COMMENTS

Arbitration and Title VII Pattern-or-Practice Claims After *Epic Systems*

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In recent years, the Supreme Court has put up roadblocks for workers who seek relief in court for wrongs committed by their employers. This development is a consequence of the Court's arbitration jurisprudence. Epic Systems Corp. v. Lewis*, a 2018 decision, was par for the course. The Supreme Court held that employers could prevent group wage-and-hour claims by enforcing individual arbitration agreements. It rejected the plaintiffs' argument that their litigation activity was protected by labor law. In dissent, Justice Ruth Bader Ginsburg questioned the application of the decision to Title VII pattern-or-practice cases. Indeed,* Epic Systems *puts potential Title VII plaintiffs in a bind. Class waivers in arbitration agreements prevent employees from banding together in group actions. But every circuit court to consider the question has determined that* only *a class—not an individual plaintiff—can litigate a claim of a pattern or practice of discrimination under Title VII. Taken together, the Supreme Court's arbitration cases and the circuit courts' Title VII jurisprudence would seem to eviscerate the pattern-or-practice suit.*

In this Comment, I argue that Epic Systems *does not reach all Title VII plaintiffs. First, I contend that some Title VII litigation is protected by the National Labor Relations Act (NLRA), notwithstanding* Epic Systems*. Congress gave Title VII plaintiffs the ability to obtain broad remedial relief to address discriminatory conditions, unlike in the wage-and-hour context. Like strikes or collective bargaining, litigation is one way that employees can reform the workplace. Then, I suggest that courts should borrow a test from securities law to evaluate whether a group of employees is sufficiently independent and cohesive to bring a pattern-or-practice case. Courts can give effect to the NLRA and Title VII without scrapping arbitration agreements entirely.*

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INTRODUCTION

Jeffboat launched its last barge into the Ohio River in 2018.[1] Once the largest inland shipbuilder in the United States, the company had endured its share of tumult since its founding in 1834, including intermittent closures, a wildcat strike, and a private-equity acquisition.[2] From 1977 to 1993, Jeffboat was caught up in a protracted employment discrimination class action under Title VII of the Civil Rights Act of 1964.[3] Black employees were less often promoted and more frequently fired than white employees were.[4] Jeffboat stamped each Black applicant's file with "DW," the initials of a local civil rights activist.[5] In the rigging unit, which did not employ any Black workers until 1973, a sign

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1 Pat McDonogh, *As the Last Barge Rolls Off the Line, Jeffboat Workers Say Goodbye to an Era and Their Jobs*, LOUISVILLE COURIER J. (Apr. 24, 2018), https://perma.cc/6HKM-FNXP.

2 *Id.*; Sam Stall, *Barge Builder Embraces Stability*, IND. BUS. J. (June 17, 2015), https://perma.cc/RQ7H-FG7F. A "wildcat strike" is one unauthorized by union leadership. *Wildcat Strike*, MERRIAM-WEBSTER, https://perma.cc/VBK7-3P7P.

3 42 U.S.C. §§ 2000a–2000h-6; Mozee v. Am. Com. Marine Serv. Co., 940 F.2d 1036, 1038 (7th Cir. 1991), *aff'd and reh'g denied*, 963 F.2d 929 (7th Cir. 1992).

4 *Mozee*, 940 F.2d at 1043.

5 *Id.* at 1043–44. Jeffboat claimed that the markings were to help them implement an affirmative action program.

declared, "No N——r Riggers."[6] In 1975, the shipyard's Black Workers' Coalition organized mass actions known as the "Black Days" protests in response to these conditions. Shortly after participating in the protests, William Mozee was suspended and ultimately fired by Jeffboat.[7] In 1977, Mozee and three coworkers filed a class action lawsuit against Jeffboat, alleging violations of Title VII under pattern-or-practice and disparate-impact theories of discrimination.[8] The case settled for $1.8 million in 1993, shortly after the Seventh Circuit partially upheld the district court's determination of liability.[9]

A solo litigant likely could not have achieved what Mozee and his coworkers did together. That class used the pattern-or-practice method, under which plaintiffs allege that their employer uses a discriminatory business practice that affects all members of a certain group.[10] Every circuit that has considered the question has held that only classes, not individuals, can litigate a claim of a pattern or practice of discrimination under Title VII.[11] Yet today, workers face a barrier to bringing such class actions: arbitration agreements. Driven both by the high cost of litigation—indeed, Jeffboat endured two trials over fifteen years before settling the case—and the business-friendly evolution of arbitration jurisprudence,[12] companies now use arbitration agreements to limit the ability of employees to litigate disputes or pursue collective relief.

Arbitration agreements prevent group actions in two ways.[13] First, plaintiffs cannot maintain class actions in court regarding

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6 *Id.* at 1044 (alteration added).

7 *Id.* at 1040.

8 *Id.* at 1039. A fifth employee filed suit in 1978, and his action was consolidated with the others. *Id.* Disparate-impact claims involve facially neutral policies that have an adverse impact on a protected group. 42 U.S.C. § 2000e-2(k). Under a pattern-or-practice theory (also termed "systemic disparate treatment"), plaintiffs allege that an employer had an intentionally discriminatory employment practice. *See* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 & n.15 (1976).

9 *Shipyard to Pay $1.8 Million to Settle Discrimination Suit*, CHI. TRIB., June 21, 1993, ProQuest, Doc. No. 283520984.

10 *See infra* Part I.A.1.

11 *See* Daniels v. United Parcel Serv., Inc., 701 F.3d 620, 632 (10th Cir. 2012) (collecting cases from the Second, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits).

12 *See* Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1317 (2015) ("[A] series of Supreme Court decisions have enabled employers to require their nonunionized employees to resolve disputes through arbitration, rather than litigation.").

13 I use the term "group action" to refer to any proceeding in court or arbitration in which multiple plaintiffs pursue common claims, including via joinder or a class or

claims subject to arbitration agreements.[14] Second, plaintiffs cannot bring group actions in arbitrations unless expressly permitted by contract.[15] To prevent arbitrators from interpreting vague language in arbitration agreements to permit group actions in arbitration,[16] employers often include "class waivers," which explicitly preclude employees from joining claims.[17] In short, when arbitration agreements include class waivers, employees cannot bring group actions via litigation or arbitration. And because Title VII pattern-or-practice claims must be brought as group actions rather than as individual claims, arbitration agreements prevent employees from bringing pattern-or-practice claims altogether.

In *AT&T Mobility LLC v. Concepcion*,[18] the Supreme Court upheld the enforceability of class waivers in arbitration agreements, even where the waivers are unenforceable under state law.[19] This decision created a new incentive for employers to include arbitration agreements in employees' contracts—to avoid class action suits.[20] Because it is not clear whether class waivers outside arbitration agreements are enforceable,[21] employers might use arbitration agreements not for any intrinsic benefits of arbitration but to impede group litigation.

The same year that Jeffboat shuttered, the Supreme Court held in *Epic Systems Corp. v. Lewis*[22] that arbitration agreements could bar group wage-and-hour litigation, in which plaintiff

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collective action mechanism; "class action" for actions in court pursuant to Rule 23 or a similar state rule; "class arbitration" for similar proceedings in arbitration; "collective action" for the group action device allowed by the Fair Labor Standards Act (*see infra* text accompanying notes 88–90); and "group litigation" to refer to class actions, collective actions, and representative suits by organizations.

14 9 U.S.C. § 3; *see also, e.g.*, Parisi v. Goldman, Sachs & Co., 710 F.3d 483, 486 (2d Cir. 2013).

15 Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010).

16 *See, e.g.*, Jock v. Sterling Jewelers Inc., 646 F.3d 113, 124 (2d Cir. 2011) (approving an arbitrator's interpretation of an agreement to permit class arbitration), *aff'd*, 942 F.3d 617, 623–24 (2d Cir. 2019).

17 *See* J. Maria Glover, Note, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1742 (2006).

18 563 U.S. 333 (2011).

19 *Id.* at 352.

20 Arguably, the decision simply clarified existing law. But, in practice, use of arbitration agreements in adhesion contracts increased after *Concepcion*. *See* Sternlight, *supra* note 12, at 1344. Prior to *Concepcion*, contracts were often silent on the availability of group action.

21 *See generally, e.g.*, Jacqueline Prats, *Are Arbitration Agreements Necessary for Class-Action Waivers to Be Enforceable?*, 92 FLA. BAR J., Nov./Dec. 2018, 64 (analyzing the enforceability of class waivers as a matter of state law).

22 138 S. Ct. 1612 (2018).

employees sue to address minimum wage or overtime violations.[23] Employees argued that the right to pursue work-related group litigation is protected by the National Labor Relations Act[24] (NLRA), which insulates "concerted activities" pursued for "mutual aid or protection" from employer interference.[25] They contended that "concerted activities" included anything workers did together to improve their working conditions—including resort to a judicial forum.[26] The Court disagreed: concerted activities are "things employees 'just do' for themselves," a definition which does not include group litigation.[27] Justice Ruth Bader Ginsburg both dissented from the Court's holding and explained that she did not interpret its decision to reach employment discrimination class actions.[28] But strict enforcement of arbitration agreements is in line with the federal courts' jurisprudence.[29] Indeed, even prior to *Epic Systems*, the Second Circuit held that a pattern-or-practice class action was barred where the named plaintiff had agreed to mandatory arbitration.[30]

Employers' use of arbitration agreements is growing. According to a survey of employers, the share of workers subject to mandatory arbitration agreements rose from just over 2% in 1992

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[23] *Id.* at 1632.

[24] 29 U.S.C. §§ 151–169.

[25] *Epic Systems*, 138 S. Ct. at 1624 (quoting 29 U.S.C. § 157).

[26] *See id.* at 1636–37 (Ginsburg, J., dissenting); Eastex Inc. v. NLRB, 437 U.S. 556, 565–67 (1978).

[27] *Epic Systems*, 138 S. Ct. at 1625.

[28] *Id.* at 1648 (Ginsburg, J., dissenting) ("I do not read the Court's opinion to place in jeopardy discrimination complaints asserting disparate-impact and pattern-or-practice claims that call for proof on a group-wide basis."). Unlike pattern-or-practice claims, courts have not limited the ability to bring disparate-impact claims to class plaintiffs. Christine Tsang, Comment, *Uncovering Systemic Discrimination: Allowing Individual Challenges to a "Pattern or Practice"*, 32 YALE L. & POL'Y REV. 319, 332 & n.68 (2013); *cf.* Melendez v. Ill. Bell Tel. Co., 79 F.3d 661, 667–68 (7th Cir. 1996) (explaining that an individual claimant does not face a higher bar than a class in proving a prima facie disparate-impact case but must still satisfy individual standing requirements). The question may not arise often, as individual disparate-impact suits are rare. For a discussion of the considerations that bear on the choice of an individual or class action for plaintiffs who seek relief from a generally applicable practice—including legal inconsistency regarding solo litigants' access to system-wide relief—see Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2024–34 (2015).

[29] *See Epic Systems*, 138 S. Ct. at 1627 (collecting cases in which the Court held that statutory rights are subject to mandatory arbitration, often regardless of "a statute's express provision for [group] actions"); *see also* Carson E. Miller, Note, Epic Systems Corp. v. Lewis*: Individual Arbitration and the Future of Title VII Disparate Impact and Pattern-or-Practice Class Actions*, 87 U. CIN. L. REV. 1167, 1185 (2019) (arguing that the reasoning in *Epic Systems* extends to Title VII cases).

[30] *Parisi*, 710 F.3d at 488.

to around 25% in the early 2000s to over 55% in 2017.[31] In 2017, 41% of such workers were additionally subject to class waivers;[32] use of such waivers may have increased after the Supreme Court decided *Epic Systems* the following year. Mandatory arbitration is more common in low-wage work and in industries with higher proportions of women and Black workers.[33]

Arbitration likely impedes the vindication of workers' rights.[34] It may chill claims: according to one estimate, workers arbitrate only 2% of the disputes that arise at their workplaces.[35] Though data on arbitration outcomes is sparse, researchers have found that plaintiffs are less likely to win in arbitration.[36] When they do, they recover less in damages.[37] And aside from leading to worse outcomes in individual cases, arbitration makes it impossible for plaintiffs to pursue structural reform via class litigation.[38] As Professor Linda Hamilton Krieger put it, the law cannot be used to "structure and reform institutionalized practices" when it "disappears into secret private spaces."[39]

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31 ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION 1 (2018), https://perma.cc/JA8Z-NMJ2.

32 *Id.* at 11; *see also* CARLTON FIELDS, THE 2020 CARLTON FIELDS CLASS ACTION SURVEY 40 (2020) (finding that the percentage of companies using arbitral class waivers increased from 16.1% in 2012 to 55.0% in 2019).

