Judge Ikuta’s argument against granting relief, characteristic of the FAA-priority approach, prefigured the *Epic Systems* decision itself. Indeed, Justice Gorsuch cited her dissent favorably, twice, in the *Epic Systems* majority opinion.<sup>82</sup> The examples that Judge Ikuta gave for what *would* constitute concerted legal activity are therefore instructive. Section 7’s “other concerted activities,” she wrote, “could include joint legal strategies, shared arguments and resources, [or] hiring the same attorneys.”<sup>83</sup>

Joining a mass arbitration falls under all three of these categories. Mass arbitration claimants share the same legal strategy: arbitrating at scale. Doing so enables individual actions to go from cost-prohibitive to economically viable. Moreover, mass arbitration claimants reduce costs by pooling expenses, such as expert witness fees and discovery costs.<sup>84</sup> Mass arbitration claimants can also

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78. Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 739-823 (2013); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 385-88 (2005).

79. *Epic Sys.*, 138 S. Ct. at 1625 (quoting *NLRB v. Alt. Ent., Inc.*, 858 F.3d 393, 414-15 (6th Cir. 2017) (Sutton, J., concurring in part and dissenting in part)).

80. See *supra* notes 14-18 and accompanying text.

81. *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 991-99 (9th Cir. 2016) (Ikuta, J., dissenting), *rev’d sub nom. Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018). *Morris* was one of three cases the Supreme Court consolidated for decision in *Epic Systems*. See *Epic Sys.*, 138 S. Ct. at 1619-20.

82. See *Epic Sys.*, 138 S. Ct. at 1620, 1622.

83. *Morris*, 834 F.3d at 995 (Ikuta, J., dissenting).

84. See Glover, *supra* note 8 (manuscript at 85).

aggregate the data of individual claimants, which is crucial for prevailing in pattern-or-practice discrimination suits.<sup>85</sup> Finally, sharing attorneys facilitates coordination of claims, lowers costs, and enables greater bargaining leverage.<sup>86</sup>

Mass arbitration fares even better under a more robust conception of the FAA, as seen in Justice Thomas's *Epic Systems* concurrence.<sup>87</sup> Though Justice Thomas did not directly address the NLRA, his approach to the FAA would make it even more difficult for employers to attack the legitimacy of mass arbitration. Apart from section 7 of the NLRA, another provision at issue in *Epic Systems* was the FAA's saving clause, which provides that arbitration contracts "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*"<sup>88</sup> On both of the Justices' readings, employers could not avoid mass arbitration by appealing to the saving clause. Justice Gorsuch held that the saving clause "offers no refuge" for defenses that discriminate against arbitration either directly or indirectly, while Justice Thomas argued for an even narrower interpretation: that the only grounds for revocation "are those that concern the formation of the arbitration agreement."<sup>89</sup>

Justice Thomas had in mind contracts that were formed through fraud or duress.<sup>90</sup> This limitation on the FAA does not apply to mass arbitration, since the employers themselves crafted these agreements.<sup>91</sup> To invalidate them on these grounds, employers would have to argue that their employees signed them under fraud or duress—an admission that would invite far bigger problems for employers.

In sum, the FAA-priority approach currently favored by the Supreme Court strongly supports interpreting mass arbitration as a concerted activity protected by the NLRA.

## 2. *The NLRA-Priority Approach*

Mass arbitration also counts as concerted activity under the NLRA-priority approach, albeit for different reasons. Justice Ginsburg's *Epic Systems* dissent, representative of the NLRA-priority approach, reads like an inversion of Justice Gorsuch's, and not just because they arrive at different outcomes. Justice Gorsuch emphasizes the scope of the FAA and minimizes the NLRA, while Justice

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85. See, e.g., *infra* text accompanying notes 114-118.

86. See *infra* text accompanying notes 114-118; Glover, *supra* note 8 (manuscript at 67-68).

87. *Epic Sys.*, 138 S. Ct. at 1632 (Thomas, J., concurring).

88. 9 U.S.C. § 2 (2018) (emphasis added).

89. *Epic Sys.*, 138 S. Ct. at 1633 (Thomas, J., concurring).

90. *Id.* at 1632-33 (citing *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 239 (2013)).

91. See, e.g., *supra* note 45 and accompanying text.

Ginsburg does the opposite. But like the reasoning in Justice Gorsuch’s majority opinion, the reasoning in Justice Ginsburg’s dissent supports an understanding of mass arbitration as concerted activity.

