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Mandatory Arbitration and Sexual Harassment Claims: #MeToo- and Time's Up-Inspired Action Against the Federal Arbitration Act

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MANDATORY ARBITRATION AND SEXUAL HARASSMENT CLAIMS: #METOO- AND TIME'S UP-INSPIRED ACTION AGAINST THE FEDERAL ARBITRATION ACT

*Kathleen McCullough**

The rise of the #MeToo movement and Time's Up campaign has brought the issue of sexual harassment into the national spotlight. Equal Employment Opportunity Commission filings for sexual harassment claims have increased 13 percent since the start of the #MeToo movement, and a little over a year since its creation on January 1, 2018, the Time's Up Legal Defense Fund has received 4139 requests for representation in sexual harassment claims. However, the U.S. Supreme Court has interpreted the Federal Arbitration Act to enforce mandatory arbitration clauses for employment claims, including sexual harassment claims—an interpretation that prohibits employees from pursuing litigation in court. Recently, federal and state legislation that prohibit mandatory arbitration of sexual harassment claims have been proposed and enacted. However, the Federal Arbitration Act generally preempts state actions, and current federal actions are limited in scope.

This Note examines the Federal Arbitration Act's enactment and evolution to its current "super-statute" status that preempts state actions to limit or prohibit mandatory arbitration. This Note then explores recent federal, state, and corporate responses to combat mandatory arbitration of sexual harassment claims. Finally, this Note argues that federal action is necessary because state action attacking mandatory arbitration, whether directly or covertly, is likely preempted by federal law. This Note also encourages alternative options to limit the impact of mandatory arbitration, such as empowering attorneys general to pursue sexual harassment claims, encouraging companies to waive mandatory arbitration, and prohibiting nondisclosure agreements.

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INTRODUCTION

In July 2016, Gretchen Carlson, a former Fox News anchor, sued Fox News CEO Roger Ailes for sexual harassment.¹ Carlson filed her claim in state court despite a mandatory arbitration clause in her employment contract.² Carlson’s suit prompted several other women to come forward, which placed pressure on Fox News and led to Roger Ailes’s eventual resignation.³ However, as part of the \$20 million settlement, Carlson cannot discuss the approach her lawyers utilized to file her claim and negotiate the settlement.⁴

The U.S. Supreme Court has interpreted the Federal Arbitration Act (FAA)⁵ to require the enforcement of mandatory arbitration clauses for employment claims, including sexual harassment claims.⁶ Mandatory

1. Hope Reese, *Gretchen Carlson on How Forced Arbitration Allows Companies to Protect Harassers*, VOX (May 21, 2018, 11:44 AM), <https://www.vox.com/conversations/2018/4/30/17292482/gretchen-carlson-me-too-sexual-harassment-supreme-court> [<https://perma.cc/FHC2-B8UL>].

2. *Id.*; see also Michael M. Grynbaum & John Koblin, *Gretchen Carlson of Fox News Files Harassment Suit Against Roger Ailes*, N.Y. TIMES (July 6, 2016), <https://www.nytimes.com/2016/07/07/business/media/gretchen-carlson-fox-news-roger-ailes-sexual-harassment-lawsuit.html> [<https://perma.cc/HGH7-2FLF>].

3. Reese, *supra* note 1.

4. *Id.*

5. 9 U.S.C. §§ 1–16 (2012).

6. See *infra* Part I.C.

arbitration clauses, and the nondisclosure agreements that often accompany them, allow serial sexual predators to operate for decades before being held accountable.⁷ As Carlson herself stated, “Forced arbitration is a sexual harasser’s best friend: It keeps proceedings secret, findings sealed, and victims silent.”⁸

This Note examines the impact of mandatory arbitration on sexual harassment claims and assesses recent federal and state legislative action to limit or abolish the FAA. Part I explores the FAA’s enactment and the Supreme Court’s subsequent arbitration jurisprudence and includes a brief discussion of the benefits and drawbacks of mandatory arbitration. Part I also explains the rise of sexual harassment claims due to the #MeToo movement and Time’s Up campaign. Part II then outlines current federal and state legislative attempts to prohibit or limit mandatory arbitration for sexual harassment claims and discusses whether the FAA is likely to preempt each action. Part II also examines recent corporate initiatives to prohibit mandatory arbitration of sexual harassment claims.

Part III advocates for the adoption of federal legislation to prohibit mandatory arbitration for sexual harassment claims. In the absence of federal action, Part III argues that state legislative efforts should be employed to pressure both Congress and companies to act. Finally, Part III proposes alternative solutions for limiting the impact of mandatory arbitration, including empowering state attorneys general to pursue sexual harassment claims, encouraging companies to waive mandatory arbitration clauses, and prohibiting nondisclosure agreements for sexual harassment claims altogether.

I. THE ENACTMENT AND EVOLUTION OF THE FEDERAL ARBITRATION ACT

To understand the impact of mandatory arbitration on sexual harassment claims, it is necessary to understand arbitration and the FAA’s rise and development into a “super-statute.”⁹ Part I.A defines mandatory arbitration, explains the scope of such agreements, and explores their benefits and drawbacks. Part I.B outlines the FAA’s legislative history, which lends context to the statute’s scope. Part I.C explores the Supreme Court’s interpretation and expansion of the FAA over the last twenty-eight years.

7. Hiba Hafiz, *How Legal Agreements Can Silence Victims of Workplace Sexual Assault*, ATLANTIC (Oct. 18, 2017), <https://www.theatlantic.com/business/archive/2017/10/legal-agreements-sexual-assault-ndas/543252/> [<https://perma.cc/3AU3-5AC2>].

8. Gretchen Carlson, *Gretchen Carlson: The Supreme Court Tried to End #MeToo. Here’s How We’re Fighting Back.*, FORTUNE (May 31, 2018), <http://fortune.com/2018/05/31/gretchen-carlson-supreme-court-ruling-arbitration-metoo/> [<https://perma.cc/XT8A-3VA9>].

9. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001) (“A super-statute is a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does ‘stick’ in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute. . . . The law must also prove robust as a solution, a standard, or a norm over time . . .”).

Finally, Part I.D examines the increase in sexual harassment claims due to the #MeToo movement and Time's Up campaign.

A. Mandatory Arbitration: Definition and Scope

In arbitration, an impartial individual—the arbitrator—resolves a conflict based on the disputing parties' evidence and arguments.¹⁰ The arbitrator makes a final and often binding decision based on the merits.¹¹ Two main mechanisms subject employees to mandatory arbitration: (1) agreements made upon hiring, and (2) company-wide employment policies.¹² Arbitration agreements may broadly apply to all employment claims or may narrowly require arbitration for only specific types of claims.¹³ When a dispute is resolved through arbitration, it excludes other forms of adjudication, such as litigation in court.¹⁴

Mandatory arbitration clauses have dramatically increased over the past twenty-eight years.¹⁵ In 1992, only 2 percent of employees in the United States were subject to mandatory arbitration.¹⁶ This figure rose to almost 25 percent by the early 2000s and exceeded 55 percent of employees in 2017.¹⁷ An estimated sixty million American employees are now subject to mandatory arbitration clauses.¹⁸

1. The Benefits of Mandatory Arbitration

Mandatory arbitration agreements may benefit both the employer and employee.¹⁹ Without mandatory arbitration, an employer may wait out smaller claims under the assumption that employees will be unable to pursue

10. *Arbitration*, A.B.A. (Oct. 11, 2018), https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/arbitration/ [<https://perma.cc/R3K U-2DLU>]; see also RICHARD A. BALES, *COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT* 3 (1997).

11. Arbitration can be binding or nonbinding. *Arbitration*, *supra* note 10. A judge can enforce a binding arbitration decision, which can only be appealed in very rare circumstances. *Id.* See generally *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987) (holding arbitration to be final and binding); *W. R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757 (1983) (holding that federal courts may not overrule arbitration decisions even when a court believes that its own interpretation of a collective bargaining agreement is more accurate).

12. ALEXANDER J. S. COLVIN, *ECON. POLICY INST., THE GROWING USE OF MANDATORY ARBITRATION: ACCESS TO THE COURTS IS NOW BARRED FOR MORE THAN 60 MILLION AMERICAN WORKERS* 5 (2017), <https://www.epi.org/files/pdf/135056.pdf> [<https://perma.cc/E5K8-KKCW>].

13. BALES, *supra* note 10, at 3; see also *Clauses*, *AM. ARB. ASS'N*, <https://www.adr.org/clauses> [<https://perma.cc/Z9H8-54N7>] (last visited Apr. 10, 2019).

14. See BALES, *supra* note 10, at 4; see also *supra* note 11 and accompanying text.

15. See COLVIN, *supra* note 12, at 1.

16. *Id.*

17. *Id.*

18. *Id.* at 2.

19. Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 790 (2008) (arguing that, in practice, mandatory arbitration agreements are the most sensible arrangement for both employers and employees).

such claims in court.²⁰ At the same time, employees are unlikely to voluntarily arbitrate cases with potentially high jury awards.²¹ Proponents of mandatory arbitration argue that “no viable alternative”²² for resolving workplace disputes exists, especially for low-wage employees who may not be able to access the court system.²³

Arbitration is considered a more accessible forum²⁴ where employees can successfully represent themselves²⁵ and attorneys can expend less time and effort.²⁶ Mandatory arbitration can also provide a forum with subject-matter expertise and can provide confidentiality to employees who do not want to go through depositions or testify in open court.²⁷

2. The Drawbacks of Mandatory Arbitration

Mandatory arbitration agreements can have major drawbacks for employees.²⁸ Critics of mandatory arbitration suggest that employees are

20. *See id.*; *see also* 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).

21. *See* St. Antoine, *supra* note 19, at 790; *see also* Estreicher, *supra* note 20, at 563–64.

22. St. Antoine, *supra* note 19, at 810.

23. *See id.* at 812; *see also* Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105, 118 (2003) (“Employment arbitration needs to be preserved and improved, not abandoned.”). Proponents of mandatory arbitration argue that “Due Process Protocols” establish basic fairness standards in mandatory arbitration and that arbitration is “surprisingly favorable” to employees as compared to court litigation. *See* Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 OHIO ST. J. ON DISP. RESOL. 1, 16–17 (2017); *see also* Lisa B. Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LAB. L.J. 108 (1996). *But see* KATHERINE V. W. STONE & ALEXANDER J. S. COLVIN, ECON. POLICY INST., EPI BRIEFING PAPER NO. 414, *THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS* 17–18 (2015), <https://www.epi.org/files/2015/arbitration-epidemic.pdf> [<https://perma.cc/XD8D-GPE6>] (“[A]rbitration procedures vary considerably in their degrees of formality, similarity to court procedures, and amount of due process provided to the participants.”).

24. *See* St. Antoine, *supra* note 23, at 15.

25. *See id.*

26. *See* St. Antoine, *supra* note 19, at 792. In arbitration, parties are not required to follow strict court procedures that may require an attorney, such as the formal rules of evidence. *See* STONE & COLVIN, *supra* note 23, at 17. Even with an attorney, arbitration may be more cost-effective because discovery and motions are more limited. *Id.* Additionally, arbitration may provide finality sooner than litigation because appeal rights are very limited. *Id.*; *see also supra* note 11 and accompanying text.

27. Helene Wasserman, *Unintended Consequences: How Legislative Responses to #MeToo May Harm Harassment Victims*, 32 WESTLAW J. EMP., Feb. 27, 2018, at 1, 1–4.

28. *See* COLVIN, *supra* note 12, at 7 (arguing that mandatory arbitration is a growing threat to workers’ rights). Parties to a mandatory employment arbitration agreement usually do not have equal bargaining power, which may create a “take-it-or-leave-it” situation. *See* Alexander J. S. Colvin, *Organizational Primacy: Employment Conflict in a Post-Standard Contract World*, in *RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT* 194, 200 (Katherine V. W. Stone & Harry Arthurs eds., 2013). Critics of mandatory arbitration argue that the more the public learns about mandatory arbitration clauses, the more the public believes them to be “unjust and illegitimate.” *See* Victor D. Quintanilla & Alexander B. Avtgis, *The Public Believes Predispute Binding*

less likely to prevail in arbitration and, even if they do prevail, often recover less than they would through litigation.²⁹ Mandatory arbitration may suppress meritorious claims and limit publicly accessible information due to nondisclosure agreements, which are often part of arbitration settlements.³⁰

Employers may have a significant advantage in the arbitration process because they often choose the applicable procedures and select the arbitrators.³¹ Employers also have a “repeat player” advantage because they are familiar with the system and may deal with the same arbitrator multiple times, which also creates the potential for unconscious bias in their favor.³² Arbitration’s finality and limited right of appeal also increases reliance on the arbitrator’s neutrality, expertise, and fairness.³³

B. Enactment of the Federal Arbitration Act

The debate regarding the benefits and drawbacks of arbitration predates the enactment of the FAA. American courts originally considered arbitration agreements illegal and void because they divested the courts of legislatively provided jurisdiction.³⁴ In the early 1900s, judicial views began to change, but laws invalidating arbitration agreements remained.³⁵ Dissatisfaction with this jurisprudence, especially in the commercial context, fostered a strong movement to change the law.³⁶ In 1921, the American Bar Association (ABA) Committee on Commerce, Trade and Commercial Law drafted a bill to reverse the common-law rule invalidating the enforcement of arbitration agreements.³⁷ This bill was introduced in the House and Senate in 1922 but never became law.³⁸ In 1923, a new bill was introduced,³⁹ and

Arbitration Clauses Are Unjust: Ethical Implications for Dispute-System Design in the Time of Vanishing Trials, 85 FORDHAM L. REV. 2119, 2133 (2017).