33 COLVIN, *supra* note 31, at 8–9.

34 Other commentators argue that arbitration has advantages for plaintiffs. *See, e.g.*, Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563–64 (2001) (arguing that arbitration increases access to justice for low-wage workers because it is cheaper than litigation).

35 Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 696 (2018). *But see* Samuel Estreicher, Michael Heise & David S. Sherwyn, *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 RUTGERS U. L. REV. 375, 397 n.149 (2018) (questioning Estlund's methodology and underlying data). Given the sparse data available, Estlund's analysis relies on a number of assumptions, including that workplaces see the same number of disputes regardless of whether they have mandatory arbitration regimes. Estlund, *supra*, at 696.

36 Estlund, *supra* note 35, at 688. *But cf.* Estreicher et al., *supra* note 35, at 382–86 (summarizing conflicting findings on win rates in arbitration and litigation).

37 Estlund, *supra* note 35, at 688; Estreicher et al., *supra* note 35, at 388–89 (noting lower damage awards in arbitrations and suggesting that the trend may result from the higher prevalence of arbitration in low-wage work or from plaintiffs' lawyers litigating only the strongest cases).

38 *See* Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 885–86 (2016).

39 Linda Hamilton Krieger, *Message in a Bottle*, 39 BERKELEY J. EMP. & LAB. L. 53, 75–78 (2018).

Legislative strategies to limit arbitration have proved elusive. Federal law preempts direct efforts at the state level.[40] So scholars have suggested creative workarounds for plaintiffs. States could "deputize employees to enforce state laws" via qui tam legislation,[41] private attorneys could do cheaper arbitrations en masse by piggybacking on public court judgments,[42] or the Equal Employment Opportunity Commission (EEOC) could co-counsel with the private bar on significant claims.[43] Federal legislation would be more far-reaching. In 2021, two separate bills that would ban mandatory arbitration in employment were introduced in the House of Representatives.[44] Their fate in the Senate is uncertain.

In this Comment, I address the puzzle created by the intersection of mandatory individual adjudication in workplace arbitration and mandatory group treatment in some Title VII litigation. If Title VII pattern-or-practice claims must be individually arbitrated, they cannot be brought at all. Either pattern-or-practice litigation must be pursued collectively, regardless of individual agreements that limit class proceedings, or it is individual, and

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[40] *Concepcion*, 563 U.S. at 341; *see also, e.g.*, Chamber of Com. of the U.S. v. Becerra, 438 F. Supp. 3d 1078, 1100 (E.D. Cal. 2020), 9th Cir. *argued* Dec. 7, 2020 (enjoining the enforcement of a California statute that prohibited contractual waivers of forum for state statutory violations). For discussion of state legislative efforts, see Stephanie Greene & Christine Neylon O'Brien, *New Battles and Battlegrounds for Mandatory Arbitration After* Epic Systems*,* New Prime*, and* Lamps Plus, 56 AM. BUS. L.J. 815, 838–42 (2019); Kathleen McCullough, Note, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo- and Time's Up-Inspired Action Against the Federal Arbitration Act*, 87 FORDHAM L. REV. 2653, 2677–83 (2019). A #MeToo-inspired Illinois law that limits mandatory arbitration, the Workplace Transparency Act, 820 ILL. COMP. STAT. 96/1-25(b) (2020), may be preempted as well, but the question has not yet been litigated. *See* Jessica Golden Cortes & Sharon Cohen, *Illinois Workplace Transparency Act Goes into Effect January 1, 2020*, MONDAQ (Dec. 16, 2019), https://perma.cc/FWC5-D267.

[41] Myriam Gilles & Gary Friedman, *The New Qui Tam: A Model for the Enforcement of Group Rights in a Hostile Era*, 98 TEX. L. REV. 489, 514–16, 527–28 (2020). Under California's Private Attorneys General Act (PAGA), CAL. LAB. CODE §§ 2698–99.6 (2020), employees can bring representative suits for labor violations. Arbitration agreements do not preclude PAGA actions. Rivas v. Coverall N. Am., Inc., 842 F. App'x 55, 56 (9th Cir. 2021).

[42] Myriam Gilles & Anthony Sebok, *Crowd-Classing Individual Arbitrations in a Post-Class Action Era*, 63 DEPAUL L. REV. 447, 468 (2014).

[43] Stephanie Bornstein, *Rights in Recession: Toward Administrative Antidiscrimination Law*, 33 YALE L. & POL'Y REV 119, 168–69 (2014); *see also* EEOC v. Waffle House, Inc., 534 U.S. 279, 291–92, 296 (2002) (holding that the government can enforce antidiscrimination law notwithstanding arbitration agreements).

[44] Levi Sumagaysay, *FAIR Act Is Being Revived in Washington, Raising Hopes for End to Forced Arbitration*, MARKETWATCH (Feb. 11, 2021), https://perma.cc/4KW5-4BN7; Alan I. Model, Kevin E. Burke, Maury Baskin & Michael J. Lotito, *PRO Act Would Upend U.S. Labor Laws for Non-union and Unionized Employers Alike*, LITTLER (Feb. 10, 2021), https://perma.cc/GX4A-259V.

there is no reason to limit pattern-or-practice litigation to classes. Otherwise, employers would essentially be able to contract out of private antidiscrimination enforcement.

Epic Systems should not be extended to Title VII pattern-or-practice claims. As in other concerted activities, pattern-or-practice plaintiffs try to change workplace practices—just through a court order, rather than a strike or collective bargaining. The Supreme Court's skepticism about the concertedness of group litigation can be answered without leaving all workplace litigation unprotected. Courts should scrutinize litigating groups to determine whether their particular litigation activity is protected by the NLRA. Adapting a test from securities law, I argue that if a group attempting to litigate a pattern-or-practice lawsuit predates the litigation, it should be able to obtain prospective injunctive relief in court, followed by arbitrations to adjudicate individual damages.

This Comment proceeds in two parts. In Part I, I explain the relevant aspects of workplace regulation and the Supreme Court's arbitration jurisprudence. In Part II, I evaluate ways of resolving the tension between *Epic Systems* and pattern-or-practice's class limitation. First, I argue that removing the class limitation would be inconsistent with Title VII. Allowing groups to seek relief for discriminatory treatment is necessary to achieve Title VII's goal of remediating group-based social stratification. Next, I argue that *Epic Systems* should not be categorically extended to Title VII. Instead, courts should decide whether litigation is a concerted activity on a case-by-case basis.

I. THE LEGAL LANDSCAPE OF WORKPLACE REGULATION

In this Part, I review the pieces at play in the application of *Epic Systems* to Title VII pattern-or-practice claims. First, I survey the relevant workplace-regulation statutes—Title VII, the primary federal employment-discrimination law; the Fair Labor Standards Act[45] (FLSA), under which the *Epic Systems* plaintiffs' substantive wage-and-hour claims arose; and the NLRA, which protects employees' group activity. Then, I turn to the Federal Arbitration Act[46] (FAA), which now channels many employment claims into arbitration. A few courts, including the Second Circuit, have found that Title VII pattern-or-practice claims are subject to

[45] 29 U.S.C. §§ 201–219.

[46] Pub. L. No. 68-401, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1–16, 201–208).

mandatory arbitration as well.[47] Finally, I examine *Epic Systems* itself. I argue that the holding does not necessarily reach beyond the FLSA to Title VII pattern-or-practice claims.

A. Workplace Regulation Statutes

1. Systemic discrimination and Title VII.

Congress passed Title VII of the Civil Rights Act of 1964[48] in order to "eradicat[e] discrimination throughout the economy" and provide relief "for injuries suffered through past discrimination."[49] Under the statute, employers may not hire, fire, or otherwise treat employees differently based on their race, religion, sex, gender identity, sexual orientation, or national origin.[50]

Title VII has a mixed enforcement regime: there is both a private right of action and a public enforcer. A would-be plaintiff must file a charge with the EEOC, which investigates the complaint and, if there is "reasonable cause to believe that the charge is true," tries to resolve the dispute through "informal methods of conference, conciliation, and persuasion."[51] If conciliation fails, the EEOC can sue the employer in federal court.[52] But if the agency dismisses the complaint or does not sue, the employee may sue.[53]

In practice, the EEOC rarely litigates. In each year between 2000 and 2013, private plaintiffs filed an average of fifty-five times as many employment discrimination lawsuits as the EEOC.[54] The reliance on private litigation rather than public enforcement is part of the statutory scheme. Congress wanted to "limit[ ] the EEOC's reach" by delegating adjudication to courts and not agencies.[55] Congress may have feared losing control over

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47 *See* Parisi v. Goldman, Sachs & Co., 710 F.3d 483, 488 (2d Cir. 2013).

48 Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–2000h-6).

49 Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).

50 42 U.S.C. § 2000e-2(a)(1); *see also* Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020) (holding that Title VII's protections based on sex extend to gender identity and sexual orientation).

51 42 U.S.C § 2000e-5(b).

52 42 U.S.C § 2000e-5(f)(1)–(2).

53 42 U.S.C § 2000e-5(f)(1).

54 Bornstein, *supra* note 43, at 130. These figures include claims under Title VII as well as other federal employment-discrimination statutes.

55 *Id.* at 131; *see also* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 117–18 (2010).

Title VII's enforcement if it were left solely to the president without the backstop of private suits.[56]

Systemic discrimination at a company can be addressed through pattern-or-practice litigation.[57] A pattern or practice exists when a business's discriminatory practices are "standard operating procedure—the regular rather than the unusual practice."[58] In *International Brotherhood of Teamsters v. United States*,[59] the Supreme Court established a two-part burden-shifting framework for pattern-or-practice cases. First, in the liability phase, plaintiffs "establish a prima facie case that such a policy existed,"[60] usually via a combination of statistical and anecdotal evidence.[61] After a prima facie showing, the court can order prospective relief, such as an injunction forbidding the discriminatory practice or requiring the employer to adopt an affirmative action program.[62] Next, in the remedial phase, potential victims may obtain individualized damages. The prima facie showing from the liability phase establishes a presumption that every member of the relevant group was a victim of illegal discrimination, but the employer can "demonstrate that [an] individual [ ] was denied an employment opportunity for lawful reasons," preventing individualized relief for that employee or job applicant.[63]

Pattern-or-practice claims can be brought by the government or as private class actions. Technically, the statutory text only expressly authorizes the government to bring these claims: the attorney general may "bring a civil action" to enforce Title VII when an employer "is engaged in a pattern or practice of resistance" to the statutory rights.[64] This responsibility was transferred to the

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56 FARHANG, *supra* note 55, at 121–22, 164–65.

57 Plaintiffs also use disparate-impact theories of discrimination. Because courts have not expressly limited disparate-impact litigation to classes, this Comment does not focus on it. *See supra* note 28.

58 International Brotherhood of Teamsters v. United States, 431 U.S. 324, 336 (1976).

59 431 U.S. 324 (1976).

60 *Id.* at 360.

61 *Id.* at 339–40.

62 *Id.* at 361. Title VII injunctions can be retrospective (for example, reinstating an illegally fired employee) or prospective (for example, a requirement that an employer change its seniority system). Typically, individual remedies are retrospective and group remedies are prospective. *See* Lowery v. Circuit City Stores, Inc., 158 F.3d 742, 761 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999).

63 *Teamsters*, 431 U.S. at 361–62; Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 366–67 (2011).

64 42 U.S.C. § 2000e-6(a).

EEOC via the Equal Employment Opportunity Act of 1972's[65] amendments to the Civil Rights Act.[66]

Yet courts allow private plaintiffs to bring pattern-or-practice claims as well. The Supreme Court has explained that "the elements of a prima facie pattern-or-practice case are the same in a private class action" as in a suit by the government.[67] A private pattern-or-practice claim is not an independent cause of action under Title VII. Rather, private plaintiffs have access to the same burden-shifting framework that allows the government to remediate discriminatory practices without showing individualized harm.[68] One commentator suggested that the Supreme Court extended the pattern-or-practice method to private plaintiffs in an "attempt to create workable standards and evidentiary requirements for challenges against systemic discrimination."[69] Regardless, recent Supreme Court cases have confirmed that class plaintiffs can bring Title VII pattern-or-practice claims.[70]

However, it is likely that *only* classes can pursue these claims. All circuits to consider the issue have ruled that private pattern-or-practice claims cannot be brought by individual plaintiffs; they can only be brought as class actions.[71] For example, in *Davis v. Coca Cola Bottling Co.*,[72] the Eleventh Circuit explained that class certification is necessary in such cases because it avoids the "res judicata and collateral estoppel issues that would arise" absent the procedural protections of Rule 23.[73] The Tenth Circuit likewise explained that these claims, "by their very nature, involve claims of classwide discrimination" and use a different

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65 Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e-6(c)).