In her dissent, Justice Ginsburg repeatedly relied on the enumerated purpose of the NLRA: to remedy “[t]he inequality of bargaining power that workers faced.”<sup>92</sup> Joint and collective legal action undoubtedly accomplish this purpose: “By joining hands in litigation, workers can spread the costs of litigation and reduce the risk of employer retaliation,” she wrote.<sup>93</sup>

Mass arbitration falls squarely within this purposive framework. As described above, the reason mass arbitration is so much more effective than, to borrow Justice Ginsburg’s term, “single-file claims,”<sup>94</sup> is that employees can pool resources, obtain the strategic benefits of using a single attorney or firm to coordinate claims, and leverage the sheer scale of the claims as a bargaining chip in the negotiation process. This process aligns with what Justice Ginsburg described as the benefit of concerted activity in general: “Employees gain strength,” she wrote, “if they can deal with their employers in numbers. That is the very reason why the NLRA secures against employer interference employees’ right to act in concert for their ‘mutual aid or protection.’”<sup>95</sup> If class actions, joint actions, and class arbitrations ought to be protected by the NLRA under the NLRA-priority approach, it follows *a fortiori* that mass arbitration should be protected too.

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Whether the Court ultimately relies on the FAA-priority approach or the NLRA-priority approach, the synchronized yet individualized claims of a mass arbitration thread the needle in a way that should pass the Court majority’s muster. First, mass arbitrations are a form of arbitration and therefore fall within the FAA’s directive to enforce arbitration agreements according to their terms. Second, mass arbitrations qualify as “concerted activity” within the meaning of the NLRA, and they are neither class action, nor joint action, nor class arbitration. Finally, these interpretations comport with the *Epic Systems* majority in another important respect. In reconciling the language of the NLRA and the FAA, Justice Gorsuch wrote that “[i]t is this Court’s duty to interpret Congress’s statutes as a harmonious whole rather than at war with one another.”<sup>96</sup> Interpreting mass arbitration as concerted activity gives effect to both statutes: the FAA’s requirement

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<sup>92</sup>. *Epic Sys.*, 138 S. Ct. at 1636 (Ginsburg, J., dissenting) (quoting 29 U.S.C. § 151 (2018)).

<sup>93</sup>. *Id.* at 1637.

<sup>94</sup>. *Id.* at 1647.

<sup>95</sup>. *Id.* at 1640 (quoting 29 U.S.C. §§ 151, 157-158 (2018)).

<sup>96</sup>. *Id.* at 1619 (majority opinion).

that courts enforce arbitration agreements according to their terms on the one hand and the “concerted activities” provision of the NLRA on the other.

### C. Concerted Arbitration in Practice

Interpreting section 7 to protect mass arbitration could reinvigorate the NLRA as a tool to effectively enforce other employment laws, from the antidiscrimination mandates of the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Civil Rights Act to the wage-and-hour requirements of the Fair Labor Standards Act.<sup>97</sup> The rights employees can vindicate through mass arbitration are manifold. Though the NLRA is a federal statute, both state and federal statutory causes of action, as well as private-law disputes such as contract and tort, are litigated through arbitration.<sup>98</sup> Consequently, employees can leverage the NLRA’s concerted-activities provision to protect their ability to mass arbitrate in these areas as well. This Section explores this argument’s implications.

The NLRA prohibits employers from interfering with, restraining, or coercing employees when it comes to concerted activity, including retaliating against employees engaged in concerted activity.<sup>99</sup> If mass arbitration is a concerted activity protected by the NLRA, it follows that employers cannot retaliate against employees for joining a mass arbitration or force them to agree not to do so.

Retaliation is a significant concern in arbitration. Unlike class actions, in which typically only the lead plaintiff is named, arbitration is not anonymous. This opens claimants up to targeted adverse action by their employer.<sup>100</sup> As one prominent plaintiff-side attorney has noted, the fear of being identified by name

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97. See Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2018); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111-12117 (2018); Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2018); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2018).

98. See Walter W. Heiser, *Forum Selection Clauses in Federal Courts: Limitations on Enforcement After Stewart and Carnival Cruise*, 45 FLA. L. REV. 553, 608 n.279 (1993) (“An agreement to arbitrate may require arbitration of not only contract claims, but also tort and statutory claims related to the contract.”); 3 FEDERAL PROCEDURE, LAWYERS EDITION § 4:8 (2022) (discussing federal statutory causes of action); *Arrigo v. Blue Fish Commodities, Inc.*, 408 F. App’x 480, 481-82 (2d Cir. 2011) (discussing state statutory causes of action).