29. See COLVIN, *supra* note 12, at 3. In successful employment cases, federal court recovery averages approximately \$143,497 versus \$23,548 in arbitration, and state court recovery averages approximately \$328,008 versus \$23,548 in arbitration. See STONE & COLVIN, *supra* note 23, at 21.

30. See COLVIN, *supra* note 12, at 5–6; Michelle Dean, *Contracts of Silence*, COLUM. JOURNALISM REV. (Winter 2018), https://www.cjr.org/special_report/nda-agreement.php [<https://perma.cc/UR23-LUDV>]. See generally Alexander J. S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71 (2014).

31. COLVIN, *supra* note 12, at 3.

32. See STONE & COLVIN, *supra* note 23, at 22–23. Repeat players may also have an advantage due to their ability to lobby for beneficial changes. See *id.*

33. See *id.* at 5; see also *supra* note 11 and accompanying text.

34. See, e.g., *Doyle v. Cont’l Ins. Co.* 94 U.S. 535, 538 (1876); *Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 453 (1874); see also BALES, *supra* note 10, at 16.

35. BALES, *supra* note 10, at 16.

36. Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 FORDHAM L. REV. 2035, 2038 (2011).

37. BALES, *supra* note 10, at 33.

38. *Id.*

39. *Id.* at 37.

Congress enacted the United States Arbitration Act⁴⁰ (USAA), later recodified in 1947 as the Federal Arbitration Act.⁴¹

The FAA governs the enforcement of arbitration agreements in contracts involving interstate commerce and maritime transactions.⁴² Judicial interpretation of the FAA generally focuses on the enforcement of arbitration clauses based on § 2 of the statute, which requires parties to any maritime transaction or transaction involving commerce to settle controversies arising out of a contract or transaction by arbitration.⁴³ Under § 2, agreements to submit to arbitration are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁴⁴ Judicial interpretation of the FAA also focuses on § 1’s exception, which excludes “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”⁴⁵

The original 1922 draft of the bill did not include the § 1 exception, and the scope of this exception is the subject of much debate.⁴⁶ Before the exception’s introduction, Andrew Furuseth, the leader of the American Federation of Labor, objected to the bill.⁴⁷ Furuseth believed that the bill would force employees to sign arbitration agreements and that arbitrators would be biased towards employers.⁴⁸ Furuseth’s objection was noted in a January 1923 hearing before a subcommittee of the Senate Judiciary Committee.⁴⁹ The report from this hearing reproduced a letter from Secretary of Commerce Herbert Hoover to Senator Thomas Sterling, the Chair of the subcommittee considering the bill.⁵⁰ Hoover actively supported the bill and wrote that it should be amended if there were objections to the inclusion of “workers’ contracts.”⁵¹ The amended language Hoover suggested became the § 1 exception.⁵² Courts interpreting the FAA often reference Furuseth’s intent, the Judiciary Committee hearings, and Hoover’s letter to determine whether a party falls within the exception.⁵³

40. Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16 (2012)).

41. Pub. L. No. 80-282, 61 Stat. 669 (1947) (codified as amended at 9 U.S.C. §§ 1–16 (2012)).

42. *Id.*; BALES, *supra* note 10, at 17.

43. 9 U.S.C. § 2 (2012).

44. *Id.*

45. *Id.* § 1.

46. BALES, *supra* note 10, at 33–34.

47. *Id.* at 34. Andrew Furuseth was also the president of the International Seamen’s Union of America. *Id.* Courts often consider Congress’s intent to be the same as Furuseth’s when interpreting the § 1 exception. *Id.*

48. *Id.*

49. *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary, 67th Cong. 9* (1923) [hereinafter *Hearing*] (statement of W. H. H. Piatt, Chairman, ABA Committee on Commerce, Trade and Commercial Law).

50. *Id.* at 14.

51. Letter from Herbert Hoover, Sec’y of Commerce, to Thomas Sterling, U.S. Senate (Jan. 31, 1923), *reprinted in Hearing, supra* note 49, at 14.

52. BALES, *supra* note 10, at 36.

53. *See id.* at 34, 37.

C. *Creating a Super-Statute: The Federal Arbitration Act in the Employment Setting*

In the 1990s, seventy years after its enactment, the Supreme Court began to construe the FAA broadly.⁵⁴ The Supreme Court cases that expanded the scope of the FAA are generally five-to-four decisions with strong majority opinions in favor of enforcing arbitration and equally intense dissents.⁵⁵

1. *Gilmer v. Interstate/Johnson Lane Corp.*: The Transformation into a Super-Statute Begins

Beginning in 1991, the Supreme Court decided a series of cases that effectively transformed the FAA into a super-statute.⁵⁶ In a seven-to-two decision in *Gilmer v. Interstate/Johnson Lane Corp.*,⁵⁷ the Court expanded the FAA's reach and held that an Age Discrimination in Employment Act of 1967 (ADEA)⁵⁸ claim could be subject to arbitration.⁵⁹

In *Gilmer*, an employee brought a suit in federal court alleging a violation of the ADEA, and the employer moved to compel arbitration, relying on the FAA.⁶⁰ The employee argued that arbitration did not align with the purpose of the ADEA⁶¹ and emphasized the inadequacy of arbitration.⁶² However, the Supreme Court held that the claim was subject to mandatory arbitration,⁶³ reasoning that the FAA was adopted to “reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts.”⁶⁴ The Court dismissed the employee's concerns regarding the adequacy of arbitration and stated that when parties agree to arbitrate a statutory claim they do not “forgo . . . substantive rights” but merely change the forum.⁶⁵ The Court held that, without evidence suggesting that Congress had not intended the FAA to apply to ADEA claims, mandatory arbitration agreements were

54. *Id.* at 1.

55. *See infra* Part I.C.

56. Previous Supreme Court decisions began this process in the business and commercial contexts. From the 1980s onward, the Court held that statutory claims may be subject to arbitration under the FAA, including claims arising from the Sherman Act, the Securities Exchange Act of 1934, civil provisions of the Racketeer Influence and Corrupt Organizations Act (RICO), and the Securities Act of 1993. *See generally, e.g.*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

57. 500 U.S. 20 (1991).

58. 29 U.S.C. §§ 621–634 (2012).

59. *Gilmer*, 500 U.S. at 35.

60. *Id.* at 23–24.

61. *Id.* at 27.

62. *Id.* at 31. The employee in *Gilmer* also claimed that additional inadequacies of arbitration included lack of written opinions, limited appellate review, biased panels, lack of discovery, lack of “broad equitable relief,” and lack of class actions. *Id.* at 30–33.

63. *See id.* at 35.

64. *Id.* at 24.

65. *Id.* at 26.

enforceable.⁶⁶ The Court also emphasized that judicial review of arbitration clauses must be analyzed with a “healthy regard” for the federal policy favoring arbitration.⁶⁷

In his dissent, Justice John Paul Stevens argued that the FAA did not apply to employment disputes.⁶⁸ Drawing on legislative history, Stevens argued that the FAA applied only to commercial disputes, as evidenced by the 1923 Senate hearing.⁶⁹ In the hearing, the chairman of the ABA committee responsible for drafting the bill assured senators that the bill was not intended to “refer[] to labor disputes, at all.”⁷⁰ The bill was intended to give commercial businesses the right to arbitrate.⁷¹ Stevens asserted that in applying the FAA to an ADEA claim, the Court “ha[d] effectively rewritten the statute.”⁷²

The *Gilmer* Court avoided the issue of whether the § 1 exception language applied because the issue was not argued in the lower courts and *Gilmer*’s arbitration agreement was not part of his employment contract.⁷³

2. *Circuit City Stores, Inc. v. Adams*: Deciding the Exception’s Scope

Ten years after *Gilmer*, in *Circuit City Stores, Inc. v. Adams*,⁷⁴ the Court squarely addressed the § 1 exception.⁷⁵ In a five-to-four decision, the Court limited the employment contract exception to only transportation workers.⁷⁶

The Court explained that for an exception of the FAA to apply it must be premised on the language of § 1.⁷⁷ Based on a textual interpretation, including application of the *eiusdem generis*⁷⁸ canon, the Court held that the

66. *Id.* This argument ignores the “last-in-time” canon, which states that more current statutes are granted greater weight than former statutes. WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 136 (2016).

67. *Gilmer*, 500 U.S. at 26 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

68. *Id.* at 36 (Stevens, J., dissenting).

69. *See id.* at 39; *see also supra* notes 46–52 and accompanying text.

70. *Gilmer*, 500 U.S. at 39 (Stevens, J., dissenting) (quoting *Hearing, supra* note 49, at 9 (statement of W. H. H. Piatt, Chairman, ABA Committee on Commerce, Trade and Commercial Law)).

71. *Id.* (describing the right to arbitrate as “the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it”).

72. *Id.* at 43.

73. *See id.* at 25 n.2 (majority opinion); *see also BALES, supra* note 10, at 33.

74. 532 U.S. 105 (2001).

75. *Id.* at 109.

76. *Id.*

77. *Id.* at 113–15. The employee also argued that the word “transaction” in § 2 applied only to commercial contracts, as opposed to employment contracts. *Id.* at 113. The Court rejected this argument, reasoning that the employee’s interpretation would render the separate exception in § 1 superfluous. *Id.*

78. *Ejusdem generis* is a canon of statutory interpretation that is used to “interpret a general term to reflect the class of objects reflected in more specific terms accompanying it.” *See* WILLIAM N. ESKRIDGE JR., PHILIP P. FRICKEY, ELIZABETH GARRETT & JAMES J. BRUDNEY, CASES AND MATERIALS ON LEGISLATION AND REGULATION 1195 (5th ed. 2014); *see also, e.g., Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 223–25 (2008) (applying the *ejusdem generis* canon).

§ 1 exclusion provision should be read narrowly.⁷⁹ The Court focused on the plain meaning of the words in the exception and reasoned that it was unnecessary to heavily weigh the legislative history.⁸⁰

The Court acknowledged various amici, including twenty-one state attorneys general, who objected to a narrow reading of the exception because it preempted state claims and infringed on states' rights.⁸¹ The Court rejected this argument and declined to overrule its previous decision, *Southland Corp. v. Keating*,⁸² which held that the FAA preempted state anti-arbitration laws.⁸³ Additionally, the Court gave weight to Congress's failure to overturn *Southland Corp.*⁸⁴

In his dissenting opinion, Justice Stevens reiterated many points from his *Gilmer* dissent⁸⁵ and argued that the FAA only applied to commercial arbitration agreements.⁸⁶ Stevens pointed to legislative history, including Representative George S. Graham's floor debate remarks in 1924, to signify that the bill was understood to apply to "*commercial contracts and admiralty contracts.*"⁸⁷ Stevens understood the § 1 exception to be read broadly—not creating superfluous text, but instead providing clarification necessary to eliminate opposition to the bill.⁸⁸

3. *AT&T Mobility LLC v. Concepcion*: Preempting State Law "Obstacles" to the Federal Arbitration Act

The Court continued to interpret the FAA broadly in *AT&T Mobility LLC v. Concepcion*.⁸⁹ In *Concepcion*, the Court focused on the final phrase of § 2, the "saving clause," which states that arbitration agreements are invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability."⁹⁰ In a five-to-four decision, the Court held that the saving clause "preserves generally applicable contract defenses" but does not

79. *Circuit City*, 532 U.S. at 113–18.

80. *Id.*

81. *See id.* at 121–22.

82. 465 U.S. 1 (1984).

83. *Id.* at 15–16; *see also Circuit City*, 532 U.S. at 122–24.

84. *Circuit City*, 532 U.S. at 122. The Supreme Court may consider legislative inaction when interpreting statutes. *See* ESKRIDGE ET AL., *supra* note 78, at 1202. Under "[a]cquiescence rules," when Congress takes no action to overturn or amend a statute in response to consistent Supreme Court interpretations that it is aware of, those interpretations are presumed to be correct. *See id.*; *see also, e.g., Flood v. Kuhn*, 407 U.S. 258, 283–84 (1972) (analyzing legislative inaction as acquiescence).

85. *See supra* notes 68–72 and accompanying text.

86. *Circuit City*, 532 U.S. at 126 (Stevens, J., dissenting).

87. *Id.* at 125 (quoting 65 CONG. REC. 1931 (1924)). Stevens also quoted Representative Ogden L. Mills, who introduced the 1922 bill in the House and stated that the FAA "provides that where there are *commercial contracts* and there is disagreement under the contract, the court can [en]force an arbitration agreement." *Id.* at 125 n.2 (alteration in original) (quoting 65 CONG. REC. 11,080 (1924)).

88. *Id.* at 128. For more information regarding opposition to the bill and the introduction of an exception by Secretary of Commerce Herbert Hoover, *see supra* notes 46–52 and accompanying text.

89. 563 U.S. 333 (2011).

90. *Id.* at 339 (quoting 9 U.S.C. § 2).