66 42 U.S.C. § 2000e-6(c).

67 Cooper v. Fed. Rsrv. Bank, 467 U.S. 867, 876 n.9 (1984).

68 *See* Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135, 147–49, 149 n.8 (2d Cir. 2012).

69 Tsang, *supra* note 28, at 321; *see also* Franks v. Bowman Transp. Co., 424 U.S. 747, 763–66 (1976) (explaining that Congress intended courts to fashion broad prospective relief for Title VII violations). In contrast, Krieger argues that courts' drawing of increasingly sharp distinctions between pattern-or-practice and other methods of proof under Title VII is a way of reining in antidiscrimination litigation. Krieger, *supra* note 39, at 58 n.23, 67–68.

70 *See, e.g.*, *Dukes*, 564 U.S. at 352–53 (2011) (explaining that plaintiffs seeking class certification in a pattern-or-practice suit must show that the causes of all adverse employment decisions were connected).

71 *See* Daniels v. United Parcel Serv., Inc., 701 F.3d 620, 632 (10th Cir. 2012); *Chin*, 685 F.3d at 149–50; Davis v. Coca-Cola Bottling Co., 516 F.3d 955, 967–69 (11th Cir. 2008); Bacon v. Honda of Am. Mfg., 370 F.3d 565, 575 (6th Cir. 2004); Celestine v. Petroleos de Venez. SA, 266 F.3d 343, 355–56 (5th Cir. 2001); *Lowery*, 158 F.3d at 760–62; Babrocky v. Jewel Food Co. & Retail Meatcutters Union, Local 320, 773 F.2d 857, 866 n.6 (7th Cir. 1985).

72 516 F.3d 955 (11th Cir. 2008).

73 *Id.* at 968–69.

method of proof than that used in individual discrimination cases.[74] District courts have allowed nonclass groups—including a union,[75] an unincorporated organization of past and present Black employees,[76] and a local NAACP chapter[77]—to participate in pattern-or-practice suits as well.

2. The FLSA: procedures and remedies.

Like Title VII, the FLSA gives individual employees legal rights at work. The FLSA establishes a right to a minimum wage[78] and overtime pay.[79] Group litigation under the FLSA differs from group litigation under Title VII in two critical ways. First, unlike in Title VII litigation, FLSA plaintiffs cannot win prospective injunctive relief to change their employers' business practices.[80] Second, FLSA group litigation is governed by a "collective action," a procedural device that Congress and the Supreme Court have treated differently from a class action.[81] Under most statutes, including Title VII but excluding the FLSA, plaintiffs aggregate claims using Rule 23 class actions.[82]

Private plaintiffs cannot obtain injunctive relief in FLSA suits. The FLSA's text limits injunctive relief to actions brought by the government,[83] and courts have declined to extend it to private FLSA plaintiffs.[84] This interpretation has been subject to criticism. A commentator calling for amendments to the FLSA explained that "wage theft [is] a fundamentally systemic problem that—like Title VII—requires restructuring employer practices."[85] But so far, Congress has refused to give workers the same

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74 *Daniels*, 701 F.3d at 633 (quoting *Babrocky*, 773 F.2d at 866 n.6).

75 Brotherhood of Maintenance of Way Employees Division v. Ind. Harbor Belt R.R. Co., No. 13 CV 18, 2014 WL 4987972, at *4 (N.D. Ind. Oct. 7, 2014).

76 Emps. Committed for Just. v. Eastman Kodak Co., 407 F. Supp. 2d 423, 435 (W.D.N.Y. 2005).

77 Welch v. Eli Lilly & Co., No. 06-cv-0641, 2008 U.S. Dist. LEXIS 61648, at *19–20 (S.D. Ind. Aug. 7, 2008).

78 29 U.S.C. § 206(a).

79 29 U.S.C. § 207(a)(1).

80 29 U.S.C. § 211(a).

81 *See* Genesis HealthCare Corp. v Symczyk, 569 U.S. 66, 73–74 (2013).

82 *See, e.g.*, *Franks*, 424 U.S. at 747.

83 29 U.S.C. §§ 211(a), 217.

84 *See, e.g.*, Powell v. Florida, 132 F.3d 677, 678 (11th Cir. 1998) (holding thus and collecting cases); Lorillard v. Pons, 434 U.S. 575, 581 (1978) (noting agreement among lower courts that "injunctive relief [is] not available in suits by private individuals" under the FLSA).

85 Jordan Laris Cohen, Note, *Democratizing the FLSA Injunction: Toward a Systemic Remedy for Wage Theft*, 127 YALE L.J. 706, 717 (2018).

rights to restructure wage-and-hour practices as it has given for discriminatory practices via Title VII.[86]

Collective actions are easier to certify than class actions are.[87] But once certified, they do not facilitate group litigation to the same extent. Whereas classes include anyone who fits the class definition and does not opt out,[88] FLSA collective actions include only similarly situated coworkers who opt in.[89] In 1947, Congress eliminated FLSA class actions and representative actions—suits brought by a representative, such as a union, that was not itself an employee.[90]

The Supreme Court has recognized important differences between the collective and class action devices. In *Genesis HealthCare Corp. v. Symczyk*,[91] the Court ruled that an FLSA collective action becomes nonjusticiable when a named plaintiff's case is mooted.[92] In contrast, class actions are excepted from normal mootness rules.[93] Unlike Rule 23 certification, FLSA certification "does not produce a class with an independent legal status, or join additional parties to the action."[94] A collective action brings legally separate actions together into one case, while a class action creates a new, formally independent legal entity.

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86 For discussion of private Title VII injunctions, see *infra* Part II.A.1.

87 The majority rule is that the FLSA's "similarly situated" standard is a lower bar than commonality and predominance in Rule 23. *See* Scott v. Chipotle Mexican Grill, Inc., 954 F.3d 502, 518–20 (2nd Cir. 2020) (holding thus and collecting cases from the Third, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits). The Seventh Circuit merges the certification standards. Espenscheid v. DirectSat USA, LLC, 705 F.3d 770, 772 (7th Cir. 2013).

88 FED. R. CIV. P. 23(c)(3). "Injunction" classes certified under 23(b)(2) do not even require opt-out.

89 29 U.S.C. § 216(b).

90 Portal-to-Portal Act of 1947, Pub. L. No. 80-49, § 5(a), 61 Stat. 84, 87 (codified at 29 U.S.C. § 216(b)); Hoffman-LaRoche Inc. v. Sperling, 493 U.S. 165, 173 (1989); *see also* Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53, 172, 167 (1991) (explaining that the amendment was "an attack on union-organized litigation," but it primarily "injured unorganized workers").

91 569 U.S. 66 (2013).

92 *Id.* at 73–74 ("Rule 23 actions are fundamentally different from collective actions under the FLSA." (citing *Hoffman-La Roche*, 493 U.S. at 177–78 (Scalia, J., dissenting))).

93 *See Franks*, 424 U.S. at 754–56 (explaining that a class action still presents a live case or controversy even if a named plaintiff's "personal stake" has become moot).

94 *Genesis*, 569 U.S. at 75; *see also Hoffman-La Roche*, 493 U.S. at 177–78 (Scalia, J., dissenting) (explaining that, unlike in class actions, potential coplaintiffs in collective actions are simply "members of the public at large," not absent parties).

3. Concerted activities under the NLRA.

Whereas Title VII and the FLSA create individual employment rights, the NLRA creates a right to group activity.[95] The statute sets out a framework "to safeguard the right of employees to self-organization,"[96] including procedures for union elections and collective bargaining.[97] The NLRA also established an agency, the National Labor Relations Board (NLRB), to adjudicate disputes and monitor compliance with the statute.[98] Section 7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other *concerted activities* for the purpose of collective bargaining or other mutual aid or protection."[99] It is an "unfair labor practice" for employers to "interfere with" or "restrain" those § 7 rights.[100] The NLRB can prevent unfair labor practices regardless of a private agreement establishing an alternate dispute-resolution mechanism.[101] Thus, if group litigation were a concerted activity under § 7, the NLRB could prevent employers from compelling arbitration to restrain it.

To sum up the statutes discussed in this section: Title VII protects employees from discrimination. Employees can bring class actions under the statute to remediate a pattern or practice of discrimination. The FLSA uses collective (as opposed to class) actions to vindicate employees' rights to a minimum wage and overtime. And the NLRA protects, via a powerful agency, the right of employees to participate in concerted activities related to self-organization. The scope of concerted activities protected by the NLRA is vital to arguments later in this Comment. In Part I.C, I argue that *Epic Systems*—in which the Supreme Court held that FLSA collective actions are not concerted activities—

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95 This is the traditional distinction between employment law and labor law—an individual rights regime compared to a collective one—but the two systems have porous boundaries. *See* Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2701–07 (2008).

96 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).

97 29 U.S.C. § 159.

98 29 U.S.C. § 153.

99 29 U.S.C. § 157 (emphasis added).

100 29 U.S.C. § 158(a)(1).

101 29 U.S.C. § 160(a) ("Th[e] power [to prevent unfair labor practices] shall not be affected by any other means of adjustment or prevention . . . established by agreement, law, or otherwise."); *see also, e.g.*, Square D Co. v. NLRB, 332 F.2d 360, 364 (9th Cir. 1964) (explaining that the NLRB has jurisdiction over unfair labor practices regardless of private agreements that require arbitration of disputes).

can be cabined to the FLSA. In Part II, I argue that some Title VII pattern-or-practice litigation is a concerted activity protected by the NLRA. But before returning to the NLRA and FLSA in the discussion of *Epic Systems*, I detour to the third statute implicated in the decision—the Federal Arbitration Act.

B. The Federal Arbitration Act and the Supreme Court's Arbitration Jurisprudence

Employers often avoid employee group litigation—whether under the FLSA, Title VII, or similar state laws—by using arbitration agreements. Congress passed the FAA in 1925, in response to the tendency of "common law courts" to "refuse[ ] to enforce agreements to arbitrate disputes."[102] Under the FAA, courts must treat written agreements to arbitrate as presumptively valid, except "upon such grounds as exist at law or in equity for the revocation of any contract."[103] If a party tries to litigate claims covered by the agreement in federal court, the court must stay the proceedings.[104] If one party refuses to arbitrate, the other party can obtain a federal court order to compel arbitration.[105]

The FAA's framers likely envisioned it only "as applying to consensual transactions between two merchants of roughly equal bargaining power"—and not to employment contracts at all.[106] The Supreme Court's early FAA jurisprudence limited its reach.[107] In *Wilko v. Swan*,[108] the Court held that an arbitration agreement could not waive a judicial forum for vindicating a statutory right.[109] As late as 1974, the Court ruled that arbitrating a discriminatory firing under the terms in a collective bargaining agreement did not preclude a Title VII suit.[110]

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[102] *Epic Systems*, 138 S. Ct. at 1621.

[103] 9 U.S.C. § 2.

[104] 9 U.S.C. § 3.

[105] 9 U.S.C. § 4.

[106] Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 647 (1996); Gilmer v. Interstate /Johnson Lane Corp., 500 U.S. 20, 39 (1991) (Stevens, J., dissenting).

[107] Sternlight, *supra* note 106, at 648–49.

[108] 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 485 (1989).

[109] *Id.* at 438.

[110] Alexander v. Gardner-Denver Co., 415 U.S. 36, 59–60 (1974).

Yet, starting in the 1980s, the Supreme Court carved out a larger space for arbitration.[111] The Court overruled *Wilko* in 1989, holding that statutory claims must be arbitrated if parties agreed to it.[112] In addition, arbitration agreements that preclude class actions must be enforced, even if they impair the "effective vindication" of a statutory right by making it uneconomical to pursue on an individual basis.[113]

In *AT&T Mobility v. Concepcion,* the Court held that class waivers in arbitration agreements must be enforced.[114] The Court overruled a California decision that was preempted by the FAA. In *Discover Bank v. Superior Court*,[115] the California Supreme Court had ruled that class waivers in some consumer contracts are unconscionable. They effect an "exemption" from wrongdoing because disputes that involve "large numbers of consumers" and "individually small sums of money" will not be litigated outside class actions.[116] The Supreme Court explained that California's unconscionability interpretation was inconsistent with the FAA because individual adjudication is a "fundamental attribute[ ] of arbitration."[117] Arbitration agreements cannot be set aside on grounds that apply only to arbitration, as opposed to grounds for invalidating any contract.[118] For example, arbitration agreements are invalid if they were procured by fraud or duress but not if state legislators or judges disfavor arbitration for policy

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111 *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (declaring "a liberal federal policy favoring arbitration agreements"); Sternlight, *supra* note 12, at 1317; Bornstein, *supra* note 43, at 146–49; Estreicher et al., *supra* note 35, at 377–79. Commentators have attributed the shift in FAA jurisprudence to conservatives' desire to rein in the "litigation explosion" created by new rights of action, fee-shifting provisions, and procedural innovations in the 1960s and 1970s, which they felt served liberal goals. *E.g.*, Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 378, 381–82 (2016); *see also* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1435 (2019) (Kagan, J., dissenting) (criticizing the Court's arbitration jurisprudence as reflecting negative policy judgments about class actions). *But see Quijas*, 490 U.S. at 480–81 (explaining that the Court's earlier jurisprudence reflected outdated judicial hostility to arbitration).