99. See 29 U.S.C. § 158 (2018); see, e.g., *Tellepsen Pipeline Servs. Co. v. NLRB*, 320 F.3d 554, 565 (5th Cir. 2003).

100. See *D. R. Horton, Inc.*, 357 N.L.R.B. 2277, 2279 n.5 (2012) (“Employees surely understand what several federal courts have recognized: that named plaintiffs run a greater risk of suffering unlawful retaliation than unnamed class members. . . . This risk of retaliation is virtually unique to employment litigation compared, for example, to securities or consumer fraud litigation. Thus, in a quite literal sense, named-employee-plaintiffs protect the unnamed class members.”), *enforcement granted in part, rev’d in part*, 737 F.3d 344 (5th Cir. 2013).



can deter potential mass arbitration claimants from signing up.<sup>101</sup> One instance of attempted retaliation in response to a mass arbitration has already occurred, albeit in a consumer action rather than an employment one. When 15,000 customers of Chegg, an education company, filed individual arbitration demands seeking damages from a data breach, Chegg responded by canceling those users' contracts with the company.<sup>102</sup> And the consequences of retaliation are far more severe in an employment context: not just a canceled contract, but loss of one's livelihood.<sup>103</sup>

As Part I noted, some employers have responded to mass arbitrations by requiring workers to sign revised arbitration agreements with employer-friendly arbitration provisions. The law firm of Gibson, Dunn & Crutcher recently advised its corporate clients to add provisions requiring pre-arbitration dismissal of frivolous claims, employee fee shifting, and the selection of arbitration bodies with pro-employer procedural rules.<sup>104</sup> Many employers want these changes to apply not just to arbitrations going forward, but to arbitrations already filed.<sup>105</sup> These responses can significantly hamper mass arbitration efforts. For example, requiring employees rather than employers to pay upfront arbitration fees, which can run into the thousands of dollars per claim, would eliminate an effective bargaining tool for employees to pressure companies to settle on favorable terms.<sup>106</sup>

But forcing revised arbitration agreements on employees may constitute unlawful retaliation under section 7 of the NLRA. A section 7 retaliation claim requires three components to succeed: an employee's concerted activity, the employer's knowledge of the concerted activity, and an adverse action by the

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101. Telephone Interview with Shannon Liss-Riordan, *supra* note 65.

102. Alison Frankel, *Chegg Tries a New Way to Avert Mass Arbitration: Cancel Users' Contracts*, REUTERS (July 2, 2020), <https://www.reuters.com/article/legal-us-otc-massarb-idINKBN24333W> [<https://perma.cc/VL8D-XYYS>].

103. Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1119-20.

104. Holecek, *supra* note 10. Companies' choice of defense-friendly arbitral bodies has been the subject of recent controversy. See Frankel, *supra* note 33; Corkery & Silver-Greenberg, *supra* note 7.

105. Alison Frankel, *DoorDash Accused of Changing Driver Rules to Block Mass Arbitration Campaign*, REUTERS (Nov. 20, 2019), <https://www.reuters.com/article/legal-us-ot-massarb/doordash-accused-of-changing-driver-rules-to-block-mass-arbitration-campaign-idUSKBN1XU2U2> [<https://perma.cc/6STT-NST2>].

106. See, e.g., Alison Frankel, *Uber Loses Appeal to Block \$92 Million in Mass Arbitration Fees*, REUTERS (Apr. 18, 2022, 4:54 PM EDT), <https://www.reuters.com/legal/litigation/uber-loses-appeal-block-92-million-mass-arbitration-fees-2022-04-18> [<https://perma.cc/3WMX-647Z>].

employer motivated by the concerted activity.<sup>107</sup> A material change in an employee's terms and conditions of employment can qualify as an adverse action.<sup>108</sup> Under this definition of retaliation, forcing new employer-friendly arbitration provisions on employees during or in response to a mass arbitration may qualify as retaliation prohibited by the NLRA. That is, employees' participation in mass arbitration is a concerted activity, employers would presumably be aware of a pending mass arbitration against them, and altering employment agreements by inserting employer-friendly arbitration provisions would constitute an adverse employment action in response to the activity.