“preserve state-law rules” that frustrate the intent of the FAA.⁹¹ The overarching purpose of the FAA, as articulated by the Court, was “to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”⁹²

The Court reasoned that the California state rule requiring the availability of class-wide arbitration interfered with arbitration’s “streamlined proceedings.”⁹³ The FAA preempted the California rule because it was an “obstacle to the accomplishment and execution of the full purposes and objectives” of the FAA.⁹⁴

Justice Breyer, dissenting, emphasized that the FAA’s saving clause permits courts to refuse enforcement of arbitration agreements for the same reasons a court would invalidate “any contract.”⁹⁵ Breyer argued that the California rule would “reinforce, not obstruct,” the purpose of the FAA and could not be characterized as targeting arbitration because it imposed equivalent limitations on litigation.⁹⁶ Breyer also raised a federalism⁹⁷ argument, specifically that contract defenses are normally decided by the states and that the saving clause reflected Congress’s intent to retain an important role for the states.⁹⁸

4. *Kindred Nursing Centers Ltd. Partnership v. Clark*: Preempting Covert Hostility to the Federal Arbitration Act

In *Kindred Nursing Centers Ltd. Partnership v. Clark*,⁹⁹ the Court emphasized that the FAA preempts state rules that discriminate against arbitration.¹⁰⁰ In a seven-to-one decision,¹⁰¹ the Court followed *Concepcion* and held that the Kentucky Supreme Court had improperly singled out

91. *See id.* at 343. The Court held that the FAA preempts states from conditioning the enforcement of an arbitration agreement on the availability of class-wide arbitration procedures. *See id.* at 340. The Court rejected the plaintiff’s argument that the California rule holding arbitration agreements unconscionable met the requirements of the saving clause. *See id.* at 341. While *Concepcion* focused on class-wide arbitration of consumer contracts, the holding also applies to employment contracts. *Id.*

92. *Id.* at 344.

93. *Id.* at 346–48.

94. *Id.* at 352. Justice Thomas’s concurrence argues that “[c]ontract defenses unrelated to the making of the agreement—such as public policy—could not be the basis for declining to enforce an arbitration clause.” *Id.* at 355 (Thomas, J., concurring).

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

96. *Id.* at 362–64.

97. “Federalism” here refers to the vertical division of authority between the federal and state governments. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 3 (4th ed. 2011). Issues regarding the allocation of power between the federal and state governments often arise when determining whether to narrowly construe congressional authority or find federal laws unconstitutional for infringing on state sovereignty. *Id.* at 240.

98. *Concepcion*, 563 U.S. at 367 (Breyer, J., dissenting). Breyer concluded by stating that the Court did “not honor federalist principles.” *Id.*

99. 137 S. Ct. 1421 (2017).

100. *Id.* at 1426.

101. In a short dissent, Justice Thomas argued that the FAA should not apply to proceedings in state courts. *Id.* at 1429–30 (Thomas, J., dissenting).

arbitration agreements for disfavored treatment and therefore violated the FAA.¹⁰²

The Court reasoned that the FAA preempts any rule that “covertly” accomplishes discrimination against arbitration by disfavoring contracts that have “defining features” of arbitration agreements.¹⁰³ Here, the Court found that the Kentucky Supreme Court had adopted a legal rule “tailor-made” to apply to arbitration agreements.¹⁰⁴

By impeding the ability of “attorney[s]-in-fact” to enter into arbitration agreements, the Kentucky Supreme Court demonstrated a “hostility to arbitration”¹⁰⁵ and disregarded the FAA’s requirement that courts “place arbitration agreements on equal footing with all other contracts.”¹⁰⁶

5. *Epic Systems Corp. v. Lewis*: Reinforcing the Super-Statute Status of the Federal Arbitration Act

The most recent decision to reinforce the broad scope of the FAA was a consolidated decision rendered in May 2018. In *Epic Systems Corp. v. Lewis*,¹⁰⁷ the Court held in a five-to-four decision that neither the FAA’s saving clause nor the National Labor Relations Act (NLRA)¹⁰⁸ superseded Congress’s intent in the FAA to enforce arbitration agreements.¹⁰⁹

The Court rejected the employees’ argument that the NLRA’s protection of concerted labor activities¹¹⁰ overrides the enforcement of individualized arbitration agreements.¹¹¹ The Court reasoned that § 7 of the NLRA does not express approval or disapproval of arbitration and “does not even hint at a wish to displace” the FAA.¹¹² The Court upheld the validity of individualized arbitration agreements given the amount of “strong[]” precedent and the absence of congressional action.¹¹³

In her dissent, Justice Ginsburg referred to the Court’s decision as “egregiously wrong.”¹¹⁴ Ginsburg reviewed the FAA’s history, arguing that

102. *Id.* at 1425 (majority opinion).

103. *Id.* at 1426.

104. *Id.* at 1427.

105. *Id.* at 1427–28.

106. *Id.* at 1424 (quoting *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 465 (2015)).

107. 138 S. Ct. 1612 (2018).

108. 29 U.S.C. §§ 151–169 (2012).

109. *Epic Sys.*, 138 S. Ct. at 1622, 1632.

110. 29 U.S.C. § 157. Section 7 of the NLRA guarantees workers “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.” *Id.*

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

112. *Id.* Once again, the majority opinion ignores the canon that statutes enacted later in time control. *See ESKRIDGE*, *supra* note 66, at 136.

113. *Epic Sys.*, 138 S. Ct. at 1628. In his concurrence, Justice Thomas argued that the saving clause does not apply to nonenforcement of a contract on public policy grounds. *Id.* at 1633 (Thomas, J., concurring). Justice Thomas wrote a similar concurrence in *Concepcion*. *See supra* note 94.

114. *Epic Sys.*, 138 S. Ct. at 1633 (Ginsburg, J., dissenting).

the FAA does not require suppression of workers' collective-action rights.¹¹⁵ Referencing the remarks of Representative Graham and Senator Thomas J. Walsh before the USAA's enactment,¹¹⁶ Ginsburg stressed that Congress intended the USAA to apply to "voluntary, negotiated agreements" and that the Court's "exorbitant application of the FAA" stretched the statute far beyond the contractual disputes it was intended to govern.¹¹⁷

Ginsburg's dissent also argued that invalidating mandatory arbitration here did not overrule precedential cases like *Concepcion* and *Kindred Nursing* because the NLRA does not discriminate against arbitration on its face or by "covert operation[s]."¹¹⁸ Ginsburg also argued that the FAA and NLRA could be read harmoniously.¹¹⁹

Over the last twenty-eight years, the Supreme Court's interpretation of the FAA has broadly increased its scope and replaced judicial access with arbitration for an estimated sixty million Americans.¹²⁰ The FAA, as construed by the Supreme Court, requires arbitration of statutory claims that were created decades after the FAA was passed, such as claims under Title VII of the Civil Rights Act of 1964 ("Title VII")¹²¹ and the ADEA.¹²² Sexual harassment claims fall under Title VII, meaning that arbitration agreements are enforced for sexual harassment claims.¹²³

D. The Impact of the #MeToo Movement and Time's Up Campaign on Sexual Harassment Claims

The #MeToo movement and Time's Up campaign brought the widespread issue of sexual harassment into the national spotlight in late 2017.¹²⁴ Under

115. *See id.* at 1643.

116. *See id.*; *see also* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 125 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 39 (1991) (Stevens, J., dissenting) (quoting Senator Walsh's extended remarks at the 1923 Senate Judiciary Committee hearing: "The trouble about the matter is that a great many of these contracts that are entered into are really not [voluntary] things at all. . . . A man says, 'These are our terms. All right, take it or leave it.' Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all." (quoting *Hearing, supra* note 49, at 9)); *supra* note 87 and accompanying text (describing Representative Graham's remarks).

117. *See Epic Sys.*, 138 S. Ct. at 1643–44 (Ginsburg, J., dissenting).

118. *Id.* at 1646.

119. *See id.* at 1645. The dissent also included information about the increase in employment arbitration clauses after *Gilmer* and *Circuit City*, stating that in 1992 only 2.1 percent of nonunionized companies imposed mandatory arbitration agreements while the number increased to 53.9 percent in 2017. *See id.* at 1644.

120. COLVIN, *supra* note 12, at 2.

121. 42 U.S.C. § 2000e (2012).

122. *See, e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *see also supra* Part I.C.1 (discussing *Gilmer* and the Supreme Court's enforcement of arbitration for an ADEA claim).

123. *Facts About Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/publications/fs-sex.cfm> [<https://perma.cc/USV7-2YGS>] (last visited Apr. 10, 2019).

124. Alix Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements—and How They're Alike*, TIME (Mar. 22, 2018), <http://time.com/5189945/>

Title VII, workplace sexual harassment¹²⁵ claims are filed as discrimination claims with the Equal Employment Opportunity Commission (EEOC).¹²⁶ In fiscal year 2018,¹²⁷ the number of sexual harassment claims filed with the EEOC increased by 13.6 percent compared to fiscal year 2017.¹²⁸ This increase can be attributed to the rise of two groundbreaking women's empowerment movements aimed at eradicating sexual harassment and sexual assault: #MeToo and Time's Up.¹²⁹

The #MeToo movement was originally inspired by activist Tarana Burke.¹³⁰ In 2006, Burke started a nonprofit, with the motto "Me Too," that focuses on helping victims of sexual harassment and assault.¹³¹ The #MeToo movement gained national attention after allegations of sexual assault and harassment by Harvey Weinstein broke in the *New York Times*.¹³² In solidarity with women speaking out against Weinstein, Hollywood actress Alyssa Milano posted on Twitter asking her followers to reply with "me too" if they had been sexually assaulted or harassed.¹³³ Within twenty-four hours, the hashtag "#MeToo" appeared in more than 500,000 tweets and twelve million Facebook posts.¹³⁴ The #MeToo movement launched an important

whats-the-difference-between-the-metoo-and-times-up-movements/ [https://perma.cc/26S7-5CF7].

125. The EEOC defines "sexual harassment" as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature." *Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/types/sexual_harassment.cfm [https://perma.cc/DW4G-GHNS] (last visited Apr. 10, 2019).

126. RAYMOND F. GREGORY, UNWELCOME AND UNLAWFUL: SEXUAL HARASSMENT IN THE AMERICAN WORKPLACE 201 (2004). An EEOC investigation of a discrimination charge generally ends with one of two findings: "for cause" or "no cause." *Id.* "For cause" findings are those where there is reason to believe the employer has engaged in discrimination. *Id.* Such findings lead to further investigation and possibly litigation by the EEOC on behalf of the claimant. *Id.* A "no cause" finding ends the EEOC's involvement but leaves the claimant the option of going to court. *Id.* Six months after filing a claim, an employee may demand a right-to-sue notice that the EEOC must issue even if it has concluded the investigation with a "no cause" finding. *Id.* at 202.

127. As a federal agency, the EEOC's fiscal year begins on October 1, ends on September 30, and is designated by the calendar year in which it ends. *Glossary Term: Fiscal Year*, U.S. SENATE, https://www.senate.gov/reference/glossary_term/fiscal_year.htm [https://perma.cc/P234-YVQS] (last visited Apr. 10, 2019).

128. *What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm> [https://perma.cc/9AGU-7X2K] (last visited Apr. 10, 2019). For a list of fiscal year 2018 EEOC litigation, see *Litigation—FY 2018 Harassment Filings*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/litigation/selected/2018harassment.cfm> [https://perma.cc/KR6K-XEBH] (last visited Apr. 10, 2019).

129. See Langone, *supra* note 124.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. Kara Fox & Jan Diehm, *#MeToo's Global Moment: The Anatomy of a Viral Campaign*, CNN (Nov. 9, 2017, 1:35 PM), <https://www.cnn.com/2017/11/09/world/metoo-hashtag-global-movement/index.html> [https://perma.cc/5TU9-JBDX]; *More Than 12M "Me Too" Facebook Posts, Comments, Reactions in 24 Hours*, CBS NEWS (Oct. 17, 2017,

discussion regarding sexual harassment and became a global phenomenon.¹³⁵ *Time* magazine named “The Silence Breakers” as its 2017 “Person of the Year,” honoring all of the women and men involved in confronting their harassers.¹³⁶

The Time’s Up campaign, announced on January 1, 2018, is an “action-orientated” extension of the #MeToo movement.¹³⁷ Started by a group of over 300 women in Hollywood, the Time’s Up campaign focuses on promoting workplace equality and creating equal economic opportunities for women and people of color.¹³⁸ Since its creation, the campaign has raised \$24 million for a legal defense fund to help with legal and media assistance.¹³⁹ As of March 1, 2019, the Time’s Up Legal Defense Fund received 4139 requests for assistance with sexual harassment claims.¹⁴⁰

Over a year after the #MeToo movement began, its “undeniable” impact on the number of reported EEOC sexual harassment claims is still palpable.¹⁴¹ As #MeToo went viral, traffic to the EEOC website spiked dramatically, increasing to 66,625 visitors from 30,000 the month before.¹⁴² News of sexual harassment claims continues to break, and on September 25, 2018, Bill Cosby’s sentence made him the first #MeToo-era perpetrator to be sent to prison.¹⁴³ The widespread impact of the #MeToo movement and Time’s Up campaign demonstrates the pervasiveness of sexual harassment throughout the United States and a desire to act in response to this issue.¹⁴⁴

6:26 PM), <https://www.cbsnews.com/news/metoo-more-than-12-million-facebook-posts-comments-reactions-24-hours/> [<https://perma.cc/PZL7-4GXT>].

135. See Fox & Diehm, *supra* note 134.

136. See Langone, *supra* note 124.

137. See *id.*; see also Cara Buckley, *Powerful Hollywood Women Unveil Anti-Harassment Action Plan*, N.Y. TIMES (Jan. 1, 2018), <https://www.nytimes.com/2018/01/01/movies/times-up-hollywood-women-sexual-harassment.html> [<https://perma.cc/T7G9-28A5>].

138. See *Open Letter from Time’s Up*, N.Y. TIMES (Jan. 1, 2018), <http://www.nytimes.com/interactive/2018/01/01/arts/02women-letter.html> [<https://perma.cc/4AHX-ZQVX>].