112 *Quijas*, 490 U.S. at 485.

113 Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 235 (2013).

114 *Concepcion*, 563 U.S. at 352.

115 113 P.3d 1100 (Cal. 2005).

116 *Id.* at 1110; *Concepcion*, 563 U.S. at 340.

117 *Concepcion*, 563 U.S. at 344, 347–48. Parties can agree to class arbitration, but "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to" arbitration. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010).

118 *Concepcion*, 563 U.S. at 339, 341.

reasons.[119] Because California's *Discover Bank* rule rested on the fact that the agreements required individual adjudications, the rule targeted arbitration and was preempted by the FAA.[120]

The Supreme Court's pro-arbitration jurisprudence now extends to employment-law claims too. In *Gilmer v. Interstate /Johnson Lane Corp.*,[121] the Court ruled that age-discrimination claims are subject to mandatory arbitration.[122] The Court found that the EEOC's role in facilitating conciliations showed that "out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme."[123] The Court ruled in *Circuit City Stores, Inc. v. Adams*[124] that the FAA's exception for employment contracts[125] applies only to transportation workers,[126] an issue that was waived in *Gilmer*.[127] The Court has also held that individual discrimination claims cannot be litigated if a collective bargaining agreement expressly requires arbitration of such claims.[128] Though arbitration of employment-related claims usually arises from clauses in employment contracts, claims of discriminatory nonhiring are subject to arbitration as well if the job application contained an arbitration agreement.[129] The Supreme Court has never directly ruled on whether Title VII class actions are subject to mandatory arbitration, but *Gilmer* and *Concepcion* would seem to apply to all employment-related claims. *Epic Systems*, discussed next, would only solidify that interpretation.

C. Cabining *Epic Systems*

With the statutes on the table, we turn in earnest to *Epic Systems*. In this case, the Supreme Court held that FLSA plaintiffs must individually arbitrate their claims, despite the NLRA's protection for group activity.[130] Read broadly—to apply to all workplace litigation—*Epic Systems* would preclude Part II of this

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119 *Id.* at 339.

120 *Id.* at 352.

121 500 U.S. 20 (1991).

122 *Id.* at 23.

123 *Id.* at 29.

124 532 U.S. 105 (2001).

125 9 U.S.C. § 1 ("[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.").

126 *Circuit City*, 532 U.S. at 109.

127 *Gilmer*, 500 U.S. at 25 n.2.

128 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 251 (2009).

129 *See*, *e.g.*, Valentin v. Adecco, 777 F. App'x 50, 51 (3d Cir. 2019) (per curiam).

130 *Epic Systems*, 138 S. Ct. at 1632.

Comment, which argues that some Title VII pattern-or-practice cases must be litigated notwithstanding arbitration agreements. I argue for a narrow reading of *Epic Systems*. FLSA litigation is a particularly poor candidate for NLRA protection, because plaintiffs can neither change workplace practices prospectively nor use a class action.

First, I explain the two bases for the Court's decision. The Court held that FLSA collective actions are not concerted activities[131] and that, even if they were, *Concepcion* would have required arbitration of the plaintiffs' claims.[132] Next, to the first basis of the decision, I argue that some protection for group litigation under the NLRA survives *Epic Systems*. Then, I explain that the basis resting on *Concepcion* is dicta; only the narrowest holding in *Epic Systems* is necessary to the decision. If group litigation were protected, the NLRA would preclude the application of *Concepcion* in some circumstances.

1. The Court's holding.

In *Epic Systems*, the Supreme Court interpreted the NLRA's "concerted activities" to exclude FLSA collective actions. The Court explained that the phrase must be read in context. Textually, "concerted activities" in § 7 ends a list which focuses on union membership and collective bargaining, suggesting it should only cover things similar to those activities.[133] Structurally, the NLRA includes a specific "regulatory regime" for each activity in the list, but no regime relates to group litigation.[134] Thus, the category should be construed to cover only "things employees 'just do' for themselves in the course of exercising their right to free association in the workplace"—not "highly regulated, courtroom-bound 'activities'" like group litigation.[135] The decision implies that strikes, picketing, and NLRB proceedings are concerted activities

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131 *Id.* at 1625.

132 *Id.* at 1622.

133 *Id.* at 1625.

134 *Id. But see id.* at 1639 (Ginsburg, J., dissenting) (countering that some items gained specific statutory guidance only via amendments).

135 *Epic Systems*, 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) (emphasis omitted)).

because of their close relationship to expressly protected labor organizing.[136]

In addition, the Court suggested that, even if it had interpreted "concerted activities" to include FLSA litigation, the arbitration agreements still would have controlled. The Court explained that, "by attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's fundamental attributes."[137] In other words, to the Court, the plaintiffs were trying to transform § 7 into something quite like the *Discover Bank* rule invalidated in *Concepcion*—a limit on arbitration that gains its meaning from the fact that arbitration requires individual adjudications. If plaintiffs cannot use generally applicable contract defenses to invalidate the agreement, they would need to show that the NLRA contains a "clearly expressed congressional intention" to suspend the FAA.[138] The Court found that the NLRA Congress did not suspend the FAA, but for the same reason as the first basis of the decision—that § 7 does not protect FLSA collective actions.[139]

Justice Ginsburg, in dissent, criticized the majority's reasoning and cautioned lower courts against reading the decision too broadly. The dissent pointed out that the majority did not explain why "things employees just do" excludes group litigation.[140] After all, collective bargaining, like litigation, is highly formalized and conducted through representatives. And the dissent would have easily resolved the conflict with *Concepcion*: agreements that violate federal law are invalid, as "[i]llegality is a traditional, generally applicable contract defense."[141] In addition to criticizing the decision, Justice Ginsburg argued that it did not reach antidiscrimination "pattern-or-practice claims that call for proof on a

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[136] *Id.* at 1625. In a decision about confidentiality provisions, the NLRB interpreted the Court's distinction to be that the NLRA protects activity which employees pursue organically (like "[c]ommunicating with each other about events, facts, and circumstances they either know about firsthand or have heard about from their colleagues") but not activity collateral to formal procedures (like "disseminating evidence or information obtained solely through participating as a party in an arbitral proceeding"). Cal. Com. Club, 369 N.L.R.B. No. 106, at 6 (June 19, 2020). This, too, is dissatisfying; collective bargaining and NLRB adjudicatory proceedings are quite formal.

[137] *Id.* at 1622.

[138] *Id.* at 1623–24 (quoting Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 533 (1995)).

[139] *Id.* at 1624.

[140] *Epic Systems*, 138 S. Ct. at 1638 (Ginsburg, J., dissenting).

[141] *Id.* at 1645.

group-wide basis."[142] To justify a narrow scope for the decision, Justice Ginsburg explained that "concerted legal actions" have been essential to effective enforcement of antidiscrimination law[143] and pointed out the class limitation on pattern-or-practice claims discussed above.[144] The majority did not engage with Justice Ginsburg's discussion of the extension of the decision to anti-discrimination law.

2. Some group litigation survives *Epic Systems*.

Like Justice Ginsburg, this Comment argues that *Epic Systems* is limited to the FLSA. Many courts have interpreted it as a categorical rejection of all group litigation from the concerted-activity category.[145] Such interpretations are incorrect for two reasons. First, the FLSA can be distinguished from other work-related group litigation. Second, the Court's analysis of concerted activities suggests the need for a case-specific inquiry into whether litigation is protected.

The FLSA is distinguishable from other statutes on grounds pertinent to the concerted-activity analysis. Workers engage in concerted activities—joining unions, collectively bargaining, or going on strike—in order to change workplace conditions through negotiation or social pressure. Wage-and-hour plaintiffs cannot achieve that goal in federal courts because the FLSA lacks private injunctive relief.[146] When plaintiffs can win prospective injunctive relief—like in Title VII cases—litigation *can* change workplace conditions, more plausibly suggesting NLRA protection. In addition, the formal nature of collective actions justifies a different result for class action litigation.[147] The *Genesis* Court explained that a class action creates an entity with an "independent legal

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[142] *Id.* at 1648.

[143] *Id.*

[144] *See supra* text accompanying notes 71–77.

[145] *See, e.g.*, Williams v. Dearborn Motors 1, LLC (*Dearborn II*), No. 17-12724, 2018 WL 3870068, at *2 (E.D. Mich. Aug. 15, 2018). (applying *Epic Systems* in a Title VII suit); Bekele v. Lyft, Inc., 918 F.3d 181, 186 (1st Cir. 2019) (applying it in an employee misclassification suit); Singh v. Uber Techs. Inc., 939 F.3d 210, 215–16, 217 n.1 (3d Cir. 2019) (same); *see also Epic Systems*, 138 S. Ct. at 1620 (noting that one of the cases under consideration included a collective action and a class action for similar state law claims).

[146] *See supra* text accompanying notes 83–86.

[147] *But see Alt. Ent.*, 858 F.3d at 414 (Sutton, J., concurring in part and dissenting in part) (explaining that "a lawsuit to achieve more favorable terms of employment" is a concerted activity because "workers mutually plan and support it," not because of "the particular procedural form that litigation takes"), *overruled by Epic Systems*, 138 S. Ct. 1612.

status," but a collective action does not.[148] A certified class proceeds in court as an independent, unitary entity, whereas collective action plaintiffs maintain their status as individual litigants. An FLSA litigating group is not formally independent and is easier to certify than a class,[149] justifying less judicial protection of the group's litigation activity.

The Court's mode of analysis in *Epic Systems* suggests that features of the particular litigating group—aside from the substantive law at issue—bear on whether litigation activity is protected. If there is a valid distinction to be drawn between "courtroom-bound activities" and "things employees 'just do' for themselves," it implies that the relevant analytical focus is not the formal structure of group litigation, but its social reality. Group litigation is often *not* something employees decide on as an independent collective; it is driven by plaintiffs' attorneys' strategic decisions.[150] Yet that functional approach implies that when employees in fact pursue collective litigation organically, their activity might be protected.

3. *Concepcion* does not apply to litigation protected by § 7.

One might argue that even if some group litigation were a concerted activity, *Epic Systems* would require arbitration in those cases anyway. The majority indicated that if the NLRA protected plaintiffs from arbitration, it would conflict with the FAA as interpreted in *Concepcion*.[151] Then, plaintiffs would need to show that the NLRA suspended the FAA. But the majority found that the NLRA did not suspend the FAA precisely because of its finding that § 7 did not include a right to an FLSA collective action.[152] Were § 7 to protect group litigation, the result of a statutory conflicts analysis would differ. Indeed, the dissent would have found that, because any illegal contract can be set aside, the plaintiffs' argument is permissible under the FAA's savings clause—an illegal agreement is unenforceable.[153] But a court would not need to adopt the dissent's view to find that the NLRA

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148 *Genesis*, 569 U.S. at 75.

149 *See supra* note 87.

150 *See* Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 109–11 (2011) ("To justify collective (sometimes mandatory) treatment of present-day class members, modern courts presume group cohesion," but "this cohesion is often a convenient fiction.").

151 *See supra* text accompanying notes 138–39.

152 *Epic Systems*, 138 S. Ct. at 1624.

153 *Id.* at 1645 (Ginsburg, J., dissenting).

trumps the FAA here. The text of § 10 of the NLRA effects a suspension of the FAA. The NLRB's power to enjoin an unfair labor practice "shall not be affected by any other means of adjustment . . . established by agreement."[154] If mandatory arbitration were an unfair labor practice, defendants could be enjoined from moving to compel arbitration regardless of private agreements.[155]

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After *Epic Systems*, the NLRA does not protect a group of workers who seek redress for wage-and-hour violations in court. If they signed arbitration agreements, they will be sent to individual adjudications. But workers who seek prospective relief for a pattern or practice of discrimination in violation of Title VII may still be protected. Like bargaining, strikes, and other concerted activities, litigation can help them win changes to the workplace.