There may also be subtler ways that companies risk violating the NLRA—if not by retaliation, then by interference.<sup>109</sup> For example, courts often find that overbroad confidentiality provisions, such as a blanket ban on wage discussions, illegally interfere with employees' right to engage in concerted activity.<sup>110</sup> And with the emergence of mass arbitration, many companies have sought to beef up confidentiality provisions in their employment contracts or enforce them more severely.<sup>111</sup> As one leading plaintiff-side attorney points out, confidentiality provisions make it especially difficult to coordinate claims for gig-economy workers such as Uber drivers, who do not regularly communicate with one another.<sup>112</sup> And these harsh confidentiality provisions lead to repetitive and costly burdens for plaintiff-side firms by requiring each mass arbitration claimant to undergo individualized depositions and discovery.<sup>113</sup>

There is another downside to strict confidentiality provisions, one Justice Ginsburg predicted in her *Epic Systems* dissent: prohibiting plaintiffs from developing statistical evidence by pooling data can be fatal to pattern-or-practice

107. See *NLRB v. Matsu Corp.*, 819 F. App'x 56, 57 (2d Cir. 2020) (citing *NLRB v. Oakes Mach. Corp.*, 897 F.2d 84, 88 (2d Cir. 1990)).

108. See, e.g., *USPS & Am. Postal Workers Union*, No. 5-CA-32295, at 24 (N.L.R.B. July 27, 2006), <https://www.nlr.gov/case/05-CA-032295> [<https://perma.cc/86MB-P8SF>]; *River Falls Healthcare, LLC*, No. 18-CA-106165, at 41 (N.L.R.B. July 7, 2014), <https://www.nlr.gov/case/18-CA-106165> [<https://perma.cc/BH46-C976>].

109. 29 U.S.C. § 158(a) (2018) (“It shall be an unfair labor practice for an employer (1) to *interfere with*, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.” (emphasis added)); see *NLRB v. Q-1 Motor Express, Inc.*, 25 F.3d 473, 477 (7th Cir. 1994).

110. E.g., *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 537 (6th Cir. 2000); *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1260 (10th Cir. 2005).

111. See Glover, *supra* note 8 (manuscript at 65).

112. Telephone Interview with Joseph M. Sellers, *supra* note 65.

113. Telephone Interview with Shannon Liss-Riordan, *supra* note 65; see also Resnik et al., *supra* note 29, at 631-32 (“The privatization of process and expansive silencing mandates prevent others, similarly situated, from learning about the alleged harms and from sharing lawyers with others to seek remedies.”).

cases.<sup>114</sup> In the context of at least one mass arbitration, Justice Ginsburg’s concerns have been realized. An ongoing mass arbitration against IBM alleges that the company disproportionately fired older employees in violation of the Age Discrimination in Employment Act.<sup>115</sup> However, IBM allegedly used the confidentiality provisions in the employees’ contracts to hinder employees’ counsel from building a pattern-or-practice case.<sup>116</sup> The attorney for the employees, Shannon Liss-Riordan, argued that IBM used the provisions to “block employees from obtaining and using highly relevant and incriminating documents [they] have obtained in other arbitration cases raising the same claim.”<sup>117</sup> As of this writing, the actions remain pending before the NLRB.<sup>118</sup> If the NLRA protects mass arbitration, then IBM’s enforcement of the confidentiality provision to prevent employees from sharing information may violate the NLRA.

In short, interpreting mass arbitration as concerted activity can enable employees to obtain relief when their employers retaliate against mass arbitration efforts by revising employment contracts or when they aggressively wield confidentiality provisions to interfere with mass arbitrations.

### III. ADDRESSING OBJECTIONS AND EMPLOYER DEFENSES

This Part anticipates and responds to both doctrinal objections and defenses employers may raise against employees’ assertion of NLRA protections for mass arbitration.

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114. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1648 (2018) (Ginsburg, J., dissenting); *see also* Resnik et al., *supra* note 29, at 648 (citing cases finding that nondisclosure or confidentiality provisions were unconscionable because they could “conceal patterns of illegal activity,” among other concerns).
115. Emily Brill, *IBM Sued over Confidentiality Rules for Age Bias Arbitrations*, LAW360 (Nov. 22, 2021, 9:09 PM EST), <https://www.law360.com/employment-authority/articles/1442835/ibm-sued-over-confidentiality-rules-for-age-bias-arbitrations> [https://perma.cc/P5U2-PEA6].
116. *Id.*; Emily Brill, *Ex-IBM Workers Accuse Co. of Implementing Illegal Gag Rules*, LAW360 (Nov. 19, 2021, 8:15 PM EST), <https://www.law360.com/employment-authority/articles/1442151/ex-ibm-workers-accuse-co-of-implementing-illegal-gag-rules> [https://perma.cc/UX47-ZDMY]; Josh Eidelson, *IBM Arbitration Gag Rules Are Illegal, Fired Workers Say*, BLOOMBERG L. (Nov. 17, 2021), <https://www.bloomberg.com/news/articles/2021-11-18/ibm-arbitration-gag-rules-are-illegal-fired-workers-say> [https://perma.cc/AY5T-MC27].
117. Brill, *supra* note 116. The employees’ lawyers also argue that IBM has violated the NLRA by “engaging in oppressive and threatening tactics in litigation and arbitration” and “enforcement efforts intended to suppress Section 7 activity that would aid IBM employees in combating IBM’s discriminatory scheme.” *Id.*
118. *See, e.g., Int’l Bus. Machs. Corp.*, No. 05-CA-290916 (N.L.R.B. filed Feb. 18, 2022), <https://www.nlr.gov/case/05-CA-290916> [https://perma.cc/ULY5-EQJZ].