139. *TIME’S UP Legal Defense Fund*, NAT’L WOMEN’S L. CTR., https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/10/2019.03.04-Final_nwlc_TimesUpOneSheet.pdf [<https://perma.cc/5SNJ-ANEM>] (last updated Mar. 1, 2019).

140. *Id.*

141. See Nigel Chiwaya, *New Data on #MeToo’s First Year Shows ‘Undeniable’ Impact*, NBC NEWS (Oct. 11, 2018, 1:54 PM), <https://www.nbcnews.com/news/us-news/new-data-metoo-s-first-year-shows-undeniable-impact-n918821> [<https://perma.cc/7WR7-5X8N>].

142. *Id.*

143. Jenny Jarvie, *Led Away in Handcuffs, Bill Cosby Will Serve Three to 10 Years in Prison for Sexual Assault*, L.A. TIMES (Sept. 25, 2018, 5:30 PM), <https://www.latimes.com/nation/la-na-bill-cosby-sentenced-20180925-story.html> [<https://perma.cc/W7R3-FK7K>]; see also Anna North, *Bill Cosby Is in Prison. But the First Real #MeToo Trial Hasn’t Happened Yet*, VOX (Oct. 1, 2018), <https://www.vox.com/2018/10/1/17902810/bill-cosby-sentencing-harvey-weinstein-larry-nassar> [<https://perma.cc/NNR7-2SDW>].

144. This Note focuses on prohibiting mandatory arbitration of sexual harassment claims. However, even supporters of legislative change in this area have voiced concerns that a focus on sexual harassment ignores intersectionality and other forms of discrimination and employment claims. See, e.g., Terri Gerstein, *End Forced Arbitration for Sexual Harassment. Then Do More.*, N.Y. TIMES (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/opinion/arbitration-google-facebook-employment.html> [<https://perma.cc/5M8P-9FN8>]. Workplace violations of different types are often intertwined, and supporters of confronting a

II. FEDERAL, STATE, AND CORPORATE RESPONSES TO MANDATORY ARBITRATION OF SEXUAL HARASSMENT CLAIMS

The national spotlight on sexual harassment has translated into various attempts to prohibit or limit the application of mandatory arbitration clauses. This Part addresses federal, state, and corporate responses to mandatory arbitration of sexual harassment claims. Part II.A discusses federal responses, including enacted and proposed legislation. Part II.B first explores enacted state legislation that directly or covertly prohibits mandatory arbitration and then reviews a state bill that was vetoed because of anticipated federal preemption. Part II.C discusses recent actions by corporations prohibiting mandatory arbitration of sexual harassment claims—some of which have been voluntary and others due to social pressure.

A. Federal Responses: Enacted and Proposed Legislation

Congress has expressed concern about mandatory arbitration clauses since the Supreme Court began to expand the scope of the FAA in *Gilmer*. Within a few years of the *Gilmer* decision, the Senate considered legislation that would have amended the FAA and created exceptions for discrimination claims.¹⁴⁵ This section explores various federal actions that were initiated to limit the application of the FAA on sexual harassment claims or prohibit mandatory arbitration in general.

1. The Franken Amendment: Successfully Enacted Federal Legislation to Limit Mandatory Arbitration

In December 2009, President Obama signed an appropriations bill for the Department of Defense (DOD), which included the “Franken Amendment.”¹⁴⁶ With the exception of a national-security waiver, this amendment prohibits providing more than \$1 million in federal funding to a contractor or subcontractor that requires employees to arbitrate claims arising under Title VII or any tort claims related to, or arising out of, sexual assault or sexual harassment.¹⁴⁷ The Franken Amendment, which received little public attention, is the first, and only, piece of federal legislation to prevent employers from requiring mandatory arbitration for their employees.¹⁴⁸

broader scope of issues maintain that sexism, racism, and economic exploitation are “inseparable.” *Id.*

145. See Protection from Coercive Employment Agreements Act, S. 2012, 103d Cong. (1994).

146. Department of Defense Appropriation Act, 2010, Pub. L. No. 111-118, § 8116, 123 Stat. 3409, 3454–55 (2009).

147. *Id.* The Title VII provision includes discrimination claims and allows victims of assault or rape to sue the individual perpetrator and the perpetrator’s employer. *Id.*; see also Sam Stein, *Franken’s Anti-Rape Amendment May Be Stripped by Senior Dem*, *Sources Say*, HUFFINGTON POST (Mar. 18, 2010, 5:12 AM), https://www.huffingtonpost.com/2009/10/22/frankens-anti-rape-amendm_n_329896.html [<https://perma.cc/3XA4-QHNY>].

148. See Department of Defense Appropriation Act, 2010 § 8116, 123 Stat. at 3454–55.

When he introduced the amendment on the Senate floor, then–Democratic Senator Al Franken¹⁴⁹ stated that his inspiration was the case of Jamie Leigh Jones, a former employee of defense contractor Kellogg Brown & Root (KBR).¹⁵⁰ Jones alleged that she was gang-raped by coworkers in her employer-provided housing while working for KBR in Iraq.¹⁵¹ When Jones attempted to bring a suit against her employer, KBR sought to enforce the arbitration clause in her employment contract.¹⁵² Senator Franken argued that while arbitration is an “efficient forum” for business disputes, it is not appropriate for sexual assault and civil rights claims.¹⁵³ Arbitration, according to Senator Franken, was inappropriate for these violations because it has limits—it occurs behind closed doors and therefore the public is not informed about recurring problems.¹⁵⁴ Additionally, an arbitration decision does not establish precedent for future cases.¹⁵⁵

On October 6, 2009, the Senate voted to include the Franken Amendment in the appropriations bill.¹⁵⁶ On the floor, then–Republican Senator Jeff Sessions, in opposition to the amendment, argued that the Supreme Court had already resolved that employment arbitration agreements were valid and “beneficial” in most cases.¹⁵⁷ Senator Sessions argued that further methods for utilizing mediation and arbitration should be explored instead of eliminating arbitration altogether.¹⁵⁸ In support of his argument, Senator Sessions stated that employees “tend to win” in arbitration as opposed to litigation.¹⁵⁹ Additionally, he listed several advantages of arbitration, including the advantage, noted by Justice Anthony Kennedy in *Circuit City*, that arbitration agreements help parties avoid the high cost of litigation.¹⁶⁰

149. Senator Franken resigned in December 2017 when faced with sexual misconduct allegations of his own. See Sheryl Gay Stolberg, Yamiche Alcindor & Nicholas Fandos, *Al Franken to Resign from Senate Amid Harassment Allegations*, N.Y. TIMES (Dec. 7, 2017), <https://www.nytimes.com/2017/12/07/us/politics/al-franken-senate-sexual-harassment.html> [<https://perma.cc/5UH7-AG3R>]. For more information on the controversy surrounding Franken’s resignation, see Laura McGann, *The Still-Raging Controversy over Al Franken’s Resignation, Explained*, VOX (May 21, 2018, 6:20 AM), <https://www.vox.com/2018/5/21/17352230/al-franken-accusations-resignation-democrats-leann-tweeden-kirsten-gillibrand> [<https://perma.cc/85Y3-N7T8>].

150. 155 CONG. REC. 23,403 (2009).

151. *Id.*

152. *Id.* Jones was able to bring her suit against KBR following litigation regarding enforcement of the arbitration provision. But ultimately, the jury found for the defendant KBR. See Daniel Gilbert, *Jury Favors KBR in Iraq Rape Trial*, WALL ST. J. (July 9, 2011), <https://www.wsj.com/articles/SB10001424052702303365804576434301221391760> [<https://perma.cc/W6SX-FV96>].

153. 155 CONG. REC. 23,403 (2009).

154. *Id.*

155. *Id.*

156. 155 CONG. REC. 23,562 (2009).

157. 155 CONG. REC. 23,558 (2009); see *supra* Parts I.A.1–2 (discussing the benefits and drawbacks of mandatory arbitration).

158. 155 CONG. REC. 23,558 (2009).

159. *Id.* But see *supra* note 29 (discussing statistics that suggest employees are less successful in arbitration).

160. 155 CONG. REC. 23,558 (2009). Senator Sessions also stated that invalidating employment agreements would violate the due process rights of both employers and

In response, Senator Franken stressed that the amendment did not seek to eliminate arbitration completely but would merely eliminate it in cases of rape or sexual assault.¹⁶¹

Immediately preceding the vote, Senator Franken cited the National Alliance to End Sexual Violence's view that it is "outrageous" to ask victims to enter into arbitration with a perpetrator or with a company that would not protect them.¹⁶² He concluded that victims of sexual assault and discrimination deserve the "basic right" to pursue "their day in court."¹⁶³ Democratic Senator Bill Nelson, a cosponsor of the amendment, also spoke in support of the bill, noting that the amendment would close a "legal loophole" that prevented victims from obtaining justice.¹⁶⁴

In his final opposing statement, Senator Sessions stated that the DOD urged him to oppose the amendment.¹⁶⁵ Senator Sessions also argued that the amendment was too broad because it went beyond issues of sexual assault and rape and eliminated arbitration for any claim under Title VII.¹⁶⁶ Despite Senator Sessions's opposition, the amendment passed by a vote of sixty-eight to thirty.¹⁶⁷

The Franken Amendment was itself amended during a conference negotiation between the defense appropriations committees of the House and Senate.¹⁶⁸ The original Senate version did not include the \$1 million contract threshold or the national-security waiver.¹⁶⁹ These changes were incorporated following criticism from the Obama administration's DOD, the chairman of the Senate Committee on Appropriations, and Senate Republicans.¹⁷⁰ The DOD opposed the amendment and expressed concern

employees and reiterated that employees could benefit from arbitration. *Id.* at 23,559. Senator Franken responded that Congress may constitutionally condition the receipt of federal funds and has imposed conditions in the past to further policy objectives. *Id.* Franken included a letter from three prominent constitutional scholars—Akhil Amar, Laurence Tribe, and Erwin Chemerinsky—in the record, which discussed the constitutionality of the "Franken Amendment." *Id.* Additionally, Senator Franken argued that the amendment supported due process rights by ensuring that defense contractors could no longer use fine print in contracts to deny victims "their day in court." *Id.* at 23,560.

161. *Id.*

162. *Id.* at 23,561.

163. *Id.* at 23,562.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* The political affiliation for the vote was sixty-eight in favor (fifty-six Democrats, ten Republicans, and two independent senators) and thirty opposed (all Republicans). Two senators did not vote. *See id.*; *Roll Call Vote 111th Congress—1st Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00308#position [<https://perma.cc/82SR-32H2>] (last visited Apr. 10, 2019).

168. *See* Stein, *supra* note 147.

169. 155 CONG. REC. 23,402 (2009) (providing the full text of the original Senate version of the Franken Amendment).

170. *See* Stein, *supra* note 147.

because “[e]nforcement would be problematic.”¹⁷¹ A White House spokesperson responded that the DOD’s opposition was overstated and that the Obama administration supported the “intent” of the Franken Amendment and was working to ensure that it would be enforceable.¹⁷² Critics of the Franken Amendment considered narrowing the scope of included claims.¹⁷³ However, attempts to remove the Title VII provision were met with public outcry, which likely helped the provision remain in the final bill.¹⁷⁴

The Franken Amendment has been reenacted each year and was included within the DOD’s \$674.4 billion budget for fiscal year 2019.¹⁷⁵ However, the Franken Amendment is limited in scope and does not prohibit a federal contractor from requiring employees to sign a mandatory arbitration agreement regarding other claims.¹⁷⁶ The legislation also does not cover race, age, or disability discrimination claims.¹⁷⁷

2. The Fair Pay and Safe Workplaces Executive Order: A Revoked Attempt to Limit Mandatory Arbitration

On July 31, 2014, President Obama signed Executive Order 13,673, the “Fair Pay and Safe Workplaces” (FPSW) order.¹⁷⁸ This order was a response to the discovery that federal contracts worth millions of dollars had been awarded to companies with “rampant” labor law violations.¹⁷⁹ The FPSW order required potential federal contractors and subcontractors to disclose labor law violations for the past three years.¹⁸⁰ Additionally, for contracts valued over \$1 million, the FPSW order prohibited mandatory arbitration for Title VII and specified tort claims related to, or arising out of, sexual assault

171. Ryan Grim, *Defense Department Opposed Franken’s Anti-Rape Amendment*, HUFFINGTON POST (Mar. 18, 2010, 5:12 AM), https://www.huffingtonpost.com/2009/10/19/defense-department-oppose_n_326569.html [<https://perma.cc/Z55E-85N3>].

172. *Id.*

173. *Id.*

174. *Id.*

175. See Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, § 8094, 132 Stat. 2981, 3022 (2018); see also *President Signs Defense Package into Law, Enacts Most On-Time Spending Bills in Two Decades*, U.S. SENATE COMMITTEE ON APPROPRIATIONS (Sept. 28, 2018), <https://www.appropriations.senate.gov/news/president-signs-defense-package-into-law-enacts-most-on-time-spending-bills-in-two-decades> [<https://perma.cc/UA8F-37BE>].