So far, however, courts have largely deferred to arbitration agreements in Title VII pattern-or-practice cases. Before *Epic Systems*, in *Parisi v. Goldman, Sachs & Co.*,[156] the Second Circuit explained that, because there is no independent "right to bring a substantive 'pattern-or-practice' claim"—rather, it is just "a method of proof"—it does not infringe a plaintiff's statutory rights to require individual arbitration.[157] The court explained that pattern-or-practice is merely a procedural device that arises from the class action mechanism. In fact, if Rule 23 were to "create a non-waivable, substantive right," it would violate the Rules Enabling Act.[158] Similarly, a district court in the First Circuit explained that the pattern-or-practice device is a "relatively minor procedural difference" that is unlikely to change a case's outcome, so arbitration that precludes a pattern-or-practice claim is

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154 29 U.S.C. § 160(a).

155 Taken formalistically, this analysis might suggest that whether the NLRA precludes arbitration would depend on a case's procedural posture. In cases where plaintiffs file a charge at the NLRB to prevent defendants' motion to compel arbitration in parallel litigation in federal court, for example, Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1016 (5th Cir. 2015), *aff'd sub nom.*, *Epic Systems*, 138 S. Ct. 1612 (2018), the NLRB would be able to enjoin mandatory arbitration. But the same argument may be precluded by the FAA if the argument were a defense to a motion to compel arbitration. *See, e.g.*, Lewis v. Epic Systems Corp., 823 F.3d 1147, 1151 (7th Cir. 2016), *overruled by Epic Systems*, 128 S. Ct. 1612; Morris v. Ernst & Young, LLP, 834 F.3d 975, 979 (9th Cir. 2015), *overruled by Epic Systems*, 128 S. Ct. 1612.

156 710 F.3d 483 (2d Cir. 2013).

157 *Id.* at 487–88 (quoting *Chin*, 685 F.3d at 149 n.8).

158 *Id.* at 488.

appropriate.[159] After *Epic Systems*, a district court interpreted the decision to reach Title VII pattern-or-practice claims as well.[160]

These decisions impair workers' ability to act together to change their workplaces—something that the NLRA expressly protects. And the characterization of pattern-or-practice as merely procedural conflicts with rulings regarding its class limitation, in which courts explain that the mechanism allows employer liability with less proof.[161] In Part II, I argue that courts can give effect to the NLRA without eviscerating arbitration agreements by examining how concerted a particular plaintiff group's litigation activity is. I suggest that courts adapt tests from securities law to evaluate plaintiff groups for cohesion and independence.

II. EVALUATING THE GROUP ACTIVITY OF PATTERN-OR-PRACTICE PLAINTIFFS

The pattern-or-practice mechanism gives plaintiffs substantial litigative power. The court can halt discriminatory business practices after plaintiffs prove preliminary liability, without any showing of individualized harm. Its limitation to classes—empowering groups instead of individuals—stands in tension with the Second Circuit's holding in *Parisi* that such actions can be prevented by arbitration agreements that bar individual claims. This Part explores the two primary ways courts could address this concern and argues that only the second is consistent with Title VII.

First, courts could hold that "there is no substantive statutory right to pursue a pattern-or-practice claim."[162] But that bare holding leaves the doctrine unsettled. Post-*Parisi*, it is unclear why individual and class plaintiffs should be treated differently.[163] Either classes should not be able to use the pattern-or-practice mechanism, which would conflict with the goals of Title VII, or individual plaintiffs should have access to it as well, which would create procedural issues.

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159 Karp v. Cigna Healthcare, Inc., 882 F. Supp. 2d 199, 213 (D. Mass. 2012).

160 *Dearborn II*, 2018 WL 3870068, at *2–3 (order denying plaintiffs' motion for reconsideration).

161 *See Chin*, 685 F.3d at 149.

162 *Parisi*, 710 F.3d at 486.

163 In fact, even as it required arbitration of a pattern-or-practice claim, one court noted that it was perpetuating an "arbitrary and illogical" distinction between individual and class plaintiffs. Karp v. Cigna Healthcare, Inc., 882 F. Supp. 2d 199, 213 (D. Mass. 2012).

Second, courts could rule that sufficient group cohesion among plaintiffs brings Title VII pattern-or-practice litigation under the § 7 concerted-activities umbrella sought by the *Epic Systems* plaintiffs. A litigating group that is acting together to vindicate Title VII rights cannot be prevented from group litigation by arbitration agreements because of the NLRA's protections for concerted activities. This Part proposes a test to gauge sufficient group cohesion. When a litigating group predates the lawsuit, courts should presume that such cohesion exists.

A. The Wrong Result: Killing Off the Private Pattern-or-Practice Suit

Courts could rule that groups cannot bring pattern-or-practice claims, insofar as such claims differ from other private claims under Title VII. On this view, Title VII class actions merely aggregate individual claims: the term "pattern or practice" in the case law simply refers to modes of proof that are more efficient when adjudicating discrimination against a large group. Assuming this holding, courts could iron out the remaining doctrinal wrinkles in two ways, but both are unsatisfactory. They could "level down" by removing the special powers that pattern-or-practice confers on classes, but this would conflict with the goals and principles of Title VII. Or they could "level up," giving individual plaintiffs the same litigating power as groups. But this would create the problems with remedial scope, standing, and issue preclusion that justify class treatment in the first place.

1. Leveling down: group harms and remedies in Title VII.

Title VII's goals and underlying principles require that groups be allowed to contest discriminatory workplace practices. Nixing pattern-or-practice powers for classes would frustrate this goal. With its analytic focus on discriminatory practices—which requires groupwide harm and corresponding groupwide relief—the pattern-or-practice mechanism is a different animal than individual discrimination. Justifying the class limitation, the Tenth Circuit explained that "[p]attern-or-practice claims, 'by their very nature, involve claims of classwide discrimination.'"[164] The Fourth Circuit explained the difference between the "nature of [the]

[164] Daniels v. United Parcel Serv., Inc., 701 F.3d 620, 633 (10th Cir. 2012) (quoting Babrocky v. Jewel Food Co. & Retail Meatcutters Union, Local 320, 773 F.2d 857, 866 n.6 (7th Cir. 1985)).

remedies" available to classes and individuals: because pattern-or-practice suits "seek to redress widespread discrimination and the harm suffered by the group of individuals subjected to that discrimination," courts grant injunctive relief, like "affirmative action plans and the altering of a seniority system," as opposed to the individual remedies, like "reinstatement, hiring, back-pay, [and] damages," available in an individual case.[165]

Congress intended for Title VII plaintiffs to get groupwide relief in addition to individual relief. The Senate Report on the 1972 amendments to Title VII stated that "[t]he committee agrees with the courts that [T]itle VII actions are by their very nature class complains [sic], and that any restriction on such actions would greatly undermine the effectiveness of [T]itle VII."[166] The Report cited with approval cases where the EEOC vindicated a group interest, class actions, and representative suits where unions sued to vindicate members' antidiscrimination interests.[167] By holding in *Parisi* that a plaintiff subject to an arbitration agreement cannot bring a pattern-or-practice suit in court, the Second Circuit cut against Congress's approach. The court explained that an entitlement to group claims would violate the Rules Enabling Act, as Rule 23 cannot modify substantive rights.[168] But the Report shows that a group right exists irrespective of the procedural mechanism used to enforce it.

Theoretical lenses on equality borrowed from constitutional law distinguish the *Parisi* court's and the 1972 Senate's approaches to Title VII. In the constitutional law context, equal-protection scholars distinguish between *anticlassification* and *antisubordination* equality norms.[169] On the anticlassification view, it is impermissible for the state (or, under Title VII, employers) to assign benefits or burdens on the basis of a disallowed classification like race. In contrast, antisubordination focuses on eliminating or preventing the formation of a stratified society

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[165] Lowery v. Circuit City Stores, Inc., 158 F.3d 742, 761 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999).

[166] S. Rep. No. 92-415, at 27 (1971), *reprinted in* COMM. ON LABOR AND PUB. WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 410, 436 (1972); *see also* Robert H. Rotstein, Comment, *Federal Employment Discrimination: Scope of Inquiry and the Class Action Under Title VII*, 22 UCLA L. REV. 1288, 1293 n.38 (1975).

[167] *See* S. Rep. No. 92-415, at 27 n.16.

[168] *Parisi*, 710 F.3d at 488.

[169] *See, e.g.*, Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1472–73 (2004).

with fixed barriers between groups.[170] Affirmative action, for example, conflicts with the anticlassification norm but could further antisubordination ends. Professor Aziz Huq recently offered a variation on this dichotomy.[171] He argues that in *Bostock v. Clayton County*[172] (which extended Title VII's antidiscrimination protections to sexual orientation and gender identity) the Court embraced *transactional* equality, which "looks to the granular motives of particular individuals."[173] In contrast, the Black Lives Matter movement "challenges institutional and social arrangements beyond the immediate interactions of individuals," in the *infrastructural* vein.[174]

Discrimination under Title VII encompasses something broader than classification. The statute separately makes it illegal to "discriminate" due to a protected category and to "classify" based on a protected category.[175] Disparate impact is a method of "proof" of unlawful discrimination.[176] Professor Bradley Areheart argues that Title VII cannot be understood without antisubordination principles in the background. The statute's disparate-impact and reasonable-accommodation provisions sometimes require classification in order to remove barriers from particular groups.[177] Courts interpreted Title VII to allow voluntary affirmative action because Congress intended "to abolish traditional patterns of racial segregation and hierarchy."[178] The threat posed by Title VII—to eliminate status quo arrangements that have entrenched a racially stratified social structure—is also consistent with Huq's notion of infrastructural equality.

Despite Title VII's antisubordinating principles, recent jurisprudence has taken an anticlassification approach to the law. The Supreme Court has cast doubt on whether it is legal to use racial

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[170] *Id.* (explaining that, on an antisubordination view, "practices that enforce the inferior social status of historically oppressed groups" are prohibited).

[171] Aziz Z. Huq, *Bostock v. BLM*, BOS. REV. (July 15, 2020), https://perma.cc/LUF7-JZLT.

[172] 140 S. Ct. 1731 (2020).

[173] Huq, *supra* note 171.

[174] *Id.*; *see also* Amna A. Akbar, *Our Reckoning with Race*, N.Y. REV. (Oct. 31, 2020), https://perma.cc/DT9L-53DN (explaining how contemporary movements for racial justice "focus not on individual bias but instead on infrastructure").

[175] *See* 42 U.S.C. § 2000e-2(a)(1)–(2).

[176] 42 U.S.C. § 2000e-2(k).

[177] Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 970–72 (2012). Under Title VII's reasonable-accommodation provision, employers must make accommodations for an employee's religious practice as long as it does not cause "undue hardship" to the business. 42 U.S.C. § 2000e(j); *see also, e.g.*, Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382, 1383–84 (9th Cir. 1984) (per curiam).

[178] Areheart, *supra* note 177, at 971.

classifications to prevent the perpetuation of racial hierarchy.[179] In *Ricci v. DeStefano*,[180] the Court ruled that when an employer discarded test results because white candidates performed systematically better than minority candidates, the employer discriminated against white candidates because it relied on racial classifications to make the decision.[181] An implication of the holding is that the Supreme Court sees a discriminatory harm under Title VII when an employer makes any racial classifications at all, even if the employer's intent is to further equality among groups. This is certainly consistent with anticlassification, but gives short shrift to the antisubordination value. Thus, the *Parisi* court tracked the sweep of the Supreme Court's Title VII jurisprudence. The possibility of an independent group claim—which it rejected—is grounded in antisubordination. It requires finding legal significance in a group's ability to collectively contest its subordinated position. The Congress that passed Title VII evinced that view of equality, in contrast to *Parisi*.[182] And unlike *Ricci*, with its strengthening of the anticlassification value, the *Parisi* court did not demonstrate any positive vision of equality in its interpretation of Title VII. Though the courts have drifted away from antisubordination in Title VII jurisprudence, the *Parisi* court traveled too far from Congress's scheme for the law.

Individual Title VII claims do not substitute for group claims, as those actions only address discrimination in particular instances. To combat subordination, plaintiffs must be able to address institutional practices. Eliminating private pattern-or-practice suits would hinder the antisubordination goals of Title VII. If the statute was passed to confer power on subordinate groups, their contestation of their treatment as a collective via pattern-or-practice litigation fits the statutory principles.

2. Leveling up: class treatment and pattern-or-practice suits.

Leveling down would conflict with Title VII's goals. So courts might level up, by allowing individuals to bring pattern-or-practice suits as well. But justifications for the class limitation align with

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179 *See id.* at 993–95.

180 557 U.S. 557 (2009).

181 *Id.* at 579; *see also* Areheart, *supra* note 177, at 993 (explaining that, prior to *Ricci*, "considering a practice's racially disparate impact for antisubordination purposes was not the sort of attention to race that threatens equality").

182 *See supra* text accompanying notes 166–68 & 175–78.

general principles that courts have articulated about the limits of individual adjudication.[183] Individual pattern-or-practice suits would implicate the remedial, standing, and issue-preclusion difficulties that justify class treatment in the first place.