### A. Mass Arbitration Versus Class Arbitration

Class arbitration is a hybrid procedure that combines the informal dispute-resolution qualities of arbitration with the aggregative qualities of a class action. One or a few representative claimants go through the arbitration process, and the results bind the other class members.<sup>119</sup> Class arbitration emerged in the early 2000s as companies began using arbitration waivers to avoid traditional class actions, and plaintiffs turned to class arbitration as an alternative.<sup>120</sup> Given that employees may be forced to waive their right to class arbitration,<sup>121</sup> employers may argue that mass arbitration should be treated the same way.

However, mass arbitration is distinct from class arbitration. Class arbitration, like class action, is a *procedure*: it consists of a single aggregated arbitration with a representative claimant, its standards generally parallel those set forth by Federal Rule of Civil Procedure 23, which governs class actions, and the outcome binds nonparties to the arbitration unless they opt out.<sup>122</sup> Mass arbitration, in contrast, is an *activity*: the mass filings, resource pooling, and single-attorney coordination that are hallmarks of mass arbitration fit comfortably within what courts currently recognize as concerted activity protected by section 7.<sup>123</sup>

There is another crucial distinction between class arbitration and nonclass arbitration. The Court has repeatedly held that class arbitration “fundamentally changes the nature of the ‘traditional individualized arbitration’ envisioned by the FAA”<sup>124</sup> by “sacrific[ing] the principal advantage of arbitration—its informality—and mak[ing] the process slower, more costly, and more likely to generate procedural morass than final judgment.”<sup>125</sup> For that reason, the Court presumes against inferring that parties agreed to class arbitration unless the contract specifically permits it.<sup>126</sup>

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119. See *Class Arbitration*, BLACK’S LAW DICTIONARY (11th ed. 2019).

120. See John M. Townsend, *United States: The Rise and Fall of Class Arbitration*, MONDAQ (Sept. 19, 2011), <https://www.mondaq.com/unitedstates/class-actions/145820/the-rise-and-fall-of-class-arbitration> [<https://perma.cc/3CVQ-4P3E>].

121. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417-18 (2019).

122. *Jock v. Sterling Jewelers*, 942 F.3d 617, 620 (2d Cir. 2019); see Martin Valasek & Ernesto M. Hernández, *Group, Class and Collective Action*, in 16 NORTON ROSE FULBRIGHT INT’L ARB. REP. 37, 37 (2021); see, e.g., Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1738, 1771 (2006).

123. See *supra* Part II.

124. *Lamps Plus*, 139 S. Ct. at 1412 (quoting *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018)); *id.* at 1416 (citing cases).

125. *AT&T Mobility LLC*, 563 U.S. at 348.

126. See *Lamps Plus*, 139 S. Ct. 1407.

Mass arbitration, in contrast, does not transform individualized and informal arbitration proceedings into collective actions. In mass arbitration, the aggregation occurs *outside* the courtroom in the form of resource pooling and joint strategy.<sup>127</sup> Moreover, whereas a class arbitration “no longer resolves a single dispute between the parties to a single agreement but instead resolves many disputes between hundreds or perhaps even thousands of parties,” mass arbitration remains individualized: the decisions apply only to the parties directly before the arbitrator.<sup>128</sup> In sum, recognizing concerted activity to encompass mass arbitration would not require courts to extend the same recognition to class arbitration.

### B. *Bad Behavior*

Courts have held that concerted activity can lose its protected status under section 7 when the activity is violent, disloyal, disruptive, or illegal.<sup>129</sup> In an effort to avoid mass arbitration, some companies have alleged that claimants’ attorneys are violating ethical rules or otherwise engaging in bad-faith behavior, which could pose a potential threat to recognizing mass arbitration as concerted activity. For example, TurboTax counsel claimed that Keller Postman was bringing “bogus” claims, and DoorDash characterized Keller Postman’s offer to settle the thousands of mass arbitration claims it brought as a “ransom” demand.<sup>130</sup>

But there is no indication that firms have sought to artificially inflate the number of filings by knowingly signing up claimants without valid claims. Indeed, even when defense attorneys argue that firms involved in mass arbitration are attempting to “extract an *in terrorem* settlement” using these claims, they do not allege that the firms’ actions are fraudulent or otherwise illegal.<sup>131</sup> To the

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127. See *supra* Section II.A.

128. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 686 (2015). Of course, parties can stipulate in advance that the results in one proceeding will bind the others through, for instance, so-called “batching” provisions. See Glover, *supra* note 8 (manuscript at 102-03); Shira A. Scheindlin, *A New ADR Development: Mass Arbitrations*, REUTERS (Dec. 22, 2021), <https://www.reuters.com/legal/legalindustry/new-adr-development-mass-arbitrations-2021-12-22> [<https://perma.cc/2L68-G4ZW>].

129. Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1707-08 & nn.158-61 (1989) (citing cases).

130. Alison Frankel, *Judge Breyer Rejects \$40 Million Intuit Class Settlement amid Arbitration Onslaught*, REUTERS (Dec. 22, 2020, 5:09 PM), <https://www.reuters.com/article/legal-us-otc-intuit/judge-breyer-rejects-40-million-intuit-class-settlement-amid-arbitration-onslaught-idUSKBN28W2M5> [<https://perma.cc/F8UV-PDD3>]; Respondent DoorDash, Inc.’s Opposition to Motion for Temporary Restraining Order at 4, *Abernathy v. DoorDash, Inc.*, No. 19-7545 (N.D. Cal. Nov. 15, 2019).

131. See, e.g., *Postmates’ Opposition to Cross-Petitioners’ Motion to Compel Arbitration at 18*, *Postmates Inc. v. 10,356 Individuals*, No. 20-2783, 2021 WL 540155 (C.D. Cal. Jan. 19, 2021);

extent that false-positive signups become a significant problem, firms can develop and implement best practices for mass arbitration actions—such as enhanced vetting procedures<sup>132</sup>—or a court or arbitral body could distinguish the mass arbitration claimants who have facially valid claims from those who do not.<sup>133</sup>

### C. *New Technology*

Finally, the technology that facilitates mass arbitration did not exist when the NLRA was passed in 1935, so opponents may claim that the enacting Congress could not have envisioned or intended for the NLRA to protect this particular form of concerted activity.<sup>134</sup> Employers have already made analogous arguments when trying to exclude mass arbitration from the FAA's reach.<sup>135</sup>

It is true that mass arbitration—at least, the mass arbitration solicitation process<sup>136</sup>—typically requires technology that was unavailable when Congress passed the NLRA. But even textualist interpretation methodologies tolerate dynamic statutory interpretation when it comes to changes in technology.<sup>137</sup> And purposive methods of interpretation typically embrace dynamic meaning even outside the realm of technological change. Justice Ginsburg's *Epic Systems*

Frankel, *supra* note 8 (“Zitrin even said that although he had seen documents suggesting that some Keller Lenkner clients were not DoorDash workers and that Keller Lenkner was using arbitration fees as leverage to obtain a global settlement, ‘it is not now my opinion that plaintiffs’ counsel has engaged in unethical conduct.’”).

132. Scale is key to properly vetting and filing the hundreds or thousands of claims in a mass arbitration, which is one reason why several plaintiff-side firms engaged in mass arbitration have ramped up paralegal and staff hiring in recent years. Telephone Interview with Shannon Liss-Riordan, *supra* note 65.
133. See, e.g., *Postmates Inc.*, 2021 WL 540155, at \*12-13.
134. Justice Gorsuch considered this factor when determining whether the NLRA protects class actions. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (“The notion that Section 7 confers a right to class or collective actions seems pretty unlikely when you recall that procedures like that were hardly known when the NLRA was adopted in 1935.”).
135. For example, *Postmates* has pointed to the Supreme Court's refusal in *Concepcion* to find a class arbitration exception to the FAA because it was “unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator. Indeed, class arbitration was not even envisioned by Congress when it passed the FAA in 1925 . . . .” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 349 (2011); see *Postmates’ Opposition to Cross-Petitioners’ Motion to Compel Arbitration at 17-18, Postmates Inc.*, No. 20-2783, 2021 WL 540155.
136. See *supra* note 42 and accompanying text.
137. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16 (2012) (“In their full context, words mean what they conveyed to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations.”).

dissent, for instance, rhetorically asked whether there is “any reason to suppose that Congress intended to protect employees’ right to act in concert using only those procedures and forums available in 1935.”<sup>138</sup> Moreover, lower courts and the NLRB have repeatedly found that email and social media interactions – such as “liking” a Facebook post – can qualify as concerted activities,<sup>139</sup> notwithstanding the fact that these technologies did not exist in the early twentieth century.

