

The Aftermath of an *Epic* Decision: Redefining the Imposition of Mandatory Arbitration Agreements Under the National Labor Relations Act

RACHEL JACKSON*

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I. INTRODUCTION

“We created a National Labor Relations Board to improve working conditions and seek industrial peace.”¹ These words spoken by President Franklin D. Roosevelt in 1936 still resonate a century later. Starting with the enactment of the National Labor Relations Act (“NLRA” or “The Act”) during the New Deal Era in 1935, the National Labor Relations Board (“NLRB” or “The Board”) has administered and furthered the purposes of the NLRA spanning through the Great Depression, World War II, and the evolutions of the industrial climate of the twentieth and twenty-first centuries.² Almost a century later, the Board continues to fulfill its mission of protecting the rights of employees to organize collectively with their employers and participate in protected concerted activities to improve working conditions.³

1. President Franklin D. Roosevelt, Address at Brooklyn, N.Y. (transcript available online by Gerhard Peters & John T. Woolley, The American Presidency Project), <https://www.presidency.ucsb.edu/node/208377>; see also Kimberly Y. Chin, *Continuing the White-Collar Unionization Movement: Imagining a Private Attorneys’ Union*, 32 PACE L. REV. 77, 82 n.17 (2012) (“Franklin D. Roosevelt, upon signing the bill in 1935, stated: ‘By assuring the employees the right of collective bargaining it fosters the development of the employment contract on a sound and equitable basis. By providing an orderly procedure for determining who is entitled to represent the employees, it aims to remove one of the chief causes of wasteful economic strife.’” (citing 79 CONG. REC. 10, 720 (1935))).

2. Trina Jones, *Race, Economic Class, and Employment Opportunity*, 72 LAW & CONTEMP. PROBS. 57, 74 (2009) (“During the Great Depression, Congress passed the NLRA (also known as the Wagner Act). Unlike other New Deal legislation, the NLRA did not set forth substantive protections for workers. Rather, it envisioned a new process through which workers could use their collective strength to negotiate with employers for greater economic power and security.” (citing 29 U.S.C. § 151)).

3. NATIONAL LABOR RELATIONS BOARD, *supra* note 1, at 7; see also 29 U.S.C. § 141(b) (“It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations

However, almost a century of monumental economic change comes with a developing body of labor law, and this evolving environment presents significant challenges to the objectives of organized labor.⁴ Numerous scholars agree that the process the NLRA envisioned, creating greater economic security for workers, seems to be deteriorating.⁵ Scholars attribute this deterioration to various court and NLRB decisions that narrowly construe the NLRA in ways that negatively impact workers by undermining the collective bargaining process.⁶ Given the shifting economy and labor climate in the past decades, one can certainly question how the NLRB continues to enforce the core provisions of the Act that protect workers' rights.⁷

As the only agency that governs the relationship between employers and employees as a *group* in most private sector establishments in this country, the NLRB plays an essential role for nonunion

whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.”).

4. See Jones, *supra* note 2, at 75 (noting that currently, the process envisioned by the NLRA faces substantial challenges); see also Philip A. Miscimarra, *Guns, Firms, and Zeal: Deconstructing Labor-Management Relations and U.S. Employment Policy*, 98 MINN. L. REV. 1728, 1740–42 (2014) (explaining the current economic effects on American labor management relations).

5. See Jones, *supra* note 2, at 75 (explaining that one of the reasons for this deterioration is that “the NLRA has been narrowly construed in ways that are adverse to workers”).

6. See *id.*

7. Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1675–76 (1989) (“Many people will be surprised that the actions of the NLRB have any relevance for nonunion establishments, except when a union is attempting to organize. Indeed, to most participants in the employment relations community, the NLRB might seem to have been relegated to a decidedly secondary role in the employment law arena. According to this conventional wisdom, the National Labor Relations Act has only minor importance in the real world of industrial relations History, however, has a way of reminding us that conventional wisdom can be deceptive. . . . Notwithstanding the recent lull in union organizational activity and the past reluctance of the NLRB to provide vigorous enforcement of the core provisions of the Act, the Board is currently very much alive and increasingly active—and potentially very active.”).

establishments.⁸ Since the early nineties, the Supreme Court and the Board have issued decisions that impact nonunion establishments, which allow employers to impose mandatory arbitration agreements.⁹ These agreements require employees to waive the right to pursue claims against employers through the court system.¹⁰ The trend of such agreements has expanded to the point where over sixty million American workers have signed employment contracts requiring individual and collective grievances to be settled through mandatory arbitration.¹¹

Epic Systems v. Lewis (“*Epic*”), a recent landmark Supreme Court decision, continued this trend in ruling that employers may impose mandatory arbitration agreements.¹² This case settled the issue of whether mandatory arbitration agreements could be enforced as written considering the conflict between the Federal Arbitration Act (“FAA”) and section 7 of the NLRA, a section that guarantees employees the right to engage in concerted action.¹³ The *Epic* Court ruled that

8. *See id.* (arguing that because many more nonunion establishments exist today, “the Board’s presence is more important to nonunion establishments and their employees than ever before”).

9. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL’Y INST. (Sept. 27, 2017), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/> (explaining that since 1991, American employers are increasingly requiring their workers to sign mandatory arbitration agreements).

10. *Id.*

11. *Id.*

12. *See* 138 S. Ct. 1612, 1632 (2018) (ruling that mandatory arbitration agreements do not interfere with NLRA section 7 protected activity); *see also* John Husband, *Mandatory Arbitration Agreements for Employees*, 48 COLO. LAW. 26, 27 (2019), https://www.cobar.org/Portals/COBAR/TCL/2019/March/CL_Feat_LE.pdf?ver=2019-02-18-121936-763×tamp=1550530300168 (“The U.S. Supreme Court in *Epic Systems Corp. v. Lewis* ruled 5 to 4 that the Federal Arbitration Act (FAA) dictates that arbitration agreements be enforced, and the National Labor Relations Act (NLRA) does not override that policy to permit employees to bring class or collective actions when employees have agreed otherwise.”).

13. *See Epic*, 138 S. Ct. at 1631–32; *see also* Morris, *supra* note 7, at 1703 (explaining that concerted activity occurs when employees deliberately act together or agree to act together). To give an example of “concerted activity,” suppose two employees circulate a petition requesting better temperature conditions at work. This action constitutes “concerted activity” because the employees deliberately acted together by initiating and circulating the petition. *See Pioneer Nat. Gas Co. v. NLRB*, 662 F.2d 408, 418 (1981) (explaining that “concerted activity” requires an element of collective activity or contemplation of such activity).

mandatory arbitration agreements did not pose a conflict with section 7 of the NLRA.¹⁴

The Board expanded the reach of *Epic* in *Cordúa Restaurants v. NLRB* (“*Cordúa*”).¹⁵ In *Cordúa*, the Board¹⁶ faced an issue of first impression: whether employers may promulgate these mandatory arbitration agreements—which operate as a collective action waiver—in response to employees opting into a collective action.¹⁷ The Board reasoned that because *Epic* ruled that mandatory arbitration agreements do not violate a worker’s section 7 rights, employers may impose them even in response to protected section 7 activity.¹⁸ A few months after this decision, the Board decided *Tarlton & Son, Inc.*, which used the *Cordúa* framework to reaffirm that arbitration agreements may be imposed in response to protected section 7 activity.¹⁹ Taken together, these recent decisions allow employers to impose mandatory arbitration agreements on their employees in almost all circumstances,²⁰ even if in retaliation for employees engaging in protected section 7 activity.

14. *Epic*, 138 S. Ct. at 1632 (ruling that Congress instructs that arbitration agreements must be enforced as written, and nothing in the NLRA suggests an intention to displace the FAA).

15. See *Cordúa Rests., Inc.*, 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *42–44 (Aug. 14, 2019) (McFerran, M., dissenting).

16. This Note will discuss the Board decisions concerning mandatory arbitration agreements since the *Epic* decision. Currently, the Board consists of five members: John F. Ring, Chairman, William J. Emanuel, Marvin E. Kaplan, William J. Emanuel, and Lauren M. McFerran. Members are presidentially appointed and serve five-year terms, creating a political dynamic within the Board. *About the Board*, NAT’L LAB. REL. BD., <https://www.nlr.gov/about-nlr/who-we-are/the-board> (last visited Dec. 18, 2020).

17. See *Cordúa*, 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *1–2 (ruling that because *Epic* ruled that mandatory arbitration agreements do not violate section 7 rights, it follows that these arbitration agreements can be imposed in response to concerted activity).

18. *Id.* at *8–9.

19. See *id.*; *Tarlton & Son, Inc.*, 368 N.L.R.B. No. 101, 2019 WL 5686741, at *3 (Oct. 30, 2019).

20. Husband, *supra* note 12, at 29. Even though *Epic* affirmed the enforceability of mandatory arbitration agreements and class action waivers in the employment context, “employees still may attack such agreements on other grounds, such as fraud, duress, or unconscionability, resulting in litigation over such issues. If the terms of the agreement are onerous or unfair to the employee, a court may find it unconscionable. That could occur, for example, if the contractual terms attempt to shorten the

This Note demonstrates how the Board can remedy the current employer-favored arbitration imbalance by enforcing a core provision of the NLRA, section 8(a)(1), and adhere to Board precedent to find a section 8(a)(1) violation when employers impose mandatory arbitration agreements in response to protected section 7 activity.²¹ This Note proposes a two-part test that the Board and the courts should use when confronted with a section 8(a)(1) violation concerning the imposition of an arbitration agreement in response to concerted activity. This two-part test asks: (1) whether the employer imposed the arbitration agreement in response to section 7 activity; and (2) if so, whether the promulgation of the arbitration agreement has a legitimate business concern without any intent of retaliation.

Part II discusses how sections 7 and 8(a)(1) of the NLRA create and enforce the collective rights of employees and how the *Epic* and *Cordúa* decisions applied these provisions to the issue of arbitration agreements.²² Part III discusses the Board's unnecessary and improvident expansion of the *Epic* decision by holding in *Cordúa* that employers may impose mandatory arbitration agreements even in response to employees' protected concerted activity.²³ Part IV proposes a two-part test that comprehensively addresses how the courts and the Board should evaluate the imposition of mandatory arbitration agreements in response to protected section 7 activity.²⁴ Finally, Part V briefly concludes on the need for ensuring conformity with the NLRA while imposing mandatory arbitration agreements post-*Epic*.²⁵

II. HISTORY & BACKGROUND

As noted in the Introduction, since the NLRA's enactment, the Board holds a special function in American law to maintain industrial

statute of limitations on employment claims, limit the statutory remedies that an arbitrator may award, or shift too many costs to the employee." *Id.*

21. See *Cordúa*, 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *42-44 (McFerran, M., dissenting).

22. See *infra* Part II.

23. See *infra* Part III.

24. See *infra* Part IV.

25. See *infra* Part V.

peace and improve American work conditions.²⁶ With that unique responsibility, the Board serves a crucial role to enforce the Act in both unionized and non-unionized workplaces.²⁷ Congress implemented the NLRA as a statutory protection that “guarantee[s] . . . the right of workers to organize and express themselves freely, in a democratic manner, concerning their wages and working conditions.”²⁸ As Senator Wagner stated when promoting the NLRA [Wagner Act]: “employers and employees should possess equality of bargaining power. The only way to accomplish this is by securing for employees the full right to act collectively”²⁹

To demonstrate how the NLRA accomplishes its objective of workplace equality, this Part will break down the “heart of the Act,”³⁰ sections 7 and 8(a)(1) of the NLRA, which work together as follows: section 7 of the Act grants employees the rights to address their work concerns collectively with other employees, and section 8(a)(1) enforces these rights by making it a violation to “interfere with, restrain, or coerce employees” in the exercise of section 7.³¹ Next, this Part will demonstrate how the *Epic* Court applied section 7 in its ruling on

26. *1935 Passage of the Wagner Act*, NAT’L LAB. REL. BD., <https://www.nlr.gov/about-nlr/who-we-are/our-history/1935-passage-wagner-act> (last visited Nov. 15, 2020) (In February 1935, Senator Wagner introduced the NLRA in the Senate. The Wagner Bill gave employees the right under section 7 to form and join unions and obligated employers to bargain with unions).

27. Morris, *supra* note 7, at 1675–76.

28. *Id.* at 1684.

29. *Id.* at 1682 (outlining his vision of a cooperative relationship between workers and employers). When Senator Wagner proposed the NLRA, “he viewed the ‘isolated worker’ as a ‘plaything of fate’: ‘Caught in the labyrinth of modern industrialism and dwarfed by the size of corporate enterprise, he can attain freedom and dignity only by the cooperation with others of his group.’” *Id.* at 1683 (citing 79 CONG. REC. 7565 (1935)).

30. *Pattern Makers’ League v. NLRB*, 473 U.S. 95, 117 (1985) (Blackmun, J., dissenting) (“[T]he heart of the Act is the protection of workers’ [section] 7 rights to self-organization and to free collective bargaining, which are in turn protected by [Section] 8 of the Act.”).

31. Morris, *supra* note 7, at 1734 (“[T]he employee cannot be denied employment or an emolument of employment on account of her participation in that expression of concerted action, for such a response by the employer would ‘interfere with, restrain, or coerce’ the employee in the exercise of a right guaranteed in Section 7.” (citing *NLRB v. Wash. Aluminum Co.* 370 U.S. 9, 12–13 (1962))).

the legality of mandatory arbitration agreements.³² Last, this Part will discuss how the *Cordúa* Board subsequently applied section 8(a)(1) to unnecessarily expand upon *Epic* to rule that employers may impose mandatory arbitration agreements in response to their employees' concerted activity.³³

A. Section 7 of the NLRA

Section 7, the “heart of the Act,” guarantees employees the right to self-organize, 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.³⁴ The NLRA's enactment sought to bring the legally protected right of association to the workplace, and Congress conceived section 7 as the statutory form of this protection.³⁵ Although the Board and the courts may vary in their interpretation of section 7, generally the Supreme Court and appellate decisions uphold the section's policy of protecting the process of concerted activity in the workplace.³⁶

Section 7 extends its protection to a vast number of American employees, both unionized and nonunionized.³⁷ Section 7 protects those covered under the definition of “employees” under section 2(3) of the NLRA, which includes “any employee, and shall not be limited to the employees of a particular employer . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute”³⁸ This definition

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

33. See cases cited *supra* notes 17–19.

34. 29 U.S.C. § 157 (“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other* concerted activities for the purpose of collective bargaining or other mutual aid or protection”) (emphasis added).

35. *Morris*, *supra* note 7, at 1686 (“[I]t is evident that, in enacting [section] 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment.” (quoting *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984))).

36. See *id.*

37. See 29 U.S.C. § 152(3).

38. *Id.*

demonstrates section 7's purposeful broad protection, as most private employees are covered by the Act irrespective of their union status.³⁹

While section 7 protects a wide range of activities, the activity must be “concerted,” which is defined as conduct that tends to produce group or representative action.⁴⁰ In order to be protected, mere talk must look toward group action.⁴¹ To qualify as group action, the conversation should hold an object of initiating an action that serves the interests of employees, which would not include simple “griping.”⁴² Congress intended a liberal construction of the term concerted, as “the guarantees of section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization.”⁴³

39. *Id.* (“[Section 7] shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act”); *see also* NLRB v. Jasper Seating Co., 857 F.2d 419, 422 (7th Cir. 1988) (“Nothing in the Act, however, limits the rights of nonunionized employees to engage in concerted conduct for their mutual aid regardless of whether or not their goal is supported by a majority of employees.”); Brian J. Christensen & David M. Kight, *The Expanding National Labor Relations Act and the Non-Union Workplace*, 67 J. Mo. B. 338, 338 (2011) (explaining that the applicability of the NLRA to the nonunion workplace has always existed).

40. *See* Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964) (explaining that to qualify as “concerted activity,” it must appear that the conversation held an “object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees”).

41. *See id.*

42. *Id.*; *see also* Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1348 (3d Cir. 1969) (explaining that “mere griping” about a condition of employment does not qualify as protected, but if it “coalesces with expression inclined to produce group or representative action, the statute protects the activity”).

43. *Morris*, *supra* note 7, at 1691 (citing *In re Root-Carlin, Inc.*, 92 N.L.R.B. 1313, 1314 (1951)). The Sixth Circuit’s decision in *NLRB v. Guernsey-Muskingum Electric Co-op., Inc.* explained how employees may reach the level of “concerted” activity with “little or no conscious direction or leadership and with a total lack of formality.” *Id.* at 1690–91 (citing *NLRB v. Guernsey-Muskingum Elec. Co-op., Inc.*, 285 F.2d 8, 12 (6th Cir. 1960)) (explaining that just because the employees did not formally choose a spokesman or person of higher authority to speak on their behalf did not negate the concerted nature of their conduct).

Second, the concerted activity must be for the purpose of mutual aid and protection,⁴⁴ which simply means that an employee's organizational rights activate when an employee discusses efforts to improve terms and conditions of employment.⁴⁵ To achieve this, the activity must contain an object, and generally, if this object seeks to improve wages, hours, or other conditions of employment, then it is likely protected.⁴⁶ Section 7 even "protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums[.]"⁴⁷

Last, the activity cannot be so offensive as to fall outside of the NLRA's statutory protection.⁴⁸ More "mild" activities such as conversation will almost always fall within the protection of section 7.⁴⁹ Additionally, the Supreme Court has deemed even vigorous or assertive activity, such as work stoppages, as protected under section 7.⁵⁰ However, "(1) if the conduct violates law or policy or (2) if there is some legitimate business justification for the employer's limiting or preventing the conduct," then the activity may lose its protected status.⁵¹ In

44. 29 U.S.C. § 157.

45. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–66 (1978). In this case, the employer contended that the concerted activity of distributing literature in non-working areas was "not within the 'mutual aid or protection' language because it [did] not relate to a 'specific dispute' between employees and their own employer 'over an issue which the employer has the right or power to affect.'" *Id.* at 563. The Court disagreed with this argument, holding that the "'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums." *Id.* at 565–66.

46. *Morris*, *supra* note 7, at 1705.

47. *Eastex, Inc. v. NLRB*, 437 U.S. 558, 565–66 (1978); *see also Morris*, *supra* note 7, at 1697.

48. *Morris*, *supra* note 7, at 1707.

49. *Id.*; *see, e.g., NLRB v. Charles H. McCauley Assocs.*, 657 F.2d 686, 688 (5th Cir. 1981); *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1359, 1365 (4th Cir. 1969).

50. *Morris*, *supra* note 7, at 1707 (citing *NLRB v. Wash. Aluminum Co.* 370 U.S. 9, 16 (1962)).

51. *Id.* at 1707–08. ("As to the first kind of limitation, the same questions heretofore noted regarding object would arise; for example, concerted conduct of a violent, disloyal, or disruptive nature, or concerted conduct that violates other laws, such as the law of trespass, may be unprotected. As to the second kind of limitation, the legitimate justification for interference by the employer, important problems of proof are presented. When an employer interferes with the right of its employees to

sum, an employee's action is generally protected under section 7 if it (1) is concerted, involving, or representing a group; (2) has a purpose of mutual aid or protection; and (3) does not violate law or public policy.⁵² Even if the employee meets these elements, the activity may lose its protected status should the employer have a legitimate business justification for limiting or preventing the conduct.

B. Section 8(a)(1) of the NLRA

Section 8(a)(1) of the NLRA simply enforces and defends the rights guaranteed in section 7 by establishing a violation when an employer “interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section 7.”⁵³ The test to determine an 8(a)(1) violation does not require intent or employer motive but rather asks whether the employer engaged in conduct which tends to interfere with the exercise of section 7 rights.⁵⁴ Congress did not provide definitions or examples of “coercion,” “restraint,” or “interference”; however, these terms “were treated as well-established legal concepts that had been employed in earlier labor and nonlabor legislation.”⁵⁵

engage in otherwise protected activity, there is a presumption, which may be rebutted, that such interference violates Section 8(a)(1).”).

52. See generally Morris, *supra* note 7, at 1702–06.

53. 29 U.S.C. § 158(a)(1); see NLRB v. Bighorn Beverage, 614 F.2d 1228, 1241 (9th Cir. 1980) (explaining that section 7 establishes employee rights, and section 8 enforces these rights by establishing violations for interference with those rights); see also Morris v. Ernst & Young, L.L.P., 834 F.3d 975, 981 (9th Cir. 2016), *vacated*, 894 F.3d 1093 (9th Cir. 2018) (vacating in light of Supreme Court's holding in *Epic Systems*); NLRB v. American Rolling Mill, 126 F.2d 38, 41–42 (6th Cir. 1942), *overruled by*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1619, 1619 (2018).

54. See NLRB v. Ford, 170 F.2d 735, 738 (6th Cir. 1948) (citing NLRB v. Illinois Tool Works, 153 F.2d 811, 814 (7th Cir. 1946)) (applying the test of “whether the employer engaged in conduct which, it may reasonable[y] be said, tends to interfere with the free exercise of employee rights under this Act.”); see also *Dye Oxygen Co.* 157 N.L.R.B. No. 109 (Mar. 31, 1966) (expanding upon *NLRB v. Illinois Tool Works* by ruling that determining whether an employer's conduct amounts to interference, restraint, or coercion under section 8(a)(1) depends not on the employer's intent or motive, but on “whether the conduct is reasonably calculated or tends to interfere with the free exercise of the rights guaranteed employees by the Act.”).

55. Charles C. Jackson & Jeffrey S. Heller, *Promises and Grants of Benefits Under the National Labor Relations Act*, 131 U. PA. L. REV. 1, 39–40 (1982) (“Contemporaneous applications and interpretations of these concepts under the RLA and

The section 8(a)(1) language of “interference,” “restraint,” and “coercion” operates as a catchall phrase to include conduct that has “a reasonable tendency to interfere with or coerce employees” who exercise their section 7 rights.⁵⁶ Interference has been characterized as an attempt that unreasonably prohibits an employee from achieving a desired end.⁵⁷ Restraint “connote[s] the affirmative act of holding back” an employee against his or her will.⁵⁸

Generally, coercion includes “the use of fear to induce someone to perform the will of another, thus eliminating one’s ability freely to choose between two alternatives.”⁵⁹ A violation lies in the coercive tendency, rather than the effect of the employer’s statement or actions.⁶⁰ For example, an employer’s statement to an employee that the employee will not be reinstated to a certain position because he filed too many grievances has been held to constitute a section 8(a)(1) violation.⁶¹ The Fifth Circuit found it immaterial that the employer

the NIRA, though not many in number, invariably involved efforts by employers to create a fear of reprisals or job loss if employees did not accede to the employer’s wishes.”).

56. LEE MODJESKA, ABIGAIL COOLEY MODJESKA & ZACHARY L. KARMEN, FEDERAL LABOR LAW: NLRB PRACTICE § 5:7 (2020) (citing *Spurlino Materials, L.L.C. v. N.L.R.B.*, 645 F.3d 870 (7th Cir. 2011)).

57. *Jackson & Heller*, *supra* note 55, at 40 (“Decisions evincing elements of interference were generally characterized as attempts unreasonably and insurmountably to prohibit someone from achieving a desired end. Restraint, of course, connoted the affirmative act of holding back another against his will.”); *see, e.g.*, *United States v. Peterson*, 28 F.2d 669, 670–71 (9th Cir. 1928).

58. *Jackson & Heller*, *supra* note 55, at 40; *see, e.g.*, *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 313 (1897).

59. *Jackson & Heller*, *supra* note 55, at 40 (citing *Weathers v. United States*, 126 F.2d 118, 119–20 (5th Cir. 1942), *cert. denied*, 316 U.S. 681 (1942)).

60. MODJESKA ET AL., *supra* note 56 (citing *Hosp. Cristo Redentor, Inc.*, 488 F.3d 513 (1st Cir. 2007)); *see also* *NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1044 (4th Cir. 1997) (To establish coercion, “the Board’s General Counsel must establish that, under all of the circumstances, the employer’s conduct may reasonably tend to coerce or intimidate employees.”) (citing *Standard-Coosa-Thatcher Carpet Yarn Div., Inc. v. NLRB*, 691 F.2d 1133, 1137 (4th Cir. 1977))).

61. MODJESKA ET AL., *supra* note 56 (citing *New Orleans Cold Storage & Warehouse Co. v. NLRB*, 201 F.3d 592, 599 (5th Cir. 2000)). For example the court notes in *New Orleans Cold Storage*: “When Pierre [employee] asked Calligan [employer] why he had been reinstated to the freezer, Calligan remarked that his assignment to the freezer was due to his frequent grievance writing.” 201 F.3d at 599.

possessed no actual authority to refuse to reinstate the employee, because any reasonable employee in such a position might infer that he is being threatened and punished and that the filing of grievances is discouraged.⁶² This ruling illustrates that section 8(a)(1) considers whether an employee could *reasonably* conclude that the employer is threatening economic reprisals if the employee continues his or her concerted activity.⁶³

“Interference,” “restraint,” and “coercion” thus makeup section 8(a)(1)’s broad reach to prohibit an employer from using his or her power to compel employees to refrain from section 7 activity under penalty of termination or adverse changes in conditions of employment.⁶⁴ When evaluating this type of claim, the courts and the Board will consider the totality of the circumstances of the employer’s conduct.⁶⁵

C. *Epic Systems v. Lewis*

Epic, in a fiercely decided 5-4 decision, put section 7 to the test when the Supreme Court answered whether arbitration agreements must be enforced according to their terms, even when those terms arguably clash with section 7 rights.⁶⁶ The *Epic* Court considered three

62. MODJESKA ET AL., *supra* note 56 (citing *New Orleans Cold Storage*, 201 F.3d at 599).

63. *New Orleans Cold Storage*, 201 F.3d at 599; *see also* Cordúa Rests., Inc., 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *42 (Aug. 14, 2019) (McFerran, M., dissenting) (explaining that in *Cordúa*, the employer’s conduct should have been found to violate section 8(a)(1) because “[a] reasonable employee would have understood this conversation as a threat of removal from the schedule and/or discharge for raising concerns about the terms and conditions of employment as the Respondent dictated them.”).

64. *See* Jackson & Heller, *supra* note 55, at 40 (“[C]oercion, interference, and restraint mean that the employer uses his superior economic power to compel employees to refrain from protected, concerted activity under penalty of losing their jobs or adversely affecting conditions of employment.”).

65. MODJESKA ET AL., *supra* note 56, at n.1 (“Taken together, courts and the NLRB hold that an employer violates these provisions of the NLRA when its statements or actions toward an employee, considering the totality of the circumstances, has a reasonable tendency to coerce or to interfere with those rights.” (citing *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1072 (D.C. Cir. 2016))).

66. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1619, 1632 (2018) (ruling that arbitration agreements between employers and employees that called for individualized

consolidated cases, each involving employees who agreed to individualized arbitration proceedings to resolve their employment disputes.⁶⁷ Nonetheless, the employees sought to litigate under the Fair Labor Standards Act for wage claims through a class action.⁶⁸ In these cases, the employees argued that the FAA, which generally requires courts to enforce arbitration agreements as written, did not bar their class action because the FAA's saving clause removed this obstacle.⁶⁹ The saving clause states that if an arbitration agreement violates a federal law, the arbitration agreement will not be upheld.⁷⁰ The employees argued that the agreement violated federal law, the NLRA, because the agreement mandated individualized proceedings.⁷¹

proceedings were to be enforced as written); *see also* Matthew J. Kolodoski & Candace M. Groth, *The Future of Collective Employment Arbitration Part II: Apocalyptic Warnings, Lochnerizing, and the Right to Contract*, 24 TEX. J. ON CIV. LIBERTIES & CIV. RTS. 1, 20 (2018); Grace O'Malley, Note, *Epic Systems Corp. v. Lewis: Singled Out by Corporations and a Textualist Supreme Court, American Workers are Left to Fend for Themselves*, 78 MD. L. REV. 635, 659–60 (2019) (arguing that the *Epic* decision, using a textualist analysis, arbitrarily applies canons of construction to arrive at the result favoring the Federal Arbitration Act).

67. *See Epic*, 138 S. Ct. at 1619.

68. *Id.* The Fair Labor Standards Act of 1938 “regulates the relationship between employers and their employees ‘to correct and as rapidly practicable to eliminate’ ‘the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.’” *Dellinger v. Sci. Applications Int’l Corp.*, 649 F.3d 226, 227–28 (4th Cir. 2011) (quoting 29 U.S.C. § 202). This includes private civil actions by employees. *Id.* at 228.

69. *Epic*, 138 S. Ct. at 1623–30; 9 U.S.C. § 2 (“A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”).

70. The saving clause appears in the portion of the statute that reads as follows: “upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. It “recognizes *only* . . . ‘generally applicable contract defenses, such as fraud, duress, or unconscionability.’” *Epic*, 138 S. Ct. at 1622 (emphasis added) (quoting *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333, 339 (2011)).

71. *Epic*, 138 S. Ct. at 1622 (The Federal Arbitration Act’s “saving clause recognizes *only* . . . ‘generally applicable contract defenses, such as fraud, duress, or

However, the Supreme Court disagreed with the employees' contention by reasoning that "Congress has instructed federal courts to enforce arbitration agreements according to their terms," and that to prevail, the employees needed to show "a clear and manifest" congressional intent that one Act (the FLSA) was meant to displace another (the NLRA).⁷² The Court found that the employees did not offer such evidence.⁷³ To further support its conclusion, the Court reasoned that when enacting the FAA, Congress intended that agreements be enforced, whereas in developing the NLRA, Congress sought to address organizing and collective bargaining without a single mention of collective actions and arbitration.⁷⁴ Therefore, the *Epic* Court adopted the

unconscionability.'" (emphasis added) (citing *AT&T Mobility L.L.C.*, 563 U.S. at 39 (2011))). The *Epic* holding viewed congressional intent of the FAA as requiring courts to enforce and not override arbitration agreements. *Epic*, 138 S. Ct. at 1623. For the employees' "savings clause" argument to prevail, they must show a "clear and manifest" congressional intention to replace one Act with the other. There is a "stron[g] presump[ption]" against repeals by implication, and "Congress will specifically address" preexisting law before suspending its normal operations in a later statute. *Epic*, 138 S. Ct. at 1624 (quoting *United States v. Fausto*, 484 U.S. 439, 452–53 (1988)).

72. *Epic*, 138 S. Ct. at 1624 (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974)) (explaining that Congress will specifically address preexisting law before suspending the law's normal operations in a later statute).

73. *Id.* at 1625 (disagreeing with the employees' "request" to infer a clear and manifest congressional command to displace the Arbitration Act and outline similar agreements like theirs). On the contrary, Justice Ginsburg's dissent in the present case finds that even if the NLRA and FAA were inharmonious, the NLRA should control because the NLRA is a more "pinpointed, subject-matter specific legislation, given that it speaks directly to group action by employees to improve the terms and conditions of their employment." *Id.* at 1646 (Ginsburg, J., dissenting) (citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)); see also *O'Malley*, *supra* note 66, at 655.

74. *Epic*, 138 S. Ct. at 1621 (The Court emphasizes that "[t]he Arbitration Act requires courts 'rigorously' to 'enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted.'" (citing *Am. Express Co. v. Italian Colors Rest.*, 570 U. S. 228, 233 (2013))). Here, the Supreme Court finds that this clear statutory direction resolves any perceived tension between the Federal Arbitration Act and the National Labor Relations Act. The Court explains that section 7 of the National Labor Relations Act focuses on the right to organize unions and bargain collectively and does not mention class or collective action procedures or even "hint at a wish to displace the Arbitration Act." *Id.* at 1624. Also, the

view that the FAA's clear and directional demand overruled the less direct import of the statutory collective right in section 7 of the NLRA.⁷⁵

Furthermore, the Court reasoned that collective action waivers in mandatory arbitration agreements do not infringe on section 7 because concerted activities "protect things employees 'just do' for themselves in the course of exercising their right to free association in the work place," and not the "highly regulated, courtroom-bound 'activities' of class action and joint litigation."⁷⁶ Therefore, the *Epic* Court concluded that the NLRA does not override the FAA.⁷⁷

The *Epic* dissent asserted that section 7 of the NLRA includes the right to use collective actions to resolve employment disputes.⁷⁸ The dissent criticized the majority for overlooking the labor market imbalance that gave rise to the NLRA and for dismissing the result that occurs when employees' ability to collectively confront an employer is reduced.⁷⁹ The dissent showed a strong deference to section 7

Court mentions that the FAA and NLRA have long coexisted, dating from 1925 and 1935, which suggests that they do not conflict. *Id.* at 1620.

75. *See id.* at 1622–24.

76. *Epic*, 138 S. Ct. at 1625 (quoting *NLRB v. Alt. Ent., Inc.*, 858 F.3d 393, 414–415 (6th Cir. 2017) (Sutton, J., concurring)). The Court applies the *ejusdem generis* canon to find that the end of the phrase of section 7 of the NLRA that states "other concerted activities for the purpose of . . . other mutual aid or protection" is a catchall term that can be read to include class actions; however, because it appears at the end of a detailed list of activities speaking of "form[ing], join[ing] or assist[ing], it should not include class actions because the general term is 'usually understood to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Id.* at 1625 (first quoting 29 U.S.C. § 157; and then quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)). Furthermore, the Court explained that the NLRA does not hint about what rules should govern the adjudication of collective actions or arbitration. The Court reasoned that it seems unlikely Congress would take "such care to regulate all the other matters mentioned in Section 7 yet remain mute about this matter alone—unless of course, Section 7 doesn't speak to class and collective action procedures in the first place." *Id.*

77. *See O'Malley, supra* note 66, at 670 (explaining that the Court's decision requires a legislative remedy because of its clear departure from well-established labor laws, ignoring the challenges workers face in enforcing widespread wage-theft, and unnecessarily expands the scope of the FAA beyond its text).

78. *See Epic*, 138 S. Ct. at 1637, 1641 (Ginsburg, J., dissenting).

79. *Id.* at 1633 (citing *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 465 U.S. 822, 835 (1984)).

language, as it stated: “Since the Act’s earliest days, the Board and federal courts have understood [section] 7’s ‘concerted activities’ clause to protect myriad ways in which employees may join together to advance their shared interests.”⁸⁰

Epic did not only clarify the legality of arbitration agreements; the decision and the dissent introduced current policy questions about the “heart of the Act” in the context of employment arbitration.⁸¹ Should the Board continue in *Epic*’s path of narrowly construing section 7 protections, or should the Board share a similar deference of the *Epic* dissent to answer the question *Epic* did not settle: Under what circumstances can these otherwise valid agreements be imposed?

D. *Cordúa Restaurants v. NLRB*

Epic held that arbitration agreements themselves do not violate section 7 of the NLRA, but it did not decide whether an employer’s promulgation of such agreements should have limitations—especially when imposed in retaliation for section 7 protected activity.⁸² The Board considered this question of first impression in *Cordúa*, where an employer discharged his employee for engaging in a class action against him.⁸³

The *Cordúa* case arose when a restaurant employee noticed his wages appeared inaccurately low.⁸⁴ He, along with several other employees, consulted an attorney and filed a collective action pursuant to

80. *Id.* at 1637; *see also Circuit City*, 532 U.S. at 115; Morris, *supra* note 7, at 1680 (emphasizing that the Supreme Court has indicated that when applying section 7 of the NLRA, in order to effectuate congressional intent, that section’s provisions should be liberally construed).

81. *See Epic*, 138 S. Ct. at 1646 (Ginsburg, J., dissenting) (discussing that the result of the majority’s decision will be an underenforcement of federal and state statutes that seek to protect employees’ vital rights).

82. *See id.* at 1628 (majority opinion).

83. *See Cordúa Rests., Inc.*, 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *1 (Aug. 14, 2019) (“This case presents two important issues of first impression regarding mandatory arbitration agreements following *Epic Systems*: (1) whether the Act prohibits employers from promulgating such agreements in response to employees opting in to a collective action; and (2) whether the Act prohibits employers from threatening to discharge an employee who refuses to sign a mandatory arbitration agreement.”).

84. *Id.* at *80.

the FLSA and the Texas Minimum Wage Act in federal district court against the employer and its owner.⁸⁵ As more employees joined the suit, the employer imposed a revised arbitration agreement that required the employees to waive the “right to file, participate or proceed in class or collective actions . . . in any civil court or arbitration proceeding.”⁸⁶ After the imposition of the agreement, the employer insisted that employees sign it or else they would be “removed from the schedule.”⁸⁷ Furthermore, when two employees insisted that counsel review the document, the manager responded, “You can’t discuss this in the open meeting.”⁸⁸ When employees objected, the manager advised, “I wouldn’t bite the hand that feeds me” and to “go ahead and sign it.”⁸⁹

The Board considered the precise issue of whether the NLRA prohibits employers from promulgating arbitration agreements in response to employees opting into a collective action.⁹⁰ To reach its answer, the Board stated, “We assume, without deciding, that an individual employee engages in protected concerted activity when he or she opts in to a collective action.”⁹¹ However, the Board stated that the promulgation of the mandatory arbitration agreement in *response* to that activity did not violate the Act.⁹² The Board stated that because *Epic* made clear that “an agreement requiring that employment-related claims be resolved through [sic] individual arbitration . . . does not restrict [s]ection 7 rights in any way[,]” then the promulgation of such an agreement did not violate the Act.⁹³ The Board reasoned that because the revised arbitration agreement only sought to mandate what *Epic* had already ruled valid, then the arbitration agreements did not infringe

85. *Id.*

86. *Id.* at *76 (“[A]fter a number of employees opted in to the collective action, the Respondent began distributing a revised arbitration agreement, under which employees would additionally agree not to opt into collective actions.” The revised agreement stated: “I agree that I cannot file or opt-in to a collective action under this Agreement, unless agreed upon by me and the Company in writing.”).

87. *Id.* at *31 (McFerran, M., dissenting).

88. *Id.* at *33 (McFerran, M., dissenting).

89. *Id.* at *127 (majority opinion).

90. *See supra* note 81 and accompanying text.

91. *See* Cordúa Rests. Inc., 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *8 (Aug. 14, 2019).

92. *Id.*

93. *See id.* at *8–9; *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1626 (2018).

upon section 7 rights, and therefore imposing this arbitration agreement could not be a section 8(a)(1) violation.⁹⁴

The Board also found that because the employer lawfully promulgated its revised arbitration agreement, the employer did not violate section 8(a)(1) when the employer and managers threatened employees who expressed concern.⁹⁵ The Board reasoned that because *Epic* permits an employer to condition employment upon such agreements, the employer did not act unlawfully, but rather the threatening statements amounted to “an explanation of the lawful consequences of failing to sign the agreement.”⁹⁶

The *Cordia* dissent argued that the revised arbitration agreement in response to the employees’ protected section 7 activity coupled with the employer’s threatening conduct constituted a clear section 8(a)(1) violation.⁹⁷ According to the dissent, the Board’s conclusion that employers may impose mandatory arbitration agreements in response to employees’ concerted activity just because *Epic* ruled that these agreements were valid failed to consider Board precedent and section 8(a)(1) of the NLRA.⁹⁸ The dissent explained that under Board law, an employer’s rule is unlawful when “promulgated in response to employees’ protected concerted activity, *even if* that rule is lawful on its face[.]”⁹⁹

94. *Cordia*, 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *13 (“In sum, any finding that the promulgation of the revised agreement violated the Act because it was in response to opt-in activity would be inconsistent with the Supreme Court’s holding in *Epic Systems* that individual arbitration agreements do not violate the Act and must be enforced according to their terms.”).

95. *Id.*

96. *Id.* at *16–17 (“Rather, [the employer’s] statements amounted to an explanation of the lawful consequences of failing to sign the agreement and an expression of the view that it would be preferable not to be removed from the schedule.”).

97. *Id.* at *42–44 (McFerran, M., dissenting) (“In finding the Respondent’s revised arbitration agreement lawful—even though it was promulgated in response to protected activity—the majority departs from Board precedent without explanation. Even assuming that the agreement was lawful, it did not entitle the Respondent—as the majority seems to hold—to threaten employees for protesting the agreement.”).

98. *Id.*

99. *Id.* at *34 (McFerran, M., dissenting) (emphasis added) (citing *Tito Contractors, Inc.*, 366 N.L.R.B. No. 47, 2018 NLRB LEXIS 135, at *3–5 (Mar. 29, 2018)) (explaining that by promulgating a rule in response to protected concerted activity, an employer is acting to suppress that activity and chill other protected activity in the future).

After *Epic*'s ruling that arbitration agreements do not violate section 7 of the NLRA, *Cordúa* further ruled that imposing these agreements in response to this protected activity did not violate section 8(a)(1).¹⁰⁰ These cases reach a conclusion that generally, neither section 7 nor 8(a)(1) of the NLRA will constrain the implementation of mandatory arbitration agreements, despite the presence of concerted activity.

III. THE CORDÚA MISAPPLICATION

The *Cordúa* Board's unnecessary expansion of *Epic* granted a broad shield of protection on employers in arbitration procedures when it ruled that an employer may impose mandatory arbitration agreements in retaliation for section 7 protected activity.¹⁰¹ The result of this decision and the *Tarlton* affirmation reflects the Board's continuous dismissal of section 8(a)(1) language, shifting the power dynamic further toward employers in arbitration procedures.¹⁰² The Board's ruling in *Cordúa* that implementing arbitration agreements in response to protected section 7 activity does not violate section 8(a)(1) incorrectly applied *Epic*, ignored Board precedent, and frustrated the central purpose of the NLRA.¹⁰³

A. The Board's Misapplication of Section 8(a)(1) of the NLRA

The *Cordúa* Board disregarded the language of section 8(a)(1) when it failed to find a violation for the employer's interference, restraint, and coercion with the employees' protected concerted

100. *Cordúa*, 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *7–8.

101. *Id.* at *8–9.

102. *See Tarlton & Son, Inc.*, 368 N.L.R.B. No. 101, 2019 WL 5686741, at *3 (Oct. 30, 2019) (using the *Cordúa* framework to reach its decision that even though employees were engaged in protected concerted activity when they filed their lawsuit, the promulgation of such an agreement in response to protected concerted activity does not violate the act because *Epic* ruled that individual arbitration agreements do not violate the act); *Cordúa*, 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *8–9.

103. *See* 29 U.S.C. §§ 157, 158(a)(1); *see Epic Sys. Corp. v. Lewis*, 138 S. Ct. at 1619 (2018); *Cordúa*, 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *3, *Tarlton*, 368 N.L.R.B. No. 101, 2019 WL 5686741, at *3.

activity.¹⁰⁴ First, the *Cordúa* Board failed to find a section 8(a)(1) violation when the employer imposed a mandatory revised arbitration agreement in response to his employees' FLSA suit against him.¹⁰⁵ When the employer became aware of the growing momentum of the employees' FLSA lawsuit, he distributed a modified arbitration agreement that prohibited employees from opting into collective actions.¹⁰⁶ The Board has held that when an employer promulgates a rule in response to protected concerted activity, an employer is acting to suppress that activity.¹⁰⁷ The employer clearly suppressed the employees' protected activity because the imposition of the revised arbitration agreement in response to the employees' collective litigation suit halted the concerted process.¹⁰⁸ Therefore, the Board should have found that this activity interfered with and restrained his employees' section 7 rights.¹⁰⁹

Second, the *Cordúa* Board failed to take into account the employer's coercive conduct surrounding the imposition of the revised arbitration agreement.¹¹⁰ After distributing the arbitration agreement, the employer told employees who questioned it that they should not "bite the hand that feeds them," and that those who refused to sign would be removed from the schedule and discharged.¹¹¹ When employees inquired about their right to an attorney, the employer stated, "You can't discuss this in the open meeting. I know your concern is about the lawsuit."¹¹² Where the Fifth Circuit found coercion when an employer removed his employee because of the employee's participation in grievance procedures, here the Board failed to find coercion when the

104. *Cordúa*, 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *42–44 (McFerran, M., dissenting).

105. *Id.* at *5–7 (majority opinion).

106. *Id.* at *32 (McFerran, M., dissenting) (The agreement read: "I agree that I cannot file or opt-in to a collective action under this Agreement, unless agreed upon by me and the Company in writing.").

107. *Id.* at *35 ("By promulgating a rule in response to protected concerted activity, an employer is acting to suppress that activity and to chill other protected activity in the future.").

108. *Id.* at *32–35.

109. *Id.*; 29 U.S.C. § 157.

110. *Cordúa*, 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *32 (McFerran, M., dissenting).

111. *Id.* at *31.

112. *Id.* at *33.

employer threatened to remove employees from the work schedule in response to the employees' pursuit of collective action.¹¹³ Because an evaluation of a section 8(a)(1) claim requires considering the totality of the circumstances, the employer's threat of removal from the schedule and threatening statements clearly constitute coercion under section 8(a)(1).¹¹⁴

A section 8(a)(1) violation can occur by either actions or words of the employer that, under the totality of the circumstances, reasonably tend to coerce or interfere with section 7 rights.¹¹⁵ Because the record clearly establishes that the *Cordúa* employer imposed a revised arbitration agreement in response to his employees' concerted activity and further threatened the employees in protesting this agreement, the conduct of the employer should have led the Board to conclude that a section 8(a)(1) violation occurred. Even further, by failing to find a section 8(a)(1) violation on these facts, the Board ignored precedent.¹¹⁶

B. The Current Board's Departure from Established NLRB Precedent

The *Cordúa* Board departed from a well-established precedent that states generally, an employer violates section 8(a)(1) of the NLRA when he or she imposes a new rule on employees in response to their protected concerted activity, even if the rule otherwise would be lawful.¹¹⁷ This Board law is reflected in *Tito Contractors, Inc.* In *Tito Contractors*, the Board ruled that even though the employer's written overtime policy was facially valid, the employer promulgated it for the

113. *New Orleans Cold Storage & Warehouse Co. v. NLRB*, 201 F.3d 592, 599 (5th Cir. 2000); *Cordúa*, 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *31 (McFerran, M., dissenting).

114. *MODJESKA ET AL.*, *supra* note 56, at n.125 ("To determine motive, the Board may rely on indirect evidence and inferences reasonably drawn from the totality of the circumstances." (quoting *E.C. Waste, Inc. v. NLRB*, 359 F.3d 36, 42, 174 (1st Cir. 2004))).

115. *MODJESKA ET AL.*, *supra* note 56.

116. *Id.*; *see also Cordúa*, 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *31–33 (McFerran, M., dissenting).

117. *See e.g., Cordúa*, 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *30 (McFerran, M., dissenting); *Tito Contractors, Inc.*, 366 N.L.R.B. No. 47, 2018 NLRB LEXIS 135, at *9 (Mar. 29, 2018)).

unlawful purpose of *retaliating* against employees who engaged in protected activities by participating in an overtime lawsuit.¹¹⁸

Cordúa stated that an individual employee engages in protected concerted activity when he or she opts into a collective action.¹¹⁹ Yet, the Board reasoned that despite the protected activity of opting into a collective action, the promulgation of the revised arbitration agreement did not violate section 8(a)(1) because *Epic* ruled that these agreements did not restrict section 7 rights in any way.¹²⁰ At this juncture, the *Cordúa* Board should have instead recognized Board precedent that facially valid rules or policies will not be upheld if imposed in response to concerted activity.¹²¹ Because *Epic* only ruled that arbitration agreements themselves did not violate section 7 and did not rule on whether employers could impose the agreements in response to such activity, *Cordúa* should have applied *Tito Contractors* to resolve this question.¹²² Therefore, by subordinating clear precedent with *Epic*'s inapplicable conclusion, the *Cordúa* Board made a fundamental error in its decision.¹²³

For these reasons, the Board made a problematic departure from section 8(a)(1) of the NLRA and NLRB precedent by not finding an 8(a)(1) violation when the employer implemented a mandatory arbitration agreement in retaliation for protected section 7 activity.¹²⁴ Unfortunately, current Board law now relies on the mere facial validity of an arbitration agreement while also ignoring explicit 8(a)(1) language, reasoning that because an arbitration agreement is valid under *Epic*, its

118. *Tito Contractors*, 366 N.L.R.B. No. 47, 2018 NLRB LEXIS 135, at *13–14 (“In sum, the evidence shows that, even though the Respondent’s written overtime policy was facially valid, the Respondent promulgated it for the unlawful purpose of retaliating against those employees who engaged in union and other protected concerted activities by participating in the overtime lawsuit.”).

119. *Cordúa*, 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *8.

120. *Id.* at *8–9 (applying *Epic*'s holding to the imposition of mandatory arbitration agreements); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1626 (2018).

121. *Cordúa*, 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *8–9.

122. *See Epic*, 138 S. Ct. at 1623–25.

123. *Cordúa*, 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *33–35, 42 (McFerran, M., dissenting).

124. *Id.* at *4–5 (majority opinion) (ruling that it was in violation of the NLRA to discharge an employee for engaging in protected activity but not to promulgate a mandatory collective action waiver against employees engaged in protected activity).

imposition must also be valid.¹²⁵ This incorrect application and disregard of NLRA language and NLRB precedent prompts a discussion on how the Board can dutifully restore this imbalance in the employer-employee relationship.

IV. SOLUTION

In order to correct the misstep in the law and imbalance of bargaining power resulting from the *Cordia* decision, the courts and Board should reevaluate the application of section 8(a)(1) in adherence with NLRA language and Board precedent.¹²⁶ In order to accomplish this, this Part proposes a two-part test that should be implemented by courts and the Board when presented with a section 8(a)(1) claim that alleges an employer imposed an arbitration agreement in response to concerted activity. The two-part test asks (1) whether the employer imposed the arbitration agreement in response to section 7 activity; and (2) if so, whether the imposition of the agreement contains a valid business concern without the intent of retaliation.¹²⁷ When applying this two-part test, if the employer satisfies the first prong of the test and not the second, the employer has committed a section 8(a)(1) violation for interfering with the employees' section 7 rights by imposing the agreement as a retaliation without a legitimate business reason. If the employer satisfies both prongs of the test however, then the imposition of the arbitration agreement would not violate section 8(a)(1) because, despite the interference with concerted activity, the imposition resulted from a legitimate business reason. As the *Cordia* dissent correctly explained, a rule or policy does not need to restrict section 7 rights to be found unlawful; the question is only "whether it was promulgated in response to the protected exercise of those rights. If so, the act of promulgating the rule is coercive and violates the Act."¹²⁸ Therefore, this test assists the courts and the Board in evaluating not simply the text of

125. *See id.*

126. *See supra* Part III.A.

127. *Fun Striders, Inc. v. NLRB*, 686 F.2d 659, 661–62 (9th Cir. 1981) (explaining that interference with section 7 activity can be halted by the employer where there is a legitimate business reason).

128. *Cordia*, 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *35 (McFerran, M., dissenting).

an arbitration agreement but the equally important *intent* with which the arbitration was promulgated.

A. The Prongs of the Two-Part Test

The two-part test will serve as an enforcement mechanism of section 8(a)(1) that the courts and the Board should implement when evaluating whether an employer interfered with protected section 7 activity when imposing a mandatory arbitration agreement. Because the Board-established test for section 8(a)(1) violations asks whether the employer's conduct would reasonably have a tendency to interfere with, restrain, or coerce employees in the exercise of their section 7 rights, it naturally follows that this Note's proposed two-part test addresses these issues as well.¹²⁹

The first prong of the two-part test asks whether the employer imposed the mandatory arbitration agreement in response to the employees' protected section 7 activity.¹³⁰ If the employer did not, then a section 8(a)(1) violation has not occurred because retaliation or interference with protected activity could not happen.¹³¹ To answer this prong of the test, the Board will first evaluate whether concerted activity took place, which for this test lies at a minimal threshold; simply discussing litigation against the employer would be protected activity.¹³² Next, the Board will evaluate whether the employer imposed the agreement in response to protected activity, which considers if the employer interfered with, restrained, or coerced his or her employees.¹³³ To reach its conclusion on this prong, the employer should look at the totality of the circumstances, including any words or actions taken by the employer.¹³⁴ Therefore when applying the two-part test, if a mandatory arbitration agreement is imposed in response even to a simple discussion about a collective action against an employer, the Board would treat this as a retaliation, would look at the totality of the

129. See *Multi-Ad Services, Inc.*, 331 N.L.R.B. 1226, 1227–28 (2019), *enforced*, 255 F.2d 363 (7th Cir. 2001).

130. See 29 U.S.C. § 157 (describing section 7 protected activity); see also 29 U.S.C. §158(a)(1) (describing unfair labor practices by employers).

131. See 29 U.S.C. § 157; see also 29 U.S.C. §158(a)(1).

132. *Morris*, *supra* note 7, at 1691.

133. See 29 U.S.C. §158(a)(1).

134. See *supra* notes 112–13 and accompanying text.

circumstances, and would likely find a violation of section 8(a)(1) unless a legitimate business concern existed.¹³⁵

The second prong of the test asks whether, despite the ongoing concerted activity demonstrated in the first prong, the employer acted out of a legitimate business reason and not for the purposes of retaliation.¹³⁶ This prong exists because sometimes an employer may have legitimate reasons for interfering with section 7 rights.¹³⁷ For example, in *Fun Striders, Inc. v. NLRB*, the Board found that where an employer acts out of entirely legitimate motives, such as ensuring order in the workplace, the employer has not violated section 8(a)(1) of the NLRA.¹³⁸ Therefore, in the situation where an arbitration agreement has been imposed on employees who engage in protected section 7 activity, so long as the employer demonstrates a legitimate business reason, and does not do so for the purposes of retaliation against employees, then its imposition complies with the Act.¹³⁹

135. See *Morris*, *supra* note 7, at 1691 (citing *NLRB v. Guernsey-Muskingum Electric Co-Operative, Inc.*, 285 F.2d 8, 12 (6th Cir. 1960)) (describing a situation in which surrounding facts and circumstances may be used to draw an inference that a discussion among employees constituted protected concerted activity).

136. See *Fun Striders, Inc. v. NLRB*, 686 F.2d 659, 661–62 (9th Cir. 1981) (ruling that where the employees distributed literature that “advocated ‘violent revolution,’ ‘destruction of all bosses,’ and ‘armed revolution of all the working class,’” the employer’s refusal to reinstate the employees was both legitimate and necessary to preserve peace).

137. See, e.g., *id.*; *Fun Striders, Inc.*, 686 F.2d at 662. This Note’s proposed test ensures that the Board will not find an employer violation where the employer interferes with concerted activity but has a legitimate reason to do so. In a hypothetical scenario in which this test has been implemented by the Board, one can imagine a situation where an employee does not agree that the employer imposed the mandatory arbitration agreement for legitimate business purposes. In this instance, the employer could use a *Wright Line* defense: under *Wright Line*, the General Counsel must show that the Respondent’s activity is motivated by animus against protected activity. Once established, the Respondent must make a showing that it would have taken the same adverse action even absent the protected activity. See *Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

138. *Id.* at 661–62.

139. *Id.* *Fun Striders* concerned a section 8(a)(1) violation. In section 8(a)(1) discharge cases, the employer must demonstrate a legitimate, substantial business reason for the dismissal. *Id.* If the employer succeeds, “the burden [then] shifts to the Board to establish that the primary motivation for the discharge was to penalize the employee” for engaging in protected activities. *Id.* at 662 (quoting *NLRB v. William S. Carroll, Inc.*, 578 F.2d 1, 4 (1st Cir. 1978)).

To determine whether a “legitimate business” reason exists, and not retaliatory motive, the Board should apply a framework somewhat comparable to Title VII retaliation cases.¹⁴⁰ For example, in *Payne v. McLemore’s Wholesale & Retail Stores*, a plaintiff brought a Title VII action against an employer, alleging that the employer failed to rehire the plaintiff in retaliation for his opposition of the employer’s racial discriminatory practices.¹⁴¹ The court explained that to prove an employer violation, a plaintiff must establish: (1) the existence of “a statutorily protected expression, (2) an adverse employment action, and (3) a causal link between the protected expression and the adverse action.”¹⁴² Next, the burden shifts to the defendant to rebut the plaintiff’s case.¹⁴³ The defendant must show evidence that a legitimate business reason existed for the adverse employment action.¹⁴⁴ Unless the plaintiff can then prove that the employer’s underlying rationale for that reason was merely pretextual, then the employer would not face Title VII liability.¹⁴⁵ The Board should adopt a similar framework to determine

140. *Cf. Payne v. McLemore’s Wholesale & Retail Stores*, 654 F.2d 1133, 1140 (5th Cir. 1981) (ruling in favor of plaintiff in a Title VII action by instructing that “a plaintiff can establish a prima facie case of retaliatory discharge under the opposition clause of section 704(a) if he shows that he had a reasonable belief that the employer was engaged in unlawful employment practices.”).

141. *See id.*; 42 U.S.C. § 2000e-3.

142. *Payne*, 654 F.2d at 1135–36 (citing *Smalley v. City of Eatonville*, 640 F.2d 765, 769 (5th Cir. 1981)). Scholar Kurtis Kemper notes, “With respect to the first element of the prima facie case, § 704(a) describes two types of protected activity.” Kurtis A. Kemper, *Who Has “Participated” in Investigation, Proceeding, or Hearing and Is Thereby Protected from Retaliation Under § 704(a) of Title VII of Civil Rights Act of 1964*, 42 U.S.C.A. § 2000e-3(a), 149 A.L.R. Fed. 431 (1998) (footnotes omitted). The first is the “‘opposition clause,’ which provides that employers may not discriminate against employees who have opposed any practice” that is made unlawful by Title VII, such as informal protests or voicing complaints. *Id.* “Second, ‘the participation clause,’ [] prohibits employers from retaliating against employees who have made a charge, testified, assisted, or participated . . . in any . . . hearing under Title VII. *Id.*

143. *Payne*, 654 F.2d at 1135–36.

144. *See id.* at 1144 (explaining the defendant must offer evidence at trial that a legitimate reason, and not the statutorily protected expression, constituted the legitimate reason for the adverse employment action).

145. *See id.* at 1142 (explaining that after the defendant has an opportunity to rebut plaintiff’s prima facie case, the burden shifts to the plaintiff to prove that this reason is merely pretextual).

the existence of a legitimate business reason, which requires the employer to demonstrate evidence of the legitimate reason that may be rebutted by the plaintiff should the underlying reason be merely pretextual.¹⁴⁶

To further illustrate the second prong of the test, suppose for example that a restaurant chain owns hundreds of restaurants and wants to revise its mandatory arbitration policy. In one restaurant store, unbeknownst to the restaurant chain headquarters, employees are discussing a potential class action lawsuit against the local employer. In this case, an employer's imposition of a mandatory class action waiver as mandated by the corporate officers may be for the legitimate business purpose of maintaining uniformity among stores and not for the purposes of retaliating.¹⁴⁷ The employer would have this defense should the plaintiff file an 8(a)(1) claim.¹⁴⁸

B. Applying the Test: The Proposed Section 8(a)(1) Violation

If the employer satisfies the first prong of the test, which simply asks if the employer imposed the arbitration agreement in response to employees' protected section 7 activity, and cannot satisfy the second prong, which asks whether despite the protected activity a legitimate business reason exists, then the Board should find a section 8(a)(1) violation. The violation would exist because this demonstrates that the employer imposed the arbitration agreement in response to the employees' exercise of protected section 7 activity without justification.¹⁴⁹

To illustrate the application of this test, suppose a group of employees in the breakroom discusses a concern that their paychecks have been less than the federal minimum wage. The employees decide to call a local employment law attorney to file a claim against their employer for violating the FLSA. The employer learns about this discussion and seeks to put matters to rest by imposing a mandatory arbitration agreement the next day that requires employees to agree to

146. See generally *id.* (finding that an employee's failure to reapply to a position would be a "legally sufficient" and legitimate business reason for the employer's action).

147. See *id.*

148. See *id.*

149. See *id.*; 29 U.S.C. § 158(a)(1).

“individually submit their grievances through arbitration” and to sign the agreement if they want to retain their employment.

In evaluating whether a section 8(a)(1) violation has occurred, the Board would apply the first prong of the two-part test to see whether the employer imposed the arbitration agreement in response to the employees’ engagement in concerted activity. To answer this question, the Board would first identify the existence of section 7 activity. Here, the Board likely would find that the employees’ activity meets the section 7 minimal requirements: the discussion in the breakroom towards filing an action tends to produce group or representative action, and their activity discusses efforts to improve terms and conditions of employment for the purpose of mutual aid and protection.¹⁵⁰ The Board would then ask if the employer imposed the arbitration agreement in response to the employees’ concerted activity. Similar to the *Cordúa* dissent’s approach, the Board would look at the facts to see whether the agreement served the purposes of halting the collective action efforts.¹⁵¹ The Board would likely find in this hypothetical that the imposition of the arbitration agreement the next day after learning of the ongoing suit would constitute as “acting in response.”

Because the Board would likely find that the employer imposed the agreement in response to protected activity, it would then apply the second prong to evaluate whether despite this, the employer had a legitimate business reason absent the purpose of retaliation.¹⁵² This prong of the test would consider the totality of the circumstances, as well as evidence that tends to show the employer did not act for a legitimate business reason.¹⁵³ Here, absent facts indicating a legitimate business justification, the Board would likely find that the employer’s immediate action to quash the potential lawsuit constituted an 8(a)(1) violation of interference with protected section 7 concerted activity.¹⁵⁴

The example above demonstrates how courts and Board can adopt this standard to correct what the *Cordúa* Board failed to enforce, that when a mandatory arbitration agreement is imposed, it at no times coerces, restrains, or interferes with employees’ protected section 7

150. See *supra* text accompanying notes 40–47.

151. See *Cordúa Rests.*, 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *40–44 (Aug. 14, 2019) (McFerran, M., dissenting).

152. See *supra* note 140 and accompanying text.

153. See *supra* note 65 and accompanying text.

154. See 29 U.S.C. §§ 157, 158(a)(1).

rights.¹⁵⁵ The implementation of the two-part test when evaluating section 8(a)(1) claims for employer retaliation to concerted action will adhere to the NLRA's language and Board precedent and will strive toward rebalancing the employee-employer relationship in grievance procedures.¹⁵⁶

C. The Effect of the Proposed Two-Part Test on Labor Policy

As previously discussed, arbitration procedures increasingly dominate the employment grievance process, resulting in fewer litigation-related resolution options for employees.¹⁵⁷ The result of *Cordia* now permits employers to impose mandatory arbitration agreements in response to employees' litigation efforts, which frustrates labor policy by allowing the employer to fully dictate the arbitration process. Overall, the Board's use of this two-part test will protect core provisions of the heart of the Act.¹⁵⁸ Furthermore, the two-part test will address how forming employer parameters on the imposition of mandatory arbitration agreements will set employee and employer expectations, as opposed to allowing employers to quickly implement provisions that catch employees by surprise.

1. NLRA Policy Implications

This proposed two-part test safeguards the "heart of the Act," ensuring that the employer does not inexcusably interfere with protected section 7 activity.¹⁵⁹ The NLRB performs a vital role in American employment law to promote an equal employee-employer relationship, which includes protecting private sector employees who engage

155. 29 U.S.C. § 158(a)(1); *Cordia*, 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *40–44 (McFerran, M., dissenting).

156. See *Cordia*, 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *40–44 (McFerran, M., dissenting).

157. See *supra* Part I.

158. *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998) ("Where the rules are likely to have a chilling effect on section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." (citing *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 67 (2d Cir. 1992))).

159. See *Morris*, *supra* note 7, at 1675–76 (noting that the Board exercises its "active" role when it enforces the core provisions of the Act).

in group action.¹⁶⁰ Therefore, if the NLRB allows for the imposition of mandatory arbitration agreements in retaliation for protected concerted activity, especially when coupled with threatening behavior, the Board will fail to enforce the basic protections of the NLRA.¹⁶¹ To ensure this enforcement, the Board should require that when employers impose a mandatory arbitration agreement on employees, the imposition is not in response to concerted activity absent a legitimate business reason.¹⁶²

A rigorous enforcement of these provisions also prevents the “chilling effect,” which occurs when an employer imposes a rule or policy that discourages—or chills—an employee from exercising his or her section 7 rights.¹⁶³ When this level of interference of section 7 rights has occurred, the Board may conclude and has concluded that its maintenance is an unfair labor practice.¹⁶⁴ Thus, when employees collectively attempt to resolve a grievance through courts, and their employer uses an agreement to halt this process by demanding employees sign away their rights to do so, this not only tends to interfere with their section 7 rights but also sends the “chilling effect” on the employees’ ability to engage in and assert these protected rights.¹⁶⁵ By

160. *Id.*

161. *See Cordúa*, 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *43–44 (McFerran, M., dissenting) (explaining that Board precedent indicates that imposing revised arbitration agreements in response to protected activity violates section 8(a)(1) of the Act); *see also* *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1619, 1640 (Ginsburg, J., dissenting) (“Congress framed [section] 7 in broad terms, ‘entrust[ing]’ the Board with ‘responsibility to adapt the Act to changing patterns of industrial life.’” (quoting *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975))).

162. Charles J. Morris, *How the National Labor Relations Act Was Stolen and How It Can Be Recovered: Taft-Hartley Revisionism and the National Labor Relations Board’s Appointment Process*, 33 BERKELEY J. EMP. & LAB. L. 1, 16 (2012).

163. *Vanguard Tours*, 981 F.2d at 67.

164. *Id.* at 66–67 (explaining that a rule that appears to dangerously interfere with one’s section 7 rights, such as “silencing” rules that prohibit discussion about wages, hours, and conditions will be held as a section 8(a)(1) violation even if the employer does not enforce such a rule).