Solo litigants generally cannot achieve the scope of relief envisioned by the pattern-or-practice structure. An equitable principle holds that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."[184] The Tenth and Fourth Circuits raised justifications for the class limitation consistent with the principle. The courts explained that the proper focus of an individual Title VII case is an individual harm, not a groupwide pattern or policy, and the scope of relief should match the harm.[185] A job applicant who was not hired due to discrimination might obtain a court-ordered position at a company, but not a change to the company's hiring practices.

Remedial limits shade into standing doctrine. Solo litigants only have standing to remedy harm to themselves, not to third parties,[186] suggesting a constitutional dimension to the Tenth and Fourth Circuits' equitable concerns. The Eleventh Circuit explicitly noted that individual plaintiffs may lack standing to obtain

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[183] For a contrary view, see Tsang, *supra* note 28, at 330–33 (arguing that courts should allow individual plaintiffs to bring pattern-or-practice claims). The doctrines that justify the class limitation can certainly be criticized on their own terms, but their application in Title VII cases is consistent with that in other areas of the law. *See, e.g.*, John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1418 (2007) (criticizing the Supreme Court's limits on injunctive relief that "preclude the use of systemic remedies for . . . institutional and systemic problems" in suits against police departments for constitutional violations).

[184] Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994) (quoting Califano v. Yamasaki, 442 U.S. 682, 702 (1979)). For a discussion of conflicting principles regarding the scope of relief for injunctions in individual cases, see Carroll, *supra* note 28, at 2030–34. Indeed, the narrowing principles that justify limiting the pattern-or-practice method conflict with the principles the Supreme Court articulated in extending the doctrine. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 763–66 (1976) (explaining that courts have "broad equitable discretion" to fashion groupwide relief in Title VII cases). Yet *Franks* was a class action.

[185] *See Daniels*, 701 F.3d at 633 ("Proving an employer had [ ] a [discriminatory] policy does not prove individual employment decisions were discriminatory, although such evidence might be relevant to individual claims."); *Lowery*, 158 F.3d at 761 (explaining that an individual employment-discrimination plaintiff litigates "the discrete question of whether the employer discriminated against the plaintiff in a specific instance," rather than "common questions of fact," and can win individual relief like reinstatement or hiring, rather than groupwide prospective relief like "affirmative action plans [or] the altering of a seniority system").

[186] *See* McKenzie v. City of Chicago, 118 F.3d 552, 555 (7th Cir. 1997) ("[P]laintiffs lack standing to seek . . . relief that benefits third parties.").

prospective relief.[187] Once a plaintiff is no longer being harmed by a particular policy, they have standing to challenge the policy only if there is a high likelihood of future harm.[188] For example, an employee who is fired then reinstated by a judicial order is probably unlikely to be fired again for the same reason.

In addition to standing, the Eleventh Circuit highlighted a concern with issue preclusion. Individual pattern-or-practice claims would lead to unfair results for defendants.[189] Say an individual plaintiff won a pattern-or-practice claim against an employer. With the employer barred by issue preclusion from directly contesting the declaratory judgment that it had a pattern of discrimination, coworkers in subsequent individual cases would benefit from a tilted playing field. The defendant would need to argue that each individual was not affected by the judicially recognized pattern. But if an individual lost her pattern-or-practice claim, future plaintiffs would *not* be precluded from prosecuting new claims. Eventually, the employer will lose a case and potentially be liable for expensive injunctive relief.[190] The procedural safeguards of the class action justify the structure and stakes of a pattern-or-practice claim.

Unlike the other concerns, the Second Circuit's justification for the class limitation relied on a misunderstanding of pattern-or-practice. The Second Circuit explained that it would be inappropriate to give individuals access to pattern-or-practice burden-shifting because "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[191] But the pattern-or-practice mechanism does not change the ultimate burden. In the damages phase, the burden of proof is the same as in an

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[187] *Davis*, 516 F.3d at 968 (explaining that, without formal class certification, "named plaintiffs lack standing to pursue such [prospective] relief for themselves, because the complaint did not allege a likelihood that they will be denied a supervisory position in the future").

[188] *See* City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983); *see also* Carroll, *supra* note 28, at 2036.

[189] *Davis*, 516 F.3d at 968–69. The court noted both res judicata (claim preclusion) and collateral estoppel (issue preclusion) problems. While there are issue-preclusion problems, *Davis* does not seem to demonstrate claim preclusion, that is, serial litigation of claims between the same parties. The reference to res judicata may reflect courts' inconsistency with this lexicon. *See* 18 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 131.10[1] (3d ed. 2020).

[190] *See* Carroll, *supra* note 28, at 2052–55.

[191] Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135, 149 (2d Cir. 2012) (quoting Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981) (alteration in original)).

individual case: an employee must establish an adverse employment action due to membership in a protected class. Because the liability ruling established that there was a pattern of discrimination, the defendant must introduce individualized contrary evidence to overcome the natural presumption that the individual was affected by that pattern. Yet aside from misunderstanding the phased litigation structure, the Second Circuit just restates the problem. Why allow burden shifting for classes but not individuals?

B. The Right Result: Some Group Claims Are Concerted Activities

As we have seen, courts might disavow the private pattern-or-practice claim entirely. Depending on what courts do next, this would either conflict with Title VII's goals or cause procedural problems in individual cases. Instead, perhaps not all class claims can be barred by arbitration agreements. However, the *Epic Systems* Court was skeptical that group litigation, at least under the FLSA, was protected by the NLRA. If there is a door open to argue that some Title VII pattern-or-practice class litigation is protected, the gap is narrow.

This Comment argues that some pattern-or-practice litigation is protected by the NLRA. When group plaintiffs seek prospective relief to change workplace practices via a class action, their activity likely falls within § 7. Yet one more piece is necessary. The Supreme Court indicated that courtroom activity is not something that "employees 'just do' for themselves."[192] But why not, if lawyer-mediated collective bargaining is protected? By eschewing the formal collectivity of an FLSA group and focusing attention instead on what employees "just do," the majority suggests a functional inquiry into the nature of a group's litigative practices to determine if its litigation is concerted.

This Section proposes a new test to guide such an inquiry. In the liability phase of a pattern-or-practice suit, courts should treat group litigation as a concerted activity if the existence of a plaintiff group participating in the lawsuit predates the lawsuit. This test operationalizes the idea that, to be protected, an activity must be related to "self-organization," the first item in the NLRA's list of protected activities.[193]

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[192] *Epic Systems*, 138 S. Ct. at 1625 (quoting NLRB v. Alt. Ent., Inc., 858 F.3d 393, 415 (6th Cir. 2017) (Sutton, J., concurring in part and dissenting in part) (emphasis omitted)).

[193] 29 U.S.C. § 157.

The test comes from securities litigation. When determining whether a group of investors can serve as lead plaintiff under the Private Securities Litigation Reform Act of 1995[194] (PSLRA), courts look to "the existence of a pre-litigation relationship between group members."[195] Securities litigation is quite different from employment discrimination, but, as in this problem, PSLRA courts attempt to distinguish actual from fictitious group cohesion.[196]

In the remainder of this Section, I explain and defend the proposed test. First, I distinguish pattern-or-practice class litigation from FLSA litigation under *Epic Systems*. Then, I show how PSLRA courts distinguish lawyer-driven litigation from group-driven litigation. Courts can determine if group litigation is protected by § 7 of the NLRA in the same way. Next, I apply the test to a few cases. Finally, I evaluate potential problems and consider variations on the test.

1. Distinguishing Title VII from the FLSA under *Epic Systems*.

In Part I.C, I justified a narrow reading of *Epic Systems* due to the FLSA's limitations on prospective injunctive relief and class actions. In contrast, class plaintiffs in Title VII pattern-or-practice cases can achieve broad, prospective, and groupwide relief, allowing plaintiffs to address the infrastructural nature of discriminatory practices.[197] If employees band together to change employer practices—which they can do under Title VII but not the FLSA—their concerted litigation activity falls squarely under NLRA § 7, which insulates what they do for "mutual aid or protection."[198]

Indeed, pattern-or-practice litigation often substitutes for protected concerted activity. A group that engages in litigation selects it from a suite of possible activities that it can use to achieve its goals. In *Mozee v. American Commercial Marine Service Co.*,[199] litigation grew out of direct action. Black workers first challenged Jeffboat's discriminatory promotion practices via mass protest.

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194 Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C. and 18 U.S.C.).

195 Varghese v. China Shenghuo Pharm. Holdings, Inc., 589 F. Supp. 2d 388, 392 (S.D.N.Y. 2008); *see also* Burch, *supra* note 150, at 110 n.94 (collecting cases).

196 Burch, *supra* note 150, at 110–11.

197 *See supra* Part II.A.1.

198 29 U.S.C. § 157.

199 940 F.2d 1036 (7th Cir. 1991), *aff'd and reh'g denied*, 963 F.2d 929 (7th Cir. 1992).

Demonstrations in August 1975, "known as the 'Black Days' protests, involved speeches, petition signing and a call for negotiations between the Black Workers' Coalition and Jeffboat's administration."[200] When the demonstrations failed and participants were disciplined, group members filed a pattern-or-practice lawsuit under Title VII.[201] The initial actions the group took to challenge Jeffboat's employment practices—forming the Black Workers' Coalition, demonstrating in the Black Days, and signing petitions—are protected under the NLRA.[202] Filing class litigation to obtain injunctive relief is another means by which the group pursued the end of changing Jeffboat's business practices.

Pattern-or-practice litigation can also complement collective bargaining. In *Chicago Teachers Union, Local No. 1 v. Board of Education*,[203] the Chicago Teachers Union (CTU) and a class of Black school staff challenged a school-board policy intended to reform underperforming schools.[204] The Board chose only schools on the south and west sides of Chicago for "turnarounds"—wholesale replacement of staff—leading to disproportionate layoffs of Black employees.[205] The CTU sought "prospective injunctive relief including a moratorium on turnarounds and the appointment of a monitor to evaluate and oversee any new turnaround process."[206] The Seventh Circuit approved class certification for the purposes of injunctive relief, because such relief would apply classwide.[207] Plaintiffs in a similar position to the Chicago teachers can bargain over such policies and be protected by the NLRA.[208] These plaintiffs sought the same outcome via group litigation.

A group that exists prior to litigation, like the Black Workers' Coalition at Jeffboat or the CTU, chooses to sue when it determines that litigation will serve its purposes more effectively than

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200 *Id.* at 1040.

201 *Id.* at 1039–40.

202 *See* 29 U.S.C. § 157 ("Employees shall have the right to self-organization."); *Epic Systems*, 138 S. Ct. at 1625 (discussing picketing within the NLRA's regulatory scheme); Cooper Tire & Rubber Co. v. NLRB, 866 F.3d 885, 889 (8th Cir. 2017) (explaining that "a firing for picket-line misconduct is an unfair labor practice" except under certain conditions).

203 797 F.3d 426 (7th Cir. 2015).

204 *Id.* at 441.

205 *Id.* at 431–32.

206 *Id.* at 441.

207 *Id.* at 442.

208 *See* 29 U.S.C. § 157. The Chicago teachers themselves are not subject to the NLRA, as public employees. *See* 29 U.S.C. § 152(2). Rather, they are covered by an Illinois-specific labor regime and were barred from bargaining over layoff policies until recently. *See* Heather Cherone, *Pritzker Signs Bill Restoring Bargaining Rights for Chicago Teachers*, WTTW NEWS (Apr. 2, 2021), https://perma.cc/A7TW-2MDM.

other activities. Addressing inequality in the workplace, as Title VII litigation does, is within the scope of the purposes protected by § 7. Litigation must be "[an]other concerted activit[y],"[209] as the alternatives available to the group clearly are.

Arguments that *Epic Systems* applies to Title VII rely on an unjustified assumption that the Supreme Court's interpretation of § 7 applies to all group litigation.[210] To counter Justice Ginsburg's suggestion that *Epic Systems* does not reach Title VII group actions, Carson Miller explained that Title VII evinces no intent to override the FAA.[211] But the relevant question is not whether Title VII overrides the FAA. Rather, courts must first determine whether there is room left after *Epic Systems* for the NLRA to protect some Title VII litigation. I argue that there is, as the FLSA and Title VII are distinguishable. Second, courts must determine whether the NLRA overrides the FAA. I have argued that it does.[212]

2. Prelitigation groups and the PSLRA.

The structure and remedies of Title VII potentially allow plaintiffs to pursue "mutual aid or protection" in a concerted manner via pattern-or-practice litigation. But class litigation might not reflect that kind of activity. Federal judges often suspect that class plaintiffs do not decide to litigate; lawyers do. As Judge Richard Posner put it in one decision: "All [the class representative's] moves in this suit were almost certainly the lawyer's. Realistically, functionally, practically, she is the class representative, not [the plaintiff]."[213] The *Epic Systems* Court's implication that litigation is not something employees "'just do' for themselves" likely constitutes a similar judgment.[214] But not all class

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[209] 29 U.S.C. § 157.