#### *D. Board Precedent*

Part II made the case for recognizing mass arbitration as concerted activity and offered a roadmap for employees to bring claims on this basis under the NLRA. For example, employees can potentially bring retaliation claims against employers who, in response to pending mass arbitrations, alter employment agreements to prohibit mass arbitration.<sup>140</sup> But whether courts will interpret these employer-friendly arbitration provisions as retaliation is another matter.

Current Board precedent regarding illegal retaliation and interference does not favor employees. But recent changes in Board personnel hint that a more robust conception of section 7 may be on the horizon, one that provides a better path for employees to vindicate their rights through mass arbitration.

Recent NLRB decisions have construed retaliation so narrowly as to permit virtually any otherwise lawful action by employers, even as a direct response to concerted activity. Before the Supreme Court decided *Epic Systems*, the Board had held that an employer violates the NLRA by imposing a new policy on employees in response to their concerted activity, even if the rule is otherwise lawful.<sup>141</sup> Justice Ginsburg espoused this view in her *Epic Systems* dissent, writing that “[e]mployees’ rights to band together to meet their employers’ superior strength would be worth precious little if employers could condition employment on workers signing away those rights.”<sup>142</sup>

But in the aftermath of *Epic Systems*, two NLRB cases – *Cordúa Restaurants* and *Tarlton & Son* – wrestled with the same question: if employees file a class or collective action, can an employer respond by requiring employees to sign

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<sup>138</sup>. *Epic Sys.*, 138 S. Ct. at 1640 (Ginsburg, J., dissenting).

<sup>139</sup>. See 144 AM. JUR. TRIALS 497 §§ 11-12, Westlaw (database updated May 2022).

<sup>140</sup>. See *supra* notes 100-107 and accompanying text.

<sup>141</sup>. *Tito Contractors, Inc.*, 366 N.L.R.B. No. 47, 2018 WL 1559885, at \*4 (Mar. 29, 2018) (“In sum, the evidence shows that, even though the Respondent’s written overtime policy was facially valid, the Respondent promulgated it for the unlawful purpose of retaliating against those employees who engaged in union and other protected concerted activities by participating in the overtime lawsuit.”).

<sup>142</sup>. *Epic Sys.*, 138 S. Ct. at 1641-42 (Ginsburg, J., dissenting).

individualized arbitration agreements waiving their right to proceed as a class?<sup>143</sup> In both *Cordúa* and *Tarlton*, the Board concluded that even if filing a class action qualified as concerted activity, employers may respond by altering employment agreements to require individualized arbitration and by firing employees who refuse to sign.<sup>144</sup> The Board distinguished *Tito Contractors* by reasoning that *Epic Systems* “establishes that requiring employees to resolve their employment-related claims through individual arbitration rather than through collective action does not restrict the exercise of section 7 rights.”<sup>145</sup> These holdings suggest that employees might not prevail on an NLRA claim based on employers imposing new agreements in response to a mass arbitration.

However, employees need not permanently resign themselves to signing new employment contracts that make mass arbitration more difficult. *Cordúa* was a 2-1 decision, with the dissenting judge arguing for a more expansive conception of the NLRA.<sup>146</sup> And since *Cordúa*, the Board’s membership has shifted, and the lone dissenter in *Cordúa* is now the Board’s Chair.<sup>147</sup> Moreover, Jennifer Abruzzo, in her first memo after President Biden appointed her as NLRB General Counsel, announced that she was interested in reexamining several of the Board’s recent holdings, including decisions relating to the scope and definition of concerted activity.<sup>148</sup> Abruzzo even singled out *Cordúa* as a case that she would like to “carefully examine.”<sup>149</sup>

The Board’s treatment of confidentiality provisions may also be in flux. Current Board precedent cuts against arguments that these provisions suppress protected activity. In *Dish Network*, the Board upheld the confidentiality provision of an arbitration agreement to the extent it prohibited employees from discussing arbitration proceedings, including hearings, discovery, and awards.<sup>150</sup> As discussed above, subjecting claimants and their attorneys to repetitive and costly procedures—not to mention prohibiting attorneys from using evidence in one arbitration that was obtained in the course of another—would seriously hinder mass arbitration efforts, especially for pattern-or-practice claims.