165. *Id.*; *see also Cordúa*, 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *35 (McFerran, M., dissenting) (“By promulgating a rule in response to protected concerted activity, an employer is acting to suppress that activity and to chill other protected activity in the future.”); Christensen & Kight, *supra* note 39, at 341 (2011) (explaining that the NLRB has found that employer’s policies either directly interfered

implementing the two-part test, the Board prevents this effect because the purpose of the test is to safeguard those engaging in section 7 activity from the fear of employment retaliation in the form of mandatory arbitration agreements.

2. Overarching Labor Policy Implications

The overall policy implications of this test will promote fairness to employees in the post-*Epic* arbitration context, which currently allows employers to impose mandatory arbitration agreements despite statutorily protected activity.¹⁶⁶ This proposed test would protect employees who would refuse to arbitrate, especially once engaged in the process of litigation. The test encourages employers to contract these arbitration agreements upfront, which promotes fairness and valid consent. Should the employer determine that an arbitration agreement in an employment contract suits the employer's best interest, a potential employee can evaluate whether he or she accepts this provision without facing undue surprise.¹⁶⁷ The employer is also assured that the arbitration agreement will be upheld post-*Epic* unless it violates an ordinary contract principle.¹⁶⁸ Overall, implementing this test affords employees the opportunity to decide for themselves whether they accept mandatory arbitration, which may be the case considering the significant benefits to arbitration.

While *Epic* may have granted substantial power to employers when the Court enabled employers to mandate arbitration, this Note does not argue for the reversal of *Epic*.¹⁶⁹ In fact, arbitration can

with section 7 rights, or tended to "chill" employees' willingness to exercise those rights).

166. See *Epic*, 138 S. Ct. at 1619; see also *Cordúa*, 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *35 (McFerran, M., dissenting).

167. See Husband, *supra* note 12, at 28 ("Although individual arbitration of employment disputes may be a wise option for larger organizations, smaller companies may not see a significant benefit in litigating each employee's dispute in a separate proceeding. . . . In addition, while private arbitration may resolve an issue with one employee, it does not bind or even influence the resolution of that same issue with other employees. Accordingly, it may be preferable for some employers to have a court rule on the lawfulness of a particular policy or practice so it has more certainty for future enforcement.").

168. *Id.* at 29.

169. See *Epic*, 138 S. Ct. at 1619.

mutually benefit the employee and the employer to resolve issues in a more efficient manner.¹⁷⁰ Arbitration promotes accessibility and ease of usage, and employees usually do not pay to file a complaint under a workplace arbitration procedure.¹⁷¹ However, arbitration does not *always* serve an employee's best interests, a principle that the recent trend in labor law has not recognized.¹⁷²

For example, arbitration agreements often include provisions that require outcomes to be kept confidential.¹⁷³ Another common provision bars arbitrators from giving prior proceedings precedential effect.¹⁷⁴ These types of provisions cause disparate treatment among employees because employers render conflicting awards in cases that involve similar circumstances.¹⁷⁵ In addition, employees are statistically less likely to win arbitration cases and more likely to recover lower damages in employment arbitration than in the courts.¹⁷⁶ Thus,

170. Alexander J.S. Colvin, *The Relationship Between Employment Arbitration and Workplace Dispute Resolution Procedures*, 16 OHIO ST. J. ON DISP. RESOL. 643, 655 (2001) (explaining that arbitration can reduce the overall burden on employees by eliminating cumbersome procedures and costs in timely manner).

171. *Id.*

172. Justice Ginsburg, authoring the dissenting opinion in *Epic*, discusses a trend in recent decades in which the Supreme Court has “veered away” from Congress’ intent in enacting the FAA simply to expedite dispute resolution in a more economical way. *Epic*, 138 S. Ct. at 1643–44 (Ginsburg, J., dissenting). Justice Ginsburg discusses how the Supreme Court in 1983 declared for the first time since the FAA’s then fifty-eight-year history that the FAA evinces a “liberal federal policy favoring arbitration.” *Id.* at 1644 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 4, 24 (1983)). Next, Justice Ginsburg discusses how the Supreme Court expanded its ruling in a series of cases that the FAA requires enforcement of agreements to arbitrate not only contract claims, but also statutory claims. *See e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). Shortly after, the Supreme Court ruled that the FAA’s exemption for employment contracts should be construed narrowly to exclude from the FAA’s scope only transportation workers’ contracts. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 109, 109 (2001). Justice Ginsburg then concludes that “[e]mployers have availed themselves of the opportunity opened by court decisions expansively interpreting the Arbitration Act.” *Epic*, 138 S. Ct. at 1644 (Ginsburg, J., dissenting).

173. *Epic*, 138 S. Ct. at 1648 (noting that arbitrating employee complaints can give rise to anomalous results).

174. *Id.*

175. *Id.*

176. *See* Colvin, *supra* note 9.

forced arbitration does not merely offer an alternative method to settle a grievance; it may actually disfavor employees who have already chosen litigation as a more effective avenue.¹⁷⁷ When employees engage in a lawsuit against their employer, and the employer imposes a mandatory arbitration agreement, it forces the employees to forfeit potentially more favorable litigation results and submit to the employer's method of grievance. This demonstrates a policy concern of inequality that the *Epic* Court set aside but ought to be heavily considered going forward.¹⁷⁸ This proposed test recognizes this principle, and thus protects employees who have initiated litigation to address their grievances from an interference in their section 7 right to do so.

One potential issue with the two-part proposed test concerns the apparent ability of the accused employer to shield himself or herself from section 8(a)(1) liability by falsely claiming that a legitimate business reason existed to implement the arbitration agreement. If accused of this type of violation, an employer will likely respond that he or she had a legitimate business reason as a defense to this proposed test.¹⁷⁹ In order to prevail on the proposed two-part test, the employee would need to demonstrate that the employer imposed the arbitration agreement without a legitimate business reason. If the employee cannot make this showing, an employer may succeed in falsely claiming a legitimate business reason and escape liability.¹⁸⁰ However, because the courts and the Board evaluate a section 8(a)(1) claim by considering the totality of the circumstances, the accused employer would need a "clean record" of conduct surrounding the imposition of the agreement, which may be a strong disqualifier for employers charged with this type of violation.¹⁸¹ Thus, the totality of the circumstances component serves as a safety net, decreasing the likelihood that employers could mislead the Board or court.

Overall, the proposed test would successfully restore an important aspect of bargaining power to employees post-*Epic*. When the

177. See *Epic*, 138 S. Ct. at 1647–48; see also Husband, *supra* note 12, at 29 (discussing the advantages and disadvantages of mandatory arbitration agreements for employees).

178. See *Epic*, 138 S. Ct. at 1646.

179. See *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1135–36 (5th Cir. 1981).

180. See *supra* notes 137–39 and accompanying text.

181. See 29 U.S.C. § 158(a)(1); *supra* notes 65, 114, and accompanying text.

Supreme Court ruled that mandatory arbitration agreements did not interfere with an employee's section 7 rights, the Board should have prioritized striking the correct balance in the wake of a highly employer-favored decision.¹⁸² As Justice Ginsburg's dissent in *Epic* warned, "the inevitable result of [*Epic*] will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."¹⁸³ Unfortunately, Justice Ginsburg's prediction became reality when *Cordúa* failed to enforce a core NLRA provision by allowing employers to dictate the terms of a grievance procedure in response to vulnerable workers attempting to resolve their grievance in the way they found most effective.¹⁸⁴ Certainly, if employers can continue to interfere with collective employment litigation aimed at improving working conditions under the current *Cordúa* framework, the gap of inequality of bargaining power will widen.¹⁸⁵

V. CONCLUSION

Epic bestowed a significant power on employers in the grievance procedure process that requires a delicate reassessment on how employers can implement mandatory arbitration agreements while also respecting the section 7 rights of their employees.¹⁸⁶ Unfortunately, this delicate reassessment did not occur when *Cordúa* expanded *Epic* to allow employers to impose mandatory arbitration agreements directly in response to section 7 protected activity.¹⁸⁷ This Note proposes a method that helps restrike the balance of the employee-employer relationship in the arbitration context by proposing that courts and the Board implement a two-part test when faced with section 8(a)(1) claims. This test asks (1) whether the employer imposed the arbitration agreement in response to section 7 activity; and (2) if so, whether the employer imposed the agreement for legitimate business reasons absent

182. See *supra* Part II.D.

183. *Epic*, 138 S. Ct. at 1646 (Ginsburg, J., dissenting).

184. *Id.* at 1646–47; see also *Cordúa Rests. Inc.*, 368 N.L.R.B. No. 43, *1–2 (Aug. 14, 2019) (McFerran, M., dissenting).

185. See *Epic*, 128 S. Ct. at 1647; *Cordúa*, 368 N.L.R.B. No. 43, 2019 NLRB LEXIS 455, at *1–2 (McFerran, M., dissenting).

186. See *supra* Part II.C.

187. See *supra* Part III.

retaliation for section 7 protected activity.¹⁸⁸ By applying the proposed two-part test to section 8(a)(1) claims concerning the unlawful imposition of mandatory arbitration agreements, the Board and courts will enforce the core provisions of the Act while also improving the employer-favored trend in mandatory arbitration procedures. On a more sweeping level, the adoption of this test heeds Justice Ginsburg's warning of the dangerous and inevitable result when courts and the Board fail to enforce a federal statute designed to advance the well-being of vulnerable workers¹⁸⁹ by ensuring the protection of the rights of employees to organize and bargain collectively with their employers and to work together to improve working conditions.

188. *See supra* Part IV.A.

189. *See Epic*, 138 S. Ct. at 1646 (“The inevitable result of today’s decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers.”).