[210] *See* Miller, *supra* note 29, at 1179; Williams v. Dearborn Motors 1, LLC (*Dearborn II*), No. 17-12724, 2018 WL 3870068, at *2 (E.D. Mich. Aug. 15, 2018) (explaining that the Court "framed the issue broadly" and stressing *Concepcion*'s concern for individual adjudications).

[211] Miller, *supra* note 29, at 1183–84.

[212] *See supra* text accompanying notes 151–55.

[213] Culver v. City of Milwaukee, 277 F.3d 908, 913 (7th Cir. 2002).

[214] *Epic Systems*, 138 S. Ct. at 1625 (quoting *Alt. Ent.*, 858 F.3d at 415 (Sutton, J., concurring in part and dissenting in part) (emphasis omitted)). Compare to that judgement Judge Jeffrey Sutton's opinion, in which he reached the same ultimate result as the *Epic Systems* majority but found that litigation pursued by workers is a concerted activity: "[T]heir legal action is protected if they are substantively cooperating in the litigation campaign—say by pooling money, coordinating the timing of their claims, or sharing

actions have this character. In fact, the PSLRA expressly created procedures to ensure that plaintiffs, not lawyers, manage litigation.[215] Courts can borrow tests from the PSLRA to determine if pattern-or-practice litigation reflects concerted activity and is thus protected by § 7 of the NLRA.

Congress passed the PSLRA in 1995 to curb frivolous securities lawsuits.[216] Congress kept the tail from wagging the dog, ensuring that plaintiffs control their counsel rather than vice versa. To ensure plaintiff control, the law included special certification procedures for named plaintiffs and required courts to pick the most "adequate" plaintiff to oversee the litigation, presumably the plaintiff with the most at stake.[217]

Securities law is far afield from employment law, but a relationship between the PSLRA and worker protection may not be as surprising as it first seems. Professor David Webber argues that the PSLRA enhances worker voice. The statutory requirements lead courts to regularly select pension funds and labor union funds as lead plaintiffs, allowing "labor's capital" to enforce good corporate governance.[218]

Lower courts have differed on how to interpret a provision of the PSLRA that permits a "group of persons" to be appointed lead plaintiff.[219] Some courts simply allow any group.[220] To others, that literal reading would frustrate congressional intent, allowing plaintiffs' counsel to evade effective supervision by assembling

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attorneys and legal strategy." *Alt. Ent.*, 858 F.3d at 414 (Sutton, J., concurring in part and dissenting in part), *overruled by Epic Systems*, 138 S. Ct. 1612. On Judge Sutton's view, cooperation in a litigation campaign (in court or arbitration) is protected, but a particular procedural mechanism like a class action is not.

[215] Jill E. Fisch, *Aggregation, Auctions, and Other Developments in the Selection of Lead Counsel Under the PSLRA*, 64 LAW & CONTEMP. PROBS. 53, 60 (2001) (describing the PSLRA as "an effort to reform class action procedures to secure more effective client control").

[216] Gilles, *supra* note 111, at 386 & n.84. For a critical evaluation of the PSLRA's passage and impact, see generally andré douglas pond cummings, *"Ain't No Glory in Pain": How the 1994 Republican Revolution and the Private Securities Litigation Reform Act Contributed to the Collapse of the United States Capital Markets*, 83 NEB. L. REV. 979 (2005).

[217] 15 U.S.C. § 78u-4(a)(2)–(3).

[218] David Webber, *Reforming Pensions While Retaining Shareholder Voice*, 99 B.U. L. REV. 1001, 1012–13 (2019). In fact, MissPERS, a Mississippi public pension fund, was lead plaintiff in a PSLRA case investors filed against a jewelry chain due to negative publicity from a Title VII case. *In re* Signet Jewelers Ltd. Sec. Litig., No. 16-cv-06728, 2020 WL 4196468, at *1 (S.D.N.Y. July 21, 2020). The securities-fraud claims settled for $240 million, *id.*; the discrimination case is ongoing. *See infra* text accompanying notes 267–72.

[219] 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

[220] *See, e.g.*, D'Hondt v. Digi Int'l, Inc., No. 97-5, 1997 WL 405668, at *3 (D. Minn. Apr. 3, 1997).

diffuse groups of unrelated investors.[221] These courts allow only "close-knit" groups that have "a meaningful relationship preceding the litigation" and share more than ownership of "the same securities."[222] Taking a middle path, a third set of courts takes a multifactor approach.[223] Along with factors that purport to evaluate the group's capacity to supervise the case, these courts consider "the existence of a pre-litigation relationship between group members."[224] The Third Circuit endorsed this "rule of reason" approach: unrelated investors can constitute a lead-plaintiff group, unless a group is too large to supervise litigation or was created by the machinations of counsel.[225]

In determining whether Title VII pattern-or-practice litigation constitutes a concerted activity, courts should borrow the most restrictive test from the PSLRA: whether plaintiffs have a relationship that predates the lawsuit. Without having a prelitigation relationship, plaintiffs, as a group, could not have affirmatively selected litigation to achieve "mutual aid or protection." This rule avoids the uncertainty and judicial discretion that would be created by importing the flexible standards of the rule-of-reason approach to the PSLRA. It is also consistent with district courts' exceptions to the class limitation—plaintiff associations that exist outside of litigation.[226]

The proposed test avoids the Supreme Court's unease with using the NLRA to protect procedural innovations that postdate its enactment.[227] The 1966 revisions to the Federal Rules that created the modern Rule 23 were driven by the desire to facilitate redress for unorganized groups—in particular, Black Americans facing entrenched discrimination and diffuse consumers who faced harm from mass manufacturers and polluters.[228] They created a novel "interest class" justification for collective treatment. Those who share an interest in the result of litigation can be bound together, despite lacking a relationship outside

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221 Aronson v. McKesson HBOC, Inc., 79 F. Supp. 2d 1146, 1153 (N.D. Cal. 1999).

222 *Id.* at 1153–54.

223 *Varghese*, 589 F. Supp. 2d at 392.

224 *Id.* at 392.

225 *In re* Cendant Corp. Litig., 264 F.3d 201, 266–67 (3d Cir. 2001) (quoting Chill v. Green Tree Fin. Corp., 181 F.R.D. 398, 409 (D. Minn. 1998)).

226 *See supra* text accompanying notes 75–77.

227 *See Epic Systems*, 138 S. Ct. at 1624 ("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.").

228 STEVEN YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 240–45 (1987).

litigation.[229] Rule 23's antecedents, however, usually did require prelitigation groups.[230] The PSLRA test would allow courts to determine when a "courtroom-bound 'activit[y]'" is also something employees "just do,"[231] and it yields results that are consistent with the history of group litigation.

3. Architecture of arbitration and pattern-or-practice suits.

This Section examines how the proposed rule would work in actual pattern-or-practice cases. The cases discussed above (under the additional hypothetical assumption that parties had agreed to arbitration) furnish productive examples to consider whether the proposed rule would preclude arbitration in the liability phase. Regardless, arbitration would still be used in the damages phase of a pattern-or-practice case. Individual proceedings in the damages phase do not constitute concerted activity.

Courts can look for signs of prelitigation relatedness among a group pursuing a Title VII pattern-or-practice case. The relationship must be geared toward addressing workplace conditions; otherwise, all potential plaintiffs who know each other as coworkers would automatically satisfy the test. At an extreme, workers may have explicitly created an association to combat workplace discrimination or have joined a union to pursue concerted activity. For less organized workplaces, evidence like petitions or meetings regarding how to address discrimination, or evidence that class members approached the lawyers as a group and not vice versa, could suffice. In *Mozee*, the organizing activity of Black employees via the Black Workers' Coalition would have justified a class action for a pattern-or-practice suit even if they had signed individual arbitration agreements. Even without the coalition, the workers engaged in protests to change workplace conditions, which shows a prelitigation relationship.

The class plaintiffs in *CTU* alleged that the Board of Education's school-closing policies were discriminatory.[232] If they had signed arbitration agreements (and were private employees

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[229] *Id.* at 248.

[230] *Id.* at 221–22 (explaining that Rule 48 of the Federal Equity Rules of 1843 provided for group litigation, but courts typically would apply the Rule only if absent parties chose to join litigating organizations).

[231] *Epic Systems*, 138 S. Ct. at 1625 (quoting *Alt. Ent.*, 858 F.3d at 415 (Sutton, J., concurring in part and dissenting in part) (emphasis omitted)).

[232] *See supra* text accompanying notes 203–04.

subject to the NLRA),[233] then they would be able to litigate because of the organizing activity embodied by the union. It is no surprise that a union's activity is protected by § 7. The list of concerted activities expressly includes "form[ing] . . . labor organizations," as well as unions' representative action in collective bargaining.[234] That said, a collective bargaining agreement that assigned Title VII pattern-or-practice claims to arbitration would still be enforced,[235] as the choice is made on a groupwide basis. The union would be expressly allocating a future group claim to arbitration, on behalf of the group.

In *Parisi*, plaintiffs' actual arbitration agreements were before the court, and the Second Circuit held that those agreements were enforceable.[236] The Second Circuit's ruling was consistent with the proposed rule. The putative class showed no evidence of prelitigation organization. The plaintiff sought to certify a class of female managing directors, vice presidents, and associates at Goldman Sachs,[237] with no indication that potential class members even knew about the lawsuit. Likely, Parisi's lawyer added the class claim to make the case make financial sense. So the Second Circuit's rejection of class certification is consistent with the proposed test.

Akin to *Parisi*, in *Wal-Mart Stores, Inc. v. Dukes*,[238] plaintiffs alleged that Wal-Mart's sexist practices affected 1.5 million women at worksites around the country.[239] The Supreme Court found that the proposed class lacked commonality.[240] Had the plaintiffs been facing mandatory arbitration rather than class certification, they would fail the proposed test. There was no prelitigation connection alleged among them.

These examples are on the extreme ends. A closer case is *Williams v. Dearborn Motors 1* (*Dearborn III*).[241] Brian P. Williams and Jay Howard brought a class action against a car dealership where they worked, alleging a racial pay disparity. They

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233 *See* 29 U.S.C. § 152(2).

234 29 U.S.C. § 157.

235 *See* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 251 (2009) (holding that union members' individual statutory age-discrimination claims must be arbitrated when arbitration is agreed to in their collective bargaining agreement).

236 *Parisi*, 710 F.3d at 488.

237 *Id.* at 485.

238 564 U.S. 338 (2011).

239 *Id.* at 343.

240 *Id.* at 356.

241 No. 17-12714, 2020 WL 1242821 (E.D. Mich. Mar. 16, 2020).

proceeded in the same litigation but had filed individual claims with the EEOC.[242] If they approached the lawyer that they retained together or on behalf of a larger group, that might constitute a prelitigation relationship.[243] But it would not satisfy the test if the lawyer had assembled the group claim on his own initiative. Courts could also look at the character of the plaintiffs' opposition to the policies at the worksite itself. The complaint stated that a plaintiff, Howard, complained to the dealership about "race-based compensation disparities."[244] How did Howard complain? If Howard had approached his employer as part of a group—for example, with likeminded coworkers or armed with a petition—that might tend toward finding a relationship among the class. But if he were just advocating for himself, that would not be enough.

In reality, the court hearing the *Dearborn Motors* litigation dismissed the class, extending *Epic Systems* to Title VII.[245] Yet the employer's contractual offer of arbitration proved illusory, as Dearborn Motors could not afford to arbitrate Howard's claim.[246] Though Howard's individual claim resumed in court, Williams could not get relief because his only claim was embedded in the groupwide pay disparity claim that was dismissed with the class.[247] If the court had used the proposed test, perhaps Williams would not have been shut out of court.[248]

Having examined the test more closely, we turn to its operation in a pattern-or-practice class action. An employer would not be able to compel arbitration to stymie class certification in a pattern-or-practice case if the group's organization predates the

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[242] *Id.* at *1.

[243] In its published guidance to employees, the NLRB states that a concerted activity is when "two or more employees take action for their mutual aid or protection regarding terms and conditions of employment." NLRB, EMPLOYEE RIGHTS, https://perma.cc/7WU8-HESU; *cf.* Melissa K. Stull, Annotation, *Spontaneous or Informal Activities of Employees as "Concerted Activities," Within Meaning of § 7 of National Labor Relations Act (29 USCS § 157)*, 107 A.L.R. Fed. 244, 251 (1992) (noting that "the most obvious type of concerted activity occurs where two or more employees are working together," but "a single employee" can also engage in a concerted activity, in particular if she represents others). That guidance might be persuasive regarding the scope of the proposed test. If so, Williams and Howard's joint activity alone would be enough to constitute a prelitigation relationship.