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143. See *Cordúa Rests., Inc.*, 368 N.L.R.B. No. 43, 2019 WL 3842331 (Aug. 14, 2019); *Tarlton & Son, Inc.*, 368 N.L.R.B. No. 101, 2019 WL 5686741 (Oct. 30, 2019).

144. *Tarlton*, 2019 WL 5686741, at \*3; *Cordúa*, 2019 WL 3842331, at \*3-4.

145. *Tarlton*, 2019 WL 5686741, at \*3.

146. *Cordúa*, 2019 WL 3842331, at \*9 (McFerran, Member, dissenting in part).

147. *Members of the NLRB Since 1935*, NLRB, <https://www.nlr.gov/about-nlr/who-we-are/the-board/members-of-the-nlr-b-since-1935> [<https://perma.cc/4VFL-YHRL>].

148. Jennifer A. Abruzzo, NLRB Gen. Couns., Memorandum GC 21-04, Mandatory Submissions to Advice (Aug. 12, 2021), <https://apps.nlr.gov/link/document.aspx/09031d4583506e0c> [<https://perma.cc/9BHC-KSPR>].

149. *Id.* at 1, 8.

150. *Dish Network, LLC & Brett Denney*, 370 N.L.R.B. No. 97, 2021 WL 1101705 (Mar. 18, 2021).



## CONCERTED ARBITRATION

But like *Cordúa*, *Dish Network* is not set in stone. *Dish Network* was also a 2-1 decision, with the now-Chair of the Board's dissent castigating the majority decision as "part of an alarming trend reflected in the Board's recent decisions . . . [in which] employees are being forced to suffer in silence at work, barred from telling co-workers, government agencies, and the public about abusive, unfair, and unlawful employer conduct."<sup>151</sup> In her above-mentioned memo, NLRB General Counsel Abruzzo pointed out that the prior Board's decisions relating to the permissible scope of confidentiality provisions broke with Board precedent. As commentators have observed, this indicates that these decisions are liable to be reversed by the new Board,<sup>152</sup> thereby making it easier for mass arbitration claimants to pool their resources and reduce costs.

## CONCLUSION

The emergence of mass arbitration turned the tables in employees' decades-long losing streak. Now employers are trying to turn them back again.

But recognizing mass arbitration as a concerted activity can help defend against employer countermeasures aimed at making mass arbitration more difficult or impossible. If these employer countermeasures succeed, mass arbitrations could meet the same fate as class actions and arbitrations, both of which have become increasingly curtailed in recent decades as viable means of relief.<sup>153</sup> One factor in their decline is that companies have discovered how to fashion arbitration agreements that make class-based remedies unfeasible without rendering the agreements unconscionable.<sup>154</sup> Employers are already deploying similar tactics to defeat mass arbitration. Without the NLRA, little stands in the way of employers forcing employees to sign new arbitration agreements with draconian confidentiality provisions and other features unfriendly to mass arbitration. This would kill mass arbitration as a viable method of relief in effect, if not in form.

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151. *Dish Network*, 2021 WL 1101705, at \*10 (McFerran, Chairman, concurring in part and dissenting in part).

152. See, e.g., Mark Theodore, Joshua Fox & Elizabeth Dailey, *Requiring Employees to Maintain the Confidentiality of Arbitration Proceedings Held to Be Lawful Under the NLRA . . . for Now*, PROSKAUER LAB. REL. UPDATE (Mar. 26, 2021), <https://www.laborrelationsupdate.com/nlra/requiring-employees-to-maintain-the-confidentiality-of-arbitration-proceedings-held-to-be-lawful-under-the-nlra-for-now> [<https://perma.cc/WB4F-PJLK>]; Marie Duarte & Jeff Dilger, *The NLRB's New General Counsel Issues First Guidance Memorandum Foreshadowing Reversal of Key Board Decisions*, LITTLER (Aug. 19, 2021), <https://www.littler.com/publication-press/publication/nlrbs-new-general-counsel-issues-first-guidance-memorandum> [<https://perma.cc/C2FK-6LSG>].

153. Daniel Wilf-Townsend, *Did Bristol-Myers Squibb Kill the Nationwide Class Action?*, 129 YALE L.J.F. 205, 206 & n.7 (2019); Resnik et al., *supra* note 29, at 655.

154. Glover, *supra* note 8 (manuscript at 39-40).

However, recognizing mass arbitration as a concerted activity could ensure that employers honor their own arbitration agreements – and breathe new life into the NLRA itself.

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