176. Department of Defense Appropriation Act, 2010, Pub. L. No. 111-118, § 8116, 123 Stat. 3409, 3454–55 (2009).

177. See STONE & COLVIN, *supra* note 23, at 25–26. Wage and hour claims under the Fair Labor Standards Act (FLSA) and claims based on state employment statutes are also not included. *Id.*

178. Exec. Order No. 13,673, 3 C.F.R. 283 (2014).

179. Mary Emily O’Hara, *Trump Pulls Back Obama-Era Protections for Women Workers*, NBC NEWS (Apr. 3, 2017, 6:23 PM), <https://www.nbcnews.com/news/us-news/trump-pulls-back-obama-era-protections-women-workers-n741041> [<https://perma.cc/6J6Z-BFU6>]. The Government Accountability Office conducted this investigation in 2010. *Id.*

180. Exec. Order No. 13,673, 3 C.F.R. 283, 284–85 (2014).

or harassment.¹⁸¹ The Obama administration originally expressed concerns regarding the Franken Amendment, but the passage of the FPSW order indicated support for this approach.¹⁸²

The majority of the FPSW order, and the administrative rule that was promulgated pursuant to the order, never went into effect.¹⁸³ A preliminary injunction partially enjoined the rule and accompanying guidance, including the prohibition on mandatory arbitration agreements.¹⁸⁴ Additionally, on March 27, 2017, President Trump issued Executive Order 13,782, revoking the FPSW order.¹⁸⁵ On the same day, President Trump also signed a resolution disapproving of the FPSW order's rule¹⁸⁶ under the Congressional Review Act (CRA).¹⁸⁷ The repeal was part of the Trump administration's campaign to revoke various Obama administration regulations, characterized as "overreaching federal rulemaking."¹⁸⁸

Unlike the Franken Amendment, the FPSW order was subject to legal challenges based on its contradiction of the FAA.¹⁸⁹ In October 2016, the United States District Court for the Eastern District of Texas held that the FPSW order and rule violated the FAA.¹⁹⁰ The district court's reasoning mirrored that of a prior Fifth Circuit opinion¹⁹¹: when Congress passes legislation in an area, such as the FAA, an executive order to the contrary is

181. *Id.* at 289–90. The FPSW order contained more exceptions than the Franken Amendment, such as exempting contractors and subcontractors with employees covered under a collective bargaining agreement. *Id.* at 290.

182. *See* Grim, *supra* note 171.

183. *See* Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces," 82 Fed. Reg. 51,358 (Nov. 6, 2017) (announcing the rescission of the Department of Labor's guidance). On August 25, 2016, the Federal Acquisition Regulatory (FAR) Council issued a final rule and the Department of Labor issued guidance based on the FPSW order. 48 C.F.R. pt. 22.20 (2017).

184. *See generally* Associated Builders & Contractors of Se. Tex. v. Rung, No. 1:16-CV-425, 2016 WL 8188655 (E.D. Tex. Oct. 24, 2016).

185. Exec. Order No. 13,782, 3 C.F.R. 314 (2017).

186. Pub. L. No. 115-11, 131 Stat. 75 (2017). The passage of Public Law 115-11 under the CRA gives Congress the ability to "fast-track" the reversal of regulations. *See* Eric Levitz, *Trump Makes Labor-Law Violators Eligible for Federal Contracts Again*, N.Y. MAG. (Mar. 27, 2017), <http://nymag.com/intelligencer/2017/03/trump-lets-federal-contractors-abuse-their-workers-again.html> [<https://perma.cc/YBP4-P5G7>]. The CRA requires a majority in both the House and Senate to strike down a federal regulation, and a subsequent executive order cannot reinstate the regulation without congressional approval. *See id.*

187. 5 U.S.C. § 801 (2012).

188. Michael Macagnone, *Senate Tees Up Repeal of Fair Pay and Safe Workplaces Rule*, LAW360 (Mar. 2, 2017, 5:30 PM), <https://www.law360.com/articles/897686/senate-tees-up-repeal-of-fair-pay-and-safe-workplaces-rule> [<https://perma.cc/H6AA-2XE2>]. In June 2018 the Senate and House introduced bills with identical language to the repealed FPSW order prohibiting mandatory arbitration. *See* Fair Pay and Safe Workplaces Act of 2018, S. 3077, 115th Cong. (2018); Workers' Freedom to Negotiate Act of 2018, S. 3064, 115th Cong. (2018); Workers' Freedom to Negotiate Act of 2018, H.R. 6080, 115th Cong. (2018). However, no further action occurred after these bills were referred to committee.

189. STONE & COLVIN, *supra* note 23, at 26.

190. Associated Builders & Contractors of Se. Tex. v. Rung, No. 1:16-CV-425, 2016 WL 8188655, at *14 (E.D. Tex. Oct. 24, 2017).

191. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1324, 1339 (D.C. Cir. 1996) (holding that an executive order that conflicted with the NLRA was preempted by the legislation).

preempted.¹⁹² The Obama administration originally appealed the district court's injunction, but the case was dismissed following Trump's inauguration.¹⁹³

3. The Arbitration Fairness Act: A Broad Approach

The proposed Arbitration Fairness Act (AFA) is a broad ban on mandatory arbitration agreements that has taken various forms over the years.¹⁹⁴ Generally, the AFA would prohibit mandatory arbitration agreements for employment, consumer, antitrust, and civil rights disputes.¹⁹⁵ Sexual harassment claims are included under employment disputes.¹⁹⁶

First introduced by Democratic Representative Henry Johnson, Jr. in July 2007,¹⁹⁷ the AFA is often reintroduced in response to Supreme Court decisions regarding arbitration.¹⁹⁸ For example, the 2011 AFA was introduced by Senator Franken and Representative Johnson in response to *Concepcion*.¹⁹⁹ The 2018 AFA was introduced by Democratic Senator Richard Blumenthal the day after *Epic Systems* was decided.²⁰⁰ The 2018 AFA had thirty-two cosponsors in the Senate, but it did not have enough support to pass within the 115th Congress.²⁰¹ A House version of the AFA was also introduced and garnered the support of eighty-two cosponsors.²⁰²

192. See *Associated Builders & Contractors*, 2016 WL 8188655, at *14; see also Reich, 74 F.3d at 1324.

193. See Order of Dismissal at 1, *Associated Builders & Contractors*, 2016 WL 8188655, ECF No. 39.

194. See, e.g., Arbitration Fairness Act of 2018, S. 2591, 115th Cong. (2018); Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007).

195. See S. 987 § 3. ("Notwithstanding any other provision of this title, no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, or civil rights dispute.")

196. See *id.*

197. H.R. 3010.

198. See S. 987; see also S. 2591.

199. See Christopher Drahozal, *Concepcion and the Arbitration Fairness Act*, SCOTUSBLOG (Sept. 13, 2011, 11:46 AM), <http://www.scotusblog.com/2011/09/concepcion-and-the-arbitration-fairness-act/> [<https://perma.cc/F3EB-AKY9>].

200. S. 2591.

201. See Shane T. Roeber, *Supreme Court Upholds Individual Proceedings in Arbitration Agreements—Hindering Class Actions*, NAT'L L. REV. (June 19, 2018), <https://www.natlawreview.com/article/supreme-court-upholds-individual-proceedings-arbitration-agreements-hindering-class> [<https://perma.cc/QHV8-8KSQ>]. The thirty-two cosponsors were all either Democratic or independent senators. See S. 2591—*Arbitration Fairness Act of 2018: Cosponsors*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/2591/cosponsors> [<https://perma.cc/7K5V-C9EN>] (last visited Apr. 10, 2019).

202. Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017). The eighty-two cosponsors were all Democrats. See H.R. 1374—*Arbitration Fairness Act of 2017: Cosponsors*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/1374/cosponsors> [<https://perma.cc/DQU4-VUFT>] (last visited Apr. 10, 2019).

In February 2019, after Democrats won a majority of seats in the House,²⁰³ the renamed Forced Arbitration Injustice Repeal (FAIR) Act, with identical language to the AFA, garnered 172 cosponsors.²⁰⁴ The FAIR Act was also introduced in the Senate and garnered thirty-four cosponsors.²⁰⁵

4. The Ending Forced Arbitration of Sexual Harassment Act: A Narrow Approach

In December 2017, Democratic Senator Kirsten Gillibrand and Democratic Representative Cheri Bustos introduced the Ending Forced Arbitration of Sexual Harassment Act.²⁰⁶ This bill is narrower than the AFA and prohibits pre-dispute arbitration agreements for “sex discrimination dispute[s].”²⁰⁷ The House version of the bill garnered thirty-eight cosponsors²⁰⁸ and the Senate version had eighteen cosponsors.²⁰⁹ In contrast to the AFA, House and Senate sponsorship for the bill did not follow strict party lines, indicating stronger bipartisan support.²¹⁰ For example,

203. See Susan Chira & Kate Zernike, *Women Lead Parade of Victories to Help Democrats Win House*, N.Y. TIMES (Nov. 6, 2018), <https://www.nytimes.com/2018/11/06/us/politics/women-midterms-historic.html> [<https://perma.cc/7GDN-HWJY>].

204. See Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (2019); *H.R. 1423—FAIR Act: Cosponsors*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/1423/cosponsors> [<https://perma.cc/RR5X-FMVA>] (last visited Apr. 10, 2019).

205. See Forced Arbitration Injustice Repeal Act, S. 610, 116th Cong. (2019); *S. 610—FAIR Act: Cosponsors*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/610/cosponsors> [<https://perma.cc/Z3LQ-7R5T>] (last visited Apr. 10, 2019).

206. See Ending Forced Arbitration of Sexual Harassment Act, H.R. 4734, 115th Cong. (2017); Ending Forced Arbitration of Sexual Harassment Act, S. 2203, 115th Cong. (2017). Senator Gillibrand stated that this bill was inspired by conversations with countless employees who made it clear that mandatory arbitration clauses were a major impediment to justice for sexual harassment claims. Janaki Chadha, *Gillibrand Calls on Congress to Pass Legislation on Workplace Sexual Harassment*, POLITICO (Jan. 26, 2018, 2:48 PM), <https://www.politico.com/states/new-york/albany/story/2018/01/26/senator-gillibrand-calls-on-congress-to-pass-legislation-on-workplace-sexual-harassment-217138> [<https://perma.cc/54EX-VC5P>]. On February 28, 2019, this legislation was reintroduced by Representative Bustos, but it only garnered three cosponsors. See Ending Forced Arbitration of Sexual Harassment Act of 2019, H.R. 1443, 116th Cong. (2019); *H.R. 1443—Ending Forced Arbitration of Sexual Harassment Act of 2019: Cosponsors*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/1443/cosponsors> [<https://perma.cc/6D66-J4JU>] (last visited Apr. 10, 2019). However, a related bill that prohibits mandatory arbitration on a broader scale, the FAIR Act, was introduced in the House on the same day and received 172 cosponsors. See *supra* notes 203–04 and accompanying text.

207. See H.R. 4734 § 2; S. 2203 § 2.

208. See *H.R. 4734—Ending Forced Arbitration of Sexual Harassment Act of 2017: Cosponsors*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/4734/cosponsors> [<https://perma.cc/9Q7J-NR9X>] (last visited Apr. 10, 2019).

209. See *S. 2203—Ending Forced Arbitration of Sexual Harassment Act of 2017: Cosponsors*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/2203/cosponsors> [<https://perma.cc/C9PH-JSF2>] (last visited Apr. 10, 2019).

210. The Senate bill had three Republican and fifteen Democratic cosponsors. See *id.* The House bill had eight Republican and thirty Democratic cosponsors. See *H.R. 4734—Ending Forced Arbitration of Sexual Harassment Act of 2017: Cosponsors*, *supra* note 208.

Republican Senator Lindsey Graham introduced the bill alongside Senator Gillibrand.²¹¹

Initial support for this legislation extended beyond Congress. The attorneys general²¹² of all fifty states, the District of Columbia, and five U.S. territories sent a letter to Congress in support of the bill.²¹³ The letter called on Congress to pass “appropriately-tailored legislation” that would ensure that sexual harassment victims have access to the judicial system.²¹⁴ This bipartisan effort, led by Florida Attorney General Pam Bondi (a Republican) and North Carolina Attorney General Josh Stein (a Democrat),²¹⁵ represented the first time in a decade that all fifty-six attorneys general signed a letter to Congress.²¹⁶

The letter recognized that arbitration agreements are often buried in “fine print” and employees often do not understand the effect of mandatory arbitration until they attempt to bring a sexual harassment claim.²¹⁷ Further, the letter stated that secrecy requirements in arbitration “disserve” the public’s interests.²¹⁸

Shortly after the letter from the attorneys general, Representative Bustos wrote an open letter to Paul Ryan, then the Republican Speaker of the House,

211. Jacqueline Thomsen, *AGs Demand Congress End Mandatory Arbitration in Sexual Harassment Cases*, HILL (Feb. 13, 2018, 6:33 PM), <https://thehill.com/regulation/administration/373715-all-us-ags-demand-congress-end-mandatory-arbitration-in-sexual> [<https://perma.cc/5HSM-PR2P>]. Senator Graham stressed that the Ending Forced Arbitration of Sexual Harassment Act would create incentives to change the workplace to a “less hostile and more respectful” environment and called on the U.S. Chamber of Commerce to endorse the bill because it was in businesses’ best interest. Press Release, U.S. Senator Lindsey Graham, Graham, Gillibrand Announce Bipartisan Legislation to Help Prevent Sexual Harassment in the Workplace (Dec. 6, 2017), <https://www.lgraham.senate.gov/public/index.cfm/2017/12/graham-gillibrand-announce-bipartisan-legislation-to-help-prevent-sexual-harassment-in-the-workplace> [<https://perma.cc/DT9L-3272>].

212. Attorneys general are considered the “top legal officers of their state or territory.” *State Attorneys General*, USA.GOV, <https://www.usa.gov/state-attorney-general> [<https://perma.cc/3P6F-4Y7P>] (last visited Apr. 10, 2019).

213. Letter from Nat’l Ass’n of Att’ys Gen. to Paul Ryan, Speaker, U.S. House of Representatives, et al. (Feb. 12, 2018), <http://www.naag.org/assets/redesign/files/sign-on-letter/Final%20Letter%20-%20NAAG%20Sexual%20Harassment%20Mandatory%20Arbitration.pdf> [<https://perma.cc/RU9M-BJCH>]; see also Emily Peck, *All 50 State AGs Demand an End to ‘Culture Of Silence’ Surrounding Sexual Harassment*, HUFFINGTON POST (Feb. 13, 2018, 4:58 PM), https://www.huffingtonpost.com/entry/attorneys-general-forced-arbitration_us_5a83484fe4b0cf06751f5abe [<https://perma.cc/SG5H-XWHX>].

214. See Letter from Nat’l Ass’n of Attorneys Gen. to Paul Ryan, Speaker, U.S. House of Representatives, et al., *supra* note 213.

215. See Thomsen, *supra* note 211; see also Press Release, Att’y Gen. Pam Bondi, Attorney General Bondi Leads Bipartisan Coalition of All 56 US AGs Urging Congress to Help Protect Employees from Sexual Harassment (Feb. 12, 2018), <https://web.archive.org/web/20180320091135/http://www.myfloridalegal.com/newsrel.nsf/newsreleases/8EDF0FD736B9D8B852582320063232E> [<https://perma.cc/6W3Z-WLS8>].

216. See Thomsen, *supra* note 211.

217. See Letter from Nat’l Ass’n of Attorneys Gen. to Paul Ryan, Speaker, U.S. House of Representatives, et al., *supra* note 213.

218. *Id.*

urging him to call for a vote, but no further congressional action occurred.²¹⁹ This inaction may have been due to quiet lobbying against the legislation by business leaders who were hesitant to publicly denounce it for fear of criticism that they were silencing victims of sexual harassment.²²⁰

B. State Responses: Covert, Explicit, and Third-Party Action

Thirty-two states introduced bills inspired by #MeToo and Time's Up in 2017 and 2018.²²¹ Some states explicitly prohibited mandatory arbitration for sexual harassment claims while others pursued a more "covert" or third-party approach. Any prohibition or limitation on mandatory arbitration for sexual harassment claims remains in effect until a law is challenged in court.²²² The legislative history of these bills indicates an awareness that a court would likely find that these statutes prohibiting mandatory arbitration are preempted by the FAA.

1. Washington: A Covert Approach to Limiting Mandatory Arbitration

In 2018, Washington State enacted Senate Bill (SB) 6313,²²³ which addresses an employee's right to file a complaint or cause of action under Washington or federal antidiscrimination laws.²²⁴ The law states that an "employment contract or agreement is . . . void and unenforceable if it requires an employee to waive the employee's right to publicly pursue a [sexual harassment] cause of action . . . or if it requires an employee to resolve claims of discrimination in a dispute resolution process that is confidential."²²⁵ While mandatory arbitration is not explicitly referenced within the statute's text, forced arbitration falls squarely under the waiver of employee rights referenced in the law.

On January 24, 2018, the Washington Senate Labor and Commerce Committee held a public hearing on three bills regarding sexual harassment

219. See Thomsen, *supra* note 211; see also Press Release, Cheri Bustos, Open Letter: Speaker Ryan, You Have the Power to Help End Sexual Harassment in the Workplace (Feb. 28, 2018), <https://bustos.house.gov/open-letter-speaker-ryan-power-help-end-sexual-harassment-workplace/> [<https://perma.cc/DQ3H-9FX6>].

220. Marina Fang, *Business Groups Might Be Quietly Killing a Bill That Would Bring Sexual Abuse Claims to Light*, HUFFINGTON POST (May 17, 2018, 4:02 PM), https://www.huffingtonpost.com/entry/forced-arbitration-sexual-harassment_us_5afda846e4b0a59b4e019e0a [<https://perma.cc/7CXW-YYVA>].

221. Porter Wells, *States Take Up #MeToo Mantle in Year After Weinstein*, BLOOMBERG NEWS (Oct. 3, 2018), <https://www.bna.com/states-metoo-mantle-n73014482949/> [<https://perma.cc/6TT6-MZJL>].

222. See Michael P. Wissa, *New York State and City Raise Bar for Employers in Handling Sexual Harassment Allegations*, NAT'L L. REV. (Oct. 1, 2018), <http://www.natlawreview.com/article/new-york-state-and-city-raise-bar-employers-handling-sexual-harassment-allegations> [<https://perma.cc/CRB4-4S47>]; see also *New York State Passes Significant Sexual Harassment Legislation*, SULLIVAN & CROMWELL LLP (Apr. 23, 2018), <https://www.sullcrom.com/blogs-new-york-state-passes-significant-sexual-harassment-legislation> [<https://perma.cc/T83Q-LXUZ>].

223. S. 6313, 65th Leg., Reg. Sess. (Wash. 2018) (substitute Senate bill).

224. *Id.*

225. WASH. REV. CODE § 49.44.085 (2019).

of employees.²²⁶ Discussing these bills, the chair of the committee and the bill's sponsor, Democratic Senator Karen Keiser, stated that SB 6313 was the “thorniest” bill of the three because federal law preempts state regulation of mandatory arbitration agreements.²²⁷ Experts in the field spoke to the committee, providing support for the bill and discussing concerns that the bill was preempted and could negatively impact workers subject to other types of unlawful harassment or discrimination.²²⁸

The public hearing on SB 6313 indicates an awareness of the preemption issue and belief that the bill would withstand a preemption challenge. This belief is likely unfounded. Waiving the right to publicly pursue a cause of action is a “defining feature” of arbitration agreements.²²⁹ If challenged, this statute would likely be preempted on the same grounds as the statute at issue in *Kindred Nursing*—both statutes disfavor arbitration agreements.²³⁰

However, the part of the Washington law that voids agreements requiring confidentiality for discrimination claims would likely survive a preemption challenge if severed from the rest of the text.²³¹ Confidentiality is not required in arbitration, and the FAA is silent on the issue. Even if SB 6313 is invalidated, another newly enacted Washington law prohibits employers from conditioning employment on an agreement that prevents disclosure of sexual harassment in the workplace.²³²

2. New York: An Explicit Approach to Limiting Mandatory Arbitration

On April 12, 2018, Democratic Governor Andrew Cuomo signed New York's 2018–2019 state budget, which included SB 7507 Part KK,²³³ a provision prohibiting arbitration agreements for sexual harassment claims.²³⁴ This law defines “prohibited clause[s]” as any provision in an agreement that

226. See *Hearing on S. 5996, S. 6313, and S. 6471 Before the S. Labor & Commerce Comm.*, 65th Leg., Reg. Sess. (Jan. 24, 2018) (statement of Sen. Keiser) (video and unofficial transcript available at <https://www.tvw.org/watch/?eventID=2018011337> [<https://perma.cc/VG7U-KWT9>]).

227. *Id.*

228. *Id.* These experts included members of the Washington Employment Lawyers Association and Washington Coalition of Sexual Assault Programs. See *id.* The bill was amended in response to these concerns. See *SB 6313—2017–18*, WASH. ST. LEGISLATURE, <https://app.leg.wa.gov/billssummary?BillNumber=6313&Initiative=false&Year=2017> [<https://perma.cc/54WQ-LJP7>] (last visited Apr. 10, 2019). For example, the legislature likely included the confidentiality provision to address the desire to limit confidential arbitration and likely removed explicit language regarding sexual harassment claims to avoid negatively impacting workers subject to other types of discrimination. When SB 6313 was introduced on January 12, 2018, the original language referenced an “employee’s right to file a complaint or cause of action arising from *sexual harassment or sexual assault*.” See S. 6313 § 1, 65th Leg., Reg. Sess. (Wash. 2018) (original Senate bill) (emphasis added). For more information about concerns regarding sexual harassment–focused legislation, see *supra* note 144.

229. See *supra* Part I.A.

230. See *supra* Part I.C.4.

231. See WASH. REV. CODE § 49.44.085 (2019).

232. WASH. REV. CODE § 49.44.210 (2019).

233. S. 7507, 241st Leg., Reg. Sess. (N.Y. 2018).

234. *Id.*

requires mandatory arbitration to resolve sexual harassment claims.²³⁵ The law states, “Except where inconsistent with federal law, . . . prohibited clause[s] . . . shall be null and void.”²³⁶

This provision was not part of the original bill and was added as part of Governor Cuomo’s “women’s agenda.”²³⁷ Floor debate on the amended version addressed the preemption issue.²³⁸ Republican Senator Catharine Young, then the chair of the Senate Finance Committee, acknowledged that federal law preempts any state law that treats arbitration less favorably than other agreements.²³⁹ When asked what protections the provision offered, Senator Young replied that some “extra protections” may exist, but she did not provide specifics.²⁴⁰ Democratic Senator Liz Krueger, then the ranking member of the Senate Finance Committee, pointed out that the provision did “not appear” to provide any new protections.²⁴¹

The New York law includes the language: “Except where inconsistent with federal law.”²⁴² This phrase sets the language apart from similar statutes and, combined with the floor debate, strongly suggests that the legislature expects preemption.²⁴³ New York’s statute explicitly targets mandatory arbitration and therefore disfavors arbitration.²⁴⁴ This goes against the long history of Supreme Court cases interpreting the FAA.²⁴⁵ It is possible that, if challenged, the statute would be upheld for companies operating solely in New York because *intrastate* companies are not subject to the FAA.²⁴⁶ However, this would severely limit the provision’s impact.²⁴⁷

The New York law also contains a provision that prohibits nondisclosure agreements.²⁴⁸ It states that for any claim resolution with a “factual foundation” involving sexual harassment, “no employer . . . shall have the authority to include . . . any term or condition that would prevent the

235. N.Y. C.P.L.R. 7515 (McKinney 2019).

236. *Id.*

237. *See id.*; *see also* Governor Cuomo Details Legislation to Empower Employees Seeking Justice for Sexual Harassment in the Workplace, N.Y. DEP’T LAB. (Jan. 30, 2018), <https://www.labor.ny.gov/pressreleases/2018/january-30-2018.shtm> [<https://perma.cc/UC6E-A6RH>] (stating that the provision would “enhance fairness and protections” for victims of sexual harassment).

238. N.Y. STATE SENATE, STENOGRAPHIC REC., 241st Leg., Reg. Sess., at 1850–51 (Mar. 30, 2018).

239. *Id.*

240. *Id.*

241. *Id.*

242. N.Y. C.P.L.R. 7515 (McKinney 2019).

243. *See supra* Part II.B.1; *see also supra* notes 224–25 and accompanying text.

244. *See supra* Part I.C.4.

245. *See supra* Part I.C.

246. Devjani H. Mishra & Emily C. Haigh, *New York State and City Expand Anti-Harassment Requirements for Employers*, LITTLER NEWS & ANALYSIS (Apr. 13, 2018), <https://www.littler.com/publication-press/publication/new-york-state-and-city-expand-anti-harassment-requirements-employers> [<https://perma.cc/NE8Q-8QT8>]. During floor debate for SB 7507, Senator Young referenced “opening the door” for lawsuits in state court. N.Y. STATE SENATE, STENOGRAPHIC REC., 241st Leg., Reg. Sess., at 1856 (Mar. 30, 2018).

247. *See* Mishra & Haigh, *supra* note 246.

248. N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2019).

disclosure of the underlying facts and circumstances to the claim or action unless the condition of confidentiality is the complainant's preference."²⁴⁹ This prohibition of nondisclosure agreements applies to all settlements, agreements, or claim resolutions.²⁵⁰ By prohibiting the nondisclosure of underlying facts, the bill allows the disclosure of the perpetrator's identity while keeping the settlement amount confidential.²⁵¹

3. California: A Veto in Anticipation of Preemption

The California State Legislature passed Assembly Bill (AB) 3080²⁵² in August 2018, but it was vetoed by then-Governor Jerry Brown, a Democrat, in September 2018.²⁵³ AB 3080 did not explicitly mention mandatory arbitration, but it prohibited an employee from having to "waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act."²⁵⁴ Discrimination claims, including sexual harassment, fall under the California Fair Employment and Housing Act.²⁵⁵ Proponents of AB 3080 argued that the bill was "carefully crafted so as not to run afoul" of Supreme Court precedent.²⁵⁶ A report on the bill from California's Office of Senate Floor Analyses specifically referenced *Concepcion* and *Epic Systems* and considered the "lengthy and extensive history" favoring enforcement of arbitration agreements.²⁵⁷

Governor Brown vetoed AB 3080 because he believed that it "plainly" violated the FAA.²⁵⁸ His veto message referenced "recent court decisions that invalidated state policies which unduly impeded arbitration."²⁵⁹ Quoting

249. *Id.*

250. *Id.*

251. Ronald L. Burdge, *Confidentiality in Settlement Agreements Is Bad for Clients, Bad for Lawyers, Bad for Justice*, A.B.A. (Sept. 26, 2018), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2012/november_december2012privacyandconfidentiality/confidentiality_settlement_agreements_is_bad_clients_lawyers_justice/ [<https://perma.cc/K5S7-ADFH>].

252. Assemb. B. 3080, 2017–2018 Reg. Sess. (Cal. 2017).

253. *AB-3080 Employment Discrimination: History*, CAL. LEGIS. INFO., https://leginfo.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180AB3080 [<https://perma.cc/KP7T-SKQB>] (last visited Apr. 10, 2019).

254. Assemb. B. 3080 § 3 (stating that "[a] person shall not, as a condition of employment, continued employment, the receipt of any employment-related benefit, or as a condition of entering into a contractual agreement, require any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act . . . including the right to file and pursue a civil action or a complaint"). The language of AB 3080 resembles the language of Washington SB 6313. *See supra* notes 224–25 and accompanying text.

255. *See* California Fair Employment and Housing Act, CAL. GOV'T CODE §§ 12900–12996 (West 2019).

256. *See* OFFICE OF SENATE FLOOR ANALYSES, THIRD, Assemb. B. 3080, 2017–2018 Reg. Sess., at 6–7 (Cal. 2018) (concluding that it was a "mischaracterization" to understand AB 3080 as a bill that "prohibits, discriminates against, or discourages arbitration agreements").

257. *See id.*; *see also supra* Parts I.C.3, I.C.5.

258. *See* Letter from Governor Edmund G. Brown Jr. to the Members of the Cal. State Assembly (Sept. 30, 2018), <https://www.gov.ca.gov/wp-content/uploads/2018/09/AB-3080-veto-9.30.pdf> [<https://perma.cc/RXV2-T2U8>].

259. *Id.*

Kindred Nursing, Governor Brown stated that a rule “selectively” invalidating agreements as “improperly formed” is preempted by the FAA, just like a rule “selectively refusing” to enforce a valid arbitration agreement is preempted.²⁶⁰ AB 3080 had passed the state assembly by forty-seven votes to twenty-five and the state senate by twenty-six votes to twelve.²⁶¹ While the votes were close to the two-thirds needed to override a veto,²⁶² the lack of a vote to override the veto likely indicates that the legislature expected both the governor’s veto and federal preemption.

The same day that Governor Brown vetoed AB 3080, he signed SB 820, the Stand Together Against Non-Disclosures (STAND) Act,²⁶³ which prohibits nondisclosure agreements for factual information in sexual harassment cases.²⁶⁴ The STAND Act requires disclosure of a perpetrator’s identity but does not prohibit nondisclosure agreements regarding the settlement amount.²⁶⁵ The law applies to claims filed in a civil action or a complaint filed in an administrative action; any settlements made before filing such claims are not subject to the same nondisclosure prohibition.²⁶⁶ With a senate vote of thirty to eight and an assembly vote of fifty-six to nineteen, SB 820 passed with a larger majority than AB 3080.²⁶⁷

Senator Connie Leyva, the bill’s sponsor, argued that nondisclosure agreements in sexual harassment claims “serve one primary purpose”: keeping sexual predators out of the public eye.²⁶⁸ Senator Leyva also stressed that the benefits of nondisclosure agreements were retained under SB 820 because some victims prefer to keep their identities confidential.²⁶⁹

The governor’s veto of AB 3080 and signing of SB 820 occurred on September 30, 2018, making these bills some of the first pieces of legislation to be considered after *Epic Systems*.²⁷⁰ However, *Epic Systems* likely had

260. *See id.* (quoting *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1428 (2017)); *see also supra* Part I.C.4.

261. *See AB-3080 Employment Discrimination: Enforcement*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=201720180AB3080 [<https://perma.cc/MGQ6-UHNN>] (last visited Apr. 10, 2019).

262. *Legislative Process*, CAL. ST. SENATE, <https://www.senate.ca.gov/legislativeprocess> [<https://perma.cc/66UN-LKJV>] (last visited Apr. 10, 2019) (stating that a two-thirds vote is necessary in both the assembly and senate to override a veto).

263. S. 820, 2017–2018 Reg. Sess. (Cal. 2018).

264. *Id.* SB 820 also prohibits nondisclosure agreements in sexual assault and sex discrimination cases. *Id.*

265. *Id.*; *see also* Burdge, *supra* note 251.

266. CAL. CIV. PROC. CODE § 1001 (West 2019) (applying to both private and public employers in California).

267. *See SB-820 Settlement Agreements: Confidentiality*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=201720180SB820 [<https://perma.cc/KHP8-EV44>] (last visited Apr. 10, 2019); *see also supra* note 261 and accompanying text.

268. OFFICE OF SENATE FLOOR ANALYSES, UNFINISHED BUSINESS, S. 820, 2017–2018 Reg. Sess., at 5 (Cal. 2018).

269. *Id.* at 7. SB 820 grants plaintiffs, but not perpetrators, the option to shield their identities if they so choose. *Id.*

270. *See AB-3080 Employment Discrimination: Enforcement*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180AB3080

little to no impact on the governor's decisions. SB 820 is not subject to the FAA because it does not address arbitration,²⁷¹ and Governor Brown cited *Kindred Nursing*, not *Epic Systems*, to support his veto of AB 3080.²⁷²

4. Massachusetts: A Side-Door Approach

As an alternative to prohibiting mandatory arbitration, one state has proposed legislation to empower the state attorney general's office to investigate sexual harassment. In January 2018, Massachusetts proposed House Bill (HB) 4323²⁷³ to enhance investigations into claims of sexual harassment and discrimination.²⁷⁴ HB 4323 would empower the attorney general to bring an action on behalf of the state against a person or company whenever the attorney general has reason to believe that a person or entity is engaged in sexual harassment and the proceeding would be in the public interest.²⁷⁵

Supreme Court precedent allows third parties to pursue judicial relief on behalf of an employee. In *EEOC v. Waffle House, Inc.*,²⁷⁶ the Supreme Court held six to three that the EEOC was not prohibited from pursuing a discrimination claim even though the employee signed an arbitration agreement.²⁷⁷ The FAA does not mention enforcement by public agencies and does not place restrictions on a nonparty's choice to pursue a claim.²⁷⁸ The Court reasoned that, while a liberal federal policy favoring arbitration exists, nothing in the FAA authorizes a court to compel arbitration that is not covered in an agreement.²⁷⁹

In *Waffle House*, the Court recognized that Congress directed the EEOC, a public agency, to exercise Title VII enforcement, remedies, and procedures.²⁸⁰ The Supreme Court allowed the EEOC to pursue the claim, deferring to Congress's clear intent that the EEOC be "the master of its own case."²⁸¹ The Massachusetts state legislature, through HB 4323, similarly empowered the attorney general, in her or his public enforcement capacity,

[<https://perma.cc/KP7T-SKQB>] (last visited Apr. 10, 2019); *SB-820 Settlement Agreements: Confidentiality*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180SB820 [<https://perma.cc/CPA7-LDYU>] (last visited Apr. 10, 2019).

271. See *supra* notes 42–45 and accompanying text.

272. See *supra* notes 259–60 and accompanying text.

273. H.R. 4323, 190th Reg. Sess. (Mass. 2018).

274. *Id.*

275. *Id.* HB 4323 also empowers the attorney general to join in any action brought by an individual alleging sexual harassment. *Id.* On January 19, 2019, the bill was reintroduced and referred to the Joint Committee on the Judiciary. H.R. 3312, 191st Reg. Sess. (Mass. 2019).

276. 534 U.S. 279 (2002).

277. *Id.* at 297–98.

278. *Id.* at 289.

279. *Id.* The Court held that the "pro-arbitration policy goals of the FAA" did not require the EEOC to "relinquish its statutory authority" unless an agreement were to require the agency to relinquish its authority. *Id.* at 294.

280. *Id.* at 285.

281. *Id.* at 291–92.

to be the “master” of pursuing sexual harassment cases.²⁸² On one hand, if HB 4323 is passed it may be upheld based on the legislature’s clear intent and the attorney general’s status as a third party who is unrestricted by the party’s arbitration agreement.²⁸³ On the other hand, the law may be preempted because state public enforcement agencies may not receive the same level of deference as the EEOC, a federal agency that was created based on a clear congressional intent. Overall, a court may uphold the statute due to federalism concerns about impinging on states’ rights to enforce their own laws through the attorney general.²⁸⁴

*C. Corporate Responses: The Tech Industry Leads the Charge
and the Impact of Social Pressure*

With the national spotlight still on sexual harassment claims, companies are waiving mandatory arbitration clauses for employees.²⁸⁵ Microsoft became the first Fortune 100 company to publicly endorse the proposed Ending Forced Arbitration of Sexual Harassment Act.²⁸⁶ Microsoft also announced that, instead of waiting for the legislation to pass, any mandatory arbitration agreements in employee contracts were waived for sexual harassment claims, effective immediately.²⁸⁷ Microsoft’s endorsement of the Ending Forced Arbitration of Sexual Harassment Act exemplifies the willingness of some companies to proactively prohibit mandatory arbitration of sexual harassment claims.²⁸⁸ Other companies have followed suit, either in voluntary support or as a result of employee dissatisfaction and social

282. See H.R. 4323, 190th Reg. Sess. (Mass. 2018).

283. See *Waffle House*, 534 U.S. at 289.

284. This Note addresses federal and state legislative actions to limit the FAA. However, the FAA has also been challenged in the state court system, such as the Kentucky Supreme Court in *Northern Kentucky Area Development District v. Snyder*, No. 2017-SC-000277-DG, 2018 WL 4628143 (Ky. Sept. 27, 2018). The court held that the FAA does not preempt a Kentucky statute that bars employers from “requir[ing] as a condition or precondition of employment that any employee . . . waive, arbitrate, or otherwise diminish any existing or future claim, right, or benefit.” *Id.* at *3. Specifically referencing *Kindred Nursing*, the Kentucky Supreme Court stated that “[t]he broad preemptive effect of the FAA is undeniable.” *Id.* at *4. However, the court “fail[ed] to see how a law . . . that does not actually attack, single out, or specifically discriminate against arbitration agreements must yield to the FAA.” *Id.* The court further clarified that the “statute only proscribes *conditioning employment* on agreements to arbitration, not the act of agreeing to arbitration.” *Id.* A petition for a rehearing was filed on October 17, 2018. Docket, N. Ky. Area Dev. Dist. v. Snyder, No. 2017-SC-000277-DG (Ky. Sept. 27, 2018). If challenged in the U.S. Supreme Court, the Court would likely hold that the FAA preempts the state statute. See *supra* Part I.C. The Kentucky Supreme Court is attempting to sever the formation of arbitration agreements from their enforcement, a distinction the Court explicitly rejected in *Kindred Nursing*. See *supra* Part I.C.4.

285. See Luke Norris, *Google Employees Are Leading the Way on Sexual Harassment Reform. The Rest of the Country Should Follow.*, SLATE (Nov. 26, 2018), <https://slate.com/news-and-politics/2018/11/google-walkout-mandatory-arbitration.html> [<https://perma.cc/W32W-89TE>].

286. Brad Smith, *Microsoft Endorses Senate Bill to Address Sexual Harassment*, MICROSOFT ON ISSUES (Dec. 19, 2017), <https://blogs.microsoft.com/on-the-issues/2017/12/19/microsoft-endorses-senate-bill-address-sexual-harassment/> [<https://perma.cc/VQ27-D4H4>].

287. See *id.*

288. See *id.*

pressure.²⁸⁹ In May 2018, Uber decided to waive mandatory arbitration of sexual harassment claims after over a dozen women sued the company for sexual harassment and sexual assault.²⁹⁰ Lyft followed suit, voluntarily waiving mandatory arbitration clauses and removing confidentiality requirements for sexual harassment claims.²⁹¹ In November 2018, Google announced a mandatory arbitration waiver following a 20,000-employee walkout protesting the company's handling of previous sexual misconduct allegations.²⁹² Facebook, eBay, and Airbnb quickly followed Google's lead.²⁹³ Airbnb also waived mandatory arbitration for all discrimination claims, including those involving sexual harassment, race, gender, religion, or age.²⁹⁴ In February 2019, Google announced that it would no longer enforce mandatory arbitration provisions for employment disputes with any employees, including temporary staff, contract workers, and vendors.²⁹⁵

While the tech industry has taken the lead regarding private action, the pressure to waive mandatory arbitration for sexual harassment claims has expanded to other industries. Law firms have also been subject to intense social pressure to remove mandatory arbitration clauses.²⁹⁶ Several law firms announced that they would remove such clauses for summer associates

289. See Daisuke Wakabayashi, Erin Griffith, Amie Tsang & Kate Conger, *Google Walkout: Employees Stage Protest over Handling of Sexual Harassment*, N.Y. TIMES (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/technology/google-walkout-sexual-harassment.html> [<https://perma.cc/ML8R-HNJ4>]; see also Krista Gmelich, *Google Workers Keep Up Fight on Forced Arbitration After Walkout*, BLOOMBERG (Jan. 15, 2019, 12:17 PM), <https://www.bloomberg.com/news/articles/2019-01-15/google-workers-keep-up-fight-on-forced-arbitration-after-walkout> [<https://perma.cc/7WR3-9X3R>].

290. See Daisuke Wakabayashi, *Uber Eliminates Forced Arbitration for Sexual Misconduct Claims*, N.Y. TIMES (May 15, 2018), <https://www.nytimes.com/2018/05/15/technology/uber-sex-misconduct.html> [<https://perma.cc/ZZE3-HEAU>].

291. *Id.*

292. Kate Conger & Daisuke Wakabayashi, *Google Overhauls Sexual Misconduct Policy After Employee Walkout*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/technology/google-arbitration-sexual-harassment.html> [<https://perma.cc/2JC6-C2MG>].

293. See Davey Alba & Caroline O'Donovan, *Square, Airbnb, and eBay Just Said They Would End Forced Arbitration for Sexual Harassment Claims*, BUZZFEED NEWS (Nov. 15, 2018), <https://www.buzzfeednews.com/article/daveyalba/tech-companies-end-forced-arbitration-airbnb-ebay> [<https://perma.cc/TX8W-3VBS>]; Didi Martinez, *Facebook, Airbnb and eBay Join Google in Ending Forced Arbitration for Sexual Harassment Claims*, NBC NEWS (Nov. 12, 2018), <https://www.nbcnews.com/tech/tech-news/facebook-airbnb-ebay-join-google-ending-forced-arbitration-sexual-harassment-n935451> [<https://perma.cc/67WN-4LDN>].

294. See Alba & O'Donovan, *supra* note 293.

295. Daisuke Wakabayashi, *Google Ends Forced Arbitration for All Employee Disputes*, N.Y. TIMES (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/technology/google-forced-arbitration.html> [<https://perma.cc/P35N-SN43>]. In February 2019, Google employees also lobbied Congress to implement changes to limit mandatory arbitration and joined Senator Blumenthal for the press conference introducing the FAIR Act. Emily Birnbaum, *Google Employees Join Lawmakers Pushing Bills to End Forced Arbitration*, HILL (Feb. 28, 2019, 2:14 PM), <https://thehill.com/policy/technology/432065-lawmakers-introduce-bills-to-end-forced-arbitration> [<https://perma.cc/AQ73-25YC>]. For more discussion of the FAIR Act see *supra* notes 203–05 and accompanying text.

296. See Angela Morris, *Why 3 BigLaw Firms Ended Use of Mandatory Arbitration Clauses*, A.B.A.J. (June 2018), http://www.abajournal.com/magazine/article/biglaw_mandatory_arbitration_clauses [<https://perma.cc/45EN-A45S>].

following a social media campaign criticizing the practice.²⁹⁷ Law students called on classmates to boycott firms during the recruiting season if the firm included mandatory arbitration for summer associates.²⁹⁸ Following the proposed boycott, additional firms removed their mandatory arbitration clauses, further demonstrating the impact of social pressure in this area.²⁹⁹

III. FEDERAL, STATE, AND THIRD-PARTY OPTIONS TO PROHIBIT MANDATORY ARBITRATION FOR SEXUAL HARASSMENT CLAIMS

The Supreme Court's "predilection for arbitration is unambiguous."³⁰⁰ The Supreme Court is perceived as increasingly pro-business, and Trump-appointed Justices Neil Gorsuch and Brett Kavanaugh are expected to continue this trend.³⁰¹ Based on the Court's current makeup, it is unlikely to limit the reach of the FAA.³⁰² However, as discussed in Part II, proposed federal and state legislation have targeted mandatory arbitration for sexual harassment claims.³⁰³

This Part argues that immediate action is necessary to restore access to the judicial system for victims of sexual harassment. Part III.A argues that federal action is required to prohibit mandatory arbitration for sexual harassment claims because state actions are likely preempted by the FAA. Part III.A also argues that despite preemption, states should continue to pass legislation to increase social pressure on Congress and corporations. Part III.B explores alternative ways to attack mandatory arbitration for sexual harassment claims by empowering attorneys general to pursue claims, encouraging companies to waive mandatory arbitration for sexual

297. *Id.*

298. Alexia Fernández Campbell, *Female Law Students Pressure Firms to Stop Banning Sexual Harassment Suits*, VOX (Dec. 3, 2018), <https://www.vox.com/2018/12/3/18123798/womens-student-association-mandatory-arbitration> [<https://perma.cc/KBV9-6EAP>].

299. Karen Sloan, *Kirkland & Ellis Drops Mandatory Arbitration for Associates amid Law Student Boycott*, LAW.COM (Nov. 21, 2018), <https://www.law.com/2018/11/21/kirkland-ellis-drops-mandatory-arbitration-for-associates-amid-law-student-boycott/> [<https://perma.cc/FN3C-VXRC>]. A list of law firms and their practices regarding sexual harassment claims is being compiled by Harvard Law School students to increase pressure on firms with mandatory arbitration clauses. See *Coercive Contracts*, PIPELINE PARITY PROJECT, <http://www.pipelineparityproject.org/coercivecontracts/> [<https://perma.cc/ZY9K-2JBK>] (last visited Apr. 10, 2019).

300. Genevieve Hanft, Note, *Giving Arbitration Some Credit: The Enforceability of Arbitration Clauses Under the Credit Repair Organizations Act*, 79 FORDHAM L. REV. 2761, 2803 (2011); see also Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 238 (2008) ("At every stage of arbitration's ascendancy, the Court has provided the necessary doctrinal pronouncements and political muscle to confirm the gains achieved and to advance the process to the next level of its reformation.").

301. See Jeffrey Bartash, *Trump Set to Make Supreme Court Even More Pro-Business with Kavanaugh Pick*, MARKETWATCH (July 10, 2018), <https://www.marketwatch.com/story/business-are-winning-big-at-the-supreme-court-a-new-trump-pick-means-theyll-keep-winning-2018-07-09> [<https://perma.cc/A3KZ-HU35>]; see also Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES (May 4, 2013), <https://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html> [<https://perma.cc/32ZU-95DP>].

302. See *supra* Part I.C.

303. See *supra* Part II.

harassment claims and prohibiting nondisclosure agreements for sexual harassment settlements, unless requested by the claimant.

A. Federal Action Is Required Because State Action Is Likely Preempted

The rise in EEOC claims and the number of claims filed with the Time's Up Defense Fund are strong indicators of the public's current desire to pursue claims of sexual harassment.³⁰⁴ Mandatory arbitration results in fewer claims, with lower chances of success and lower damages.³⁰⁵ Additionally, dissenting opinions in Supreme Court cases that interpret the FAA provide a strong argument that the FAA was never meant to apply to employment contracts.³⁰⁶ However, based on the Supreme Court's FAA analysis, mandatory arbitration extends to sexual harassment claims and state action to the contrary is likely preempted.³⁰⁷ Congress should therefore create a federal exception to the FAA, either broadly with the FAIR Act³⁰⁸ or narrowly with the Ending Forced Arbitration of Sexual Harassment Act.³⁰⁹

Congressional action is not subject to preemption challenges because later federal statutes control previous statutes. Additionally, public support for the proposed Ending Forced Arbitration of Sexual Harassment Act is evident. For example, the numerous proposed state statutes prohibiting mandatory arbitration for sexual harassment claims suggest a strong desire for Congress to create a sexual harassment exception to the FAA.³¹⁰ The #MeToo movement and Time's Up campaign are not fading away and Congress cannot ignore the national spotlight on the pervasiveness of sexual harassment across industries.³¹¹ Passing the Ending Forced Arbitration of Sexual Harassment Act would send a strong message that Congress is responsive to public concerns about sexual harassment and that arbitration is not an appropriate forum for such claims.³¹²

Congress should consider expanding the Franken Amendment if the Ending Forced Arbitration of Sexual Harassment Act does not receive enough bipartisan support.³¹³ The Franken Amendment continues to be reenacted with each annual DOD budget.³¹⁴ The continued reenactment of the Franken Amendment shows a bipartisan acceptance of this approach that could be expanded to other federal budgets and eventually to all government

304. *See supra* notes 128, 140 and accompanying text.

305. *See supra* notes 29–30 and accompanying text.

306. *See supra* Part I.C.

307. *See supra* Part I.C.

308. *See* Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (2019); Forced Arbitration Injustice Repeal Act, S. 610, 116th Cong. (2019); *see also supra* Part II.A.3.

309. *See* Ending Forced Arbitration of Sexual Harassment Act of 2019, H.R. 1443, 116th Cong. (2019); *see also supra* Part II.A.4.

310. *See supra* Part II.B.

311. *See supra* notes 139–44 and accompanying text.

312. *See supra* Part II.A.4.

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

314. *See supra* note 175 and accompanying text.

contracts.³¹⁵ Re-legislating the Franken Amendment's limit on mandatory arbitration each year is not as impactful or permanent as passing the Ending Forced Arbitration of Sexual Harassment Act, but this approach may be the only way to maintain bipartisan support.

A step towards expanding the Franken Amendment to all government contracts could be accomplished by passing the Fair Pay and Safe Work Act of 2018 ("FPSW Act").³¹⁶ Approximately twenty-eight million employees currently work for federal contractors.³¹⁷ The proposed FPSW Act would prohibit mandatory arbitration for new contracts worth more than \$500,000—a lower threshold than the \$1 million threshold in the FPSW order,³¹⁸ which would increase the number of employees covered by the prohibition.³¹⁹

States should also continue to pass legislation that prohibits mandatory arbitration for sexual harassment claims. Statutes with explicit language, such as New York's SB 7507, are almost certain to be preempted by the FAA if passed and challenged in court.³²⁰ However, some protections may still be offered for employees of *intrastate* businesses.³²¹ Additionally, each enacted or publicized statute brings this issue to the public's attention and increases pressure on Congress and companies to act.

The proactive state approach of limiting mandatory arbitration for sexual harassment claims conveys a powerful message to Congress.³²² Additionally, state statutes remain valid until challenged in court.³²³ In the wake of #MeToo and Time's Up, employers may be hesitant to challenge statutes for fear of social backlash.³²⁴ Once challenged, the state statutes face an uphill battle to overcome the argument that they are preempted by the FAA.³²⁵ However, relevant Supreme Court dissents, especially Justice

315. See *supra* note 175–177 and accompanying text. The DOD budget makes up the largest portion of the federal budget. See *supra* note 175 and accompanying text.

316. See *supra* Part II.A.2. The Fair Pay and Safe Work Act of 2018 and the Workers' Freedom to Negotiate Act of 2018 include the same text regarding mandatory arbitration. See Fair Pay and Safe Workplaces Act of 2018, S. 3077, 115th Cong. (2018); Workers' Freedom to Negotiate Act of 2018, S. 3064, 115th Cong. (2018); *supra* note 188.

317. See Emily Bazelon, *Obama Is on a Pro-Labor Roll*, SLATE (Aug. 7, 2014), <https://slate.com/news-and-politics/2014/08/obama-executive-order-on-mandatory-arbitration-huge-news-for-workers-rights.html> [<https://perma.cc/KEL4-9DAX>].

318. Exec. Order No. 13,673, 3 C.F.R. 283 (2014).

319. See *supra* Part II.A.2.

320. See *supra* Part II.B.2.

321. See *supra* notes 246–47 and accompanying text.

322. In addition to the examples of Washington and New York discussed above, Maryland, New Jersey, and Vermont have also enacted legislation prohibiting mandatory arbitration by prohibiting provisions that waive substantive or procedural rights or remedies for sexual harassment claims. See Gena B. Usenheimer, Nila Merola, Anne R. Dana & Vlada Feldman, *#MeToo Inspires Legislative Changes Across the United States*, SEYFARTH SHAW (Mar. 28, 2019), <https://www.seyfarth.com/publications/MA032819-LE> [<https://perma.cc/Z529-4B8G>]. New Jersey's legislation is the most expansive and prohibits mandatory arbitration for any discrimination, retaliation, or harassment claim. See *id.*

323. See Mishra & Haigh, *supra* note 246.

324. See Fang, *supra* note 220.

325. See *supra* Part I.C.

Ginsburg's recent dissent in *Epic Systems*, lay out a method for interpreting statutes without conflicting with the FAA.³²⁶

B. Alternative Options for Indirectly Attacking Mandatory Arbitration

In the absence of federal legislation, states may still act indirectly to limit the impact of mandatory arbitration. Such side-door methods focus on empowering third parties, whether state agencies or companies, to bring enforcement actions and thus ensure judicial access for sexual harassment claims.³²⁷ Additionally, states should prohibit problematic aspects of mandatory arbitration, such as nondisclosure agreements. These actions are not in conflict with the FAA and therefore are not subject to preemption.³²⁸

1. Encouraging Third-Party Action: State Attorneys General and Corporate Empowerment

Third-party action should be encouraged to combat mandatory arbitration for sexual harassment claims.

By empowering attorneys general to directly pursue sexual harassment claims, states bypass mandatory arbitration provisions.³²⁹ The letter to Congress signed by all fifty-six attorneys general indicates an overwhelming interest in limiting mandatory arbitration for sexual harassment claims.³³⁰ The empowerment of attorneys general ensures access to the judicial system for victims of sexual harassment, which the letter describes as “a fundamental right of all Americans.”³³¹

Massachusetts should pass the pending bill³³² to empower its attorney general, and other states should follow suit.³³³ Allowing state actors to pursue sexual harassment claims, despite the existence of a valid arbitration agreement between the employer and the employee, would begin to limit the impact of mandatory arbitration agreements.³³⁴ Additionally, empowering attorneys general to pursue sexual harassment claims returns some power to the states, power the FAA currently restricts with its broad preemption scope.³³⁵

Second, social pressure on corporations should not be underestimated.³³⁶ More companies should be encouraged to follow the lead of Microsoft and Google and waive mandatory arbitration clauses for employee sexual

326. *See supra* Part I.C.5.

327. *See supra* Parts II.B.4, II.C.

328. *See supra* Parts II.B.4, II.C.

329. *See supra* Part II.B.4.

330. *See* Letter from Nat'l Ass'n of Attorneys Gen. to Paul Ryan, Speaker, U.S. House of Representatives, et al., *supra* note 213.

331. *See id.*

332. H.R. 3312, 191st Reg. Sess. (Mass. 2019).

333. *See supra* Part II.B.4.

334. *See supra* Part II.B.4.

335. *See supra* Part II.B.4; *see also supra* note 97 and accompanying text.

336. *See supra* Part II.C.

harassment claims.³³⁷ Ideally, companies will voluntarily waive these agreements. However, public pressure has proven effective in this area.³³⁸ Google and top law firms changed their practices following social pressure.³³⁹ Additionally, CBS's board of directors announced in December 2018 that it would deny its ex-CEO \$120 million in exit pay after an investigation into allegations of sexual harassment and assault.³⁴⁰ The board announced its decision days after information leaked about a \$9.5 million sexual harassment settlement between CBS and Eliza