[244] Williams v. Dearborn Motors 1, LLC (*Dearborn I*), No. 17-12724, 2018 WL 3092790, at *2 (E.D. Mich. May 24, 2018).

[245] *Dearborn II*, 2018 WL 3870068, at *2.

[246] *Dearborn III*, 2020 WL 1242821, at *2.

[247] *Id.* at *4.

[248] Williams likely would not have collected damages anyway. A business that cannot pay for arbitration probably cannot pay a judgment either.

lawsuit, because that would be an unfair labor practice under the NLRA. The group could obtain injunctive and declaratory relief, but arbitration would be required in the damages phase.

Arbitration in the damages phase is consistent with the pattern-or-practice litigation scheme. The liability and damages phases of a pattern-or-practice case are procedurally distinct. Nonclass associations can only participate in the liability phase.[249] Likewise, Rule 23(b)(2) classes can only pursue injunctive and declaratory relief, not individualized damages.[250] Post-liability, the damages phase involves individual "additional proceedings."[251] There might be a proceeding for each class member.[252] These proceedings could easily be arbitrations. The arbitrator would have a presumption that the employer engaged in an unlawful discriminatory policy.[253]

In extending *Epic Systems* to Title VII pattern-or-practice cases, the *Dearborn Motors* court stressed that the plaintiffs' attack on "the individualized nature of the arbitration proceedings" was precluded by *Concepcion*.[254] As discussed, the NLRA might suspend the FAA for litigation that falls into § 7.[255] But in addition, requiring arbitrations in the damages phase preserves contracted-for individual adjudications where individualized proof and relief are at issue. The pattern-or-practice structure allows plaintiffs' groups to pursue liability rulings without destroying contractual expectations with respect to individual adjudication.

4. Limitations of the PSLRA test.

The test proposed above—whether a litigating group predates a lawsuit—is one way courts can determine whether a group is acting in a concerted manner when it litigates. In this

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[249] Emps. Committed for Just. v. Eastman Kodak Co., 407 F. Supp. 2d 423, 433 (W.D.N.Y. 2005).

[250] *Dukes*, 564 U.S. at 360, 366–67.

[251] *Teamsters*, 431 U.S. at 361.

[252] McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 491 (7th Cir. 2012) (explaining that, in a disparate-impact case with the same structure, "hundreds of separate trials may be necessary" in the damages phase "to determine which class members were actually adversely affected" and "what loss each [ ] sustained").

[253] This structure is very similar to the "hybrid" litigation-arbitration model proposed by Professors Myriam Gilles and Anthony Sebok, in which attorneys could seek an "enforceable judicial judgment" of liability, followed by "subsequent serial arbitrations," using the judicial ruling for its preclusive or persuasive effect. Gilles & Sebok, *supra* note 42, at 468–70.

[254] *Dearborn Motors 1*, 2018 WL 3870068, at *2.

[255] *See supra* text accompanying notes 151–55.

Section, I consider alternatives to and limitations of the test. First, courts could use standards adopted from the PSLRA rule-of-reason approach—rather than a bright-line rule—but a rule has advantages for litigation expectations. Second, plaintiffs or attorneys may try to game the rule by organizing in advance of litigation or creating paper organizations. I argue that this risk is limited. Third, some litigating groups are left out by the proposed rule. This is a severe limitation of the rule. They are no less deserving of protection from discrimination at work.

The proposed test is intended to be a simple bright-line rule to cabin judicial discretion in determining if group litigation is protected.[256] As such, it likely does not perfectly capture all or exclusively the conduct that it is intended to.[257] For example, perhaps an organized group exists, but its activities are unrelated to the problems that led to litigation, and group members do not plan to oversee the lawyers. Such a group would pass the prelitigation test, but in reality, the litigation would not reflect concerted activity. Courts could instead analyze concertedness with a standard. For the courts that take the rule-of-reason approach to the PSLRA, "the extent of the prior relationships" among group members is only one, nondispositive factor that is considered.[258] Most importantly, groups must show "an ability (and a desire) to work collectively to manage the litigation."[259] To show independence from counsel and capacity for collective organization, those courts look to factors like members' "involvement . . . in litigation thus far," "plans for cooperation," "sophistication," and "whether the members chose outside counsel, and not vice versa."[260] For example, one court found that, because investors had "held joint conference calls" to form a litigating strategy "separately and apart from their lawyers," they could constitute a lead-plaintiff group.[261] A dissent that presaged *Epic Systems* explained that a litigation campaign is concerted if workers "substantively

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[256] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI L. REV. 1175, 1179–80 (1989).

[257] *See* Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 990–91 (1995).

[258] *Cendant*, 264 F.3d at 266–67.

[259] Reimer v. Ambac Fin. Grp., Inc., No. 08-411, 2008 WL 2073931, at *3 (S.D.N.Y. May 9, 2008).

[260] *Varghese*, 589 F. Supp. 2d at 392.

[261] *Reimer*, 2008 WL 2073931, at *3.

cooperat[e]," for example, "by pooling money, coordinating the timing of their claims, or sharing attorneys and legal strategy."[262]

But in the Title VII arbitration context, a rule is preferable to a multifactor standard. Litigants should be able to predict ex ante whether they will end up in court. Extended proceedings in federal court ought to be avoided if possible, as that is exactly what parties who agree to arbitrate do not want. A bright-line rule that does not give a sympathetic factfinder leeway to invalidate arbitration agreements left and right better addresses the Supreme Court's unease with legal strategies that attempt end-runs around arbitration.

At the same time, one might wonder whether a hard-edged proposed rule could be gamed by clever plaintiffs—or their attorneys.[263] Such gaming could work in two ways. First, anticipating the application of the rule, plaintiffs could engage in group activity to contest employer practices outside of and prior to litigation, perhaps on the advice of counsel. This kind of strategic behavior would be good: if workers succeed, they would conserve judicial resources. It is also in line with the regulatory regime established by the NLRA, which envisions a limited state role in labor and management's joint governance of the workplace.[264]

Second, plaintiff-side attorneys could fake it. Like corporate lawyers creating shell companies, plaintiffs' lawyers could create associations that exist only on paper. But to the extent that the existence of a cohesive plaintiff group turns on a contested question of fact, the NLRA and the FAA both include procedures to resolve such disputes. When the NLRB conducts a hearing on an unfair labor practice, it uses the Federal Rules of Evidence.[265] In a motion to compel arbitration under the FAA, the court must "proceed summarily to [a] trial" if there is a factual question regarding the formation or performance of an arbitration

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[262] *Alt. Ent.*, 858 F.3d at 414 (Sutton, J., concurring in part and dissenting in part), *overruled by Epic Systems*, 138 S. Ct. 1612.

[263] *See* Sunstein, *supra* note 257, at 995 ("Because rules have clear edges, they allow people to 'evade' them by engaging in conduct that is technically exempted but that [is substantively] the same.").

[264] Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1545 (1981) (elucidating and critiquing the "industrial pluralist" ideology of the NLRA and its judicial interpretations, whereby the workplace is a miniature democracy in which "labor and management jointly determine workplace conditions" with "limited" government intervention).

[265] 29 U.S.C. § 160(b).

agreement.[266] Factual disputes created by attorneys trying to game the rules are no different than any other dispute in litigation.

The biggest problem with the proposed rule is that it excludes deserving classes. Sterling Jewelers, owner of Kay and Jared, has been in a class arbitration with women employees over discriminatory pay and promotions for over a decade.[267] Sterling's mandatory arbitration agreements were silent on whether they allowed class proceedings, and the arbitrator permitted a class for declaratory and injunctive relief of the disparate-impact claims.[268] Though the class was only certified for pay-and-promotions claims, a culture of sexual harassment pervaded the company. The annual managers' retreat typically included "Bacchian" levels of drinking and sex, combined with explicit coercion or promises of advancement for women who consented to sex.[269] After they were contacted by employees at one store, lawyers discovered that the company's practices spanned its operations across regions and business lines, emanating from a "good old boys' club" at the top.[270] The chief executive, Mark Light, allegedly "conditioned women's success" on sex.[271] "The company culture oozed downward" to other executives and individual stores.[272]

Because of *Concepcion* and *Epic Systems*, the Sterlings of today probably use class waivers. A pattern-or-practice claim on Sterling's facts arising from contemporary employment contracts would be channeled into individual arbitrations. The group of employees fails the proposed test because it was created by lawyers for the purpose of litigation. Without a company-wide adjudication, many potential plaintiffs would fall through the cracks, either not knowing their legal rights or unable to afford representation,[273] and the company's practices might go unreformed.

This shows the limits of using the NLRA to combat arbitration agreements after *Epic Systems*. Even when employees are

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266 9 U.S.C. § 4.

267 Taffy Brodesser-Akner, *The Company That Sells Love to America Had a Dark Secret*, N.Y. TIMES MAG. (Apr. 23, 2019), https://perma.cc/LN65-TTYX; Jock v. Sterling Jewelers Inc., 942 F.3d 617, 620–21 (2d Cir. 2019).

268 *Jock*, 942 F.3d at 620–21. Prior to *Concepcion*, fewer employers used class waivers, as they could be found unconscionable in some jurisdictions. *See Concepcion*, 563 U.S. at 340; CARLTON FIELDS, *supra* note 32, at 40 (showing that the percentage of companies that use class waivers more than doubled after 2012).

269 Brodesser-Akner, *supra* note 267.

270 *Id.*

271 *Id.*

272 *Id.*

273 *See* Sternlight, *supra* note 12, at 1334–35.

not acting in a concerted manner, they deserve access to pattern-or-practice relief. The root problem is *Concepcion*, which allows companies to contract out of group proceedings.[274] Yet perhaps the NLRA should have played a larger role in the Sterling case. Employees at Sterling were barred from sharing stories of harassment because they signed nondisclosure agreements.[275] Because jewelry store workers who were harassed could not talk about it with their coworkers, it was less likely that they would realize harassment was a systemic problem and organize against it prior to litigation. However, the confidentiality provisions that made concerted action unlikely in the first place may have been illegal under the NLRA.[276]

As the Sterling case shows, using a PSLRA test to determine whether litigation is a concerted activity would leave mandatory arbitration in place for many potential pattern-or-practice plaintiffs. Title VII plaintiffs who are subject to mandatory arbitration are currently shut out of court. If courts adopt the proposed test, many plaintiffs would be able to get groupwide relief for discriminatory practices. Yet to achieve a systemic change to mandatory arbitration in the workplace, Congress needs to step up.

CONCLUSION

Lower courts have read *Epic Systems* to reach all group litigation, not just litigation under the FLSA. But that is not a necessary implication of the decision. The Supreme Court focused attention on what plaintiffs do, rather than their formal status, which might leave a window open for plaintiffs who act together to change workplace practices, like Title VII pattern-or-practice plaintiffs. The federal courts limit solo litigants' ability to win prospective injunctive relief. So it makes sense to give group plaintiffs a greater ability to stick together. The alternative is to denude statutory schemes of the remedial relief that Congress intended.

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[274] *See supra* text accompanying notes 114–20.

[275] Brodesser-Akner, *supra* note 267.

[276] The NLRB recently ruled that confidentiality provisions in arbitration agreements do not violate the NLRA if they apply only to the arbitration process itself but might if they bar communication about the circumstances giving rise to the dispute. Cal. Com. Club, 369 N.L.R.B. No. 106, at 1, 6 (June 19, 2020); *cf.* Samuel Estreicher & Lukasz Swiderski, *Issue Preclusion in Employment Arbitration After* Epic Systems v. Lewis, 4 U. PA. J.L. & PUB. AFFS. 15, 24–31 (2018) (suggesting that, outside the NLRA, arbitration confidentiality provisions may be unconscionable notwithstanding *Concepcion* and proposing that arbitrators disclose prior opinions where relevant).

To determine when litigation is something workers just do, Title VII courts should borrow tests from the PSLRA. That statute requires courts to closely scrutinize litigating groups for independence and concertedness. When a group is acting together to change discriminatory workplace practices, pattern-or-practice class litigation is protected from employer interference, including motions to compel arbitration. This model is aligned with Congress's overall statutory scheme. Title VII confers greater power on litigative groups pursuing pattern-or-practice claims, due to Congress's goal of directly changing workplace practices. That purpose is consistent with the NLRA, which protects workers' group activities to challenge their employers. And by allocating individual damages proceedings to arbitration, this scheme lets arbitration do what it does best,[277] leaving the rest to federal courts.

[277] *Concepcion*, 563 U.S. at 344, 347–48 (explaining that the individual nature of arbitration is "fundamental," whereas groupwide proceedings are anathema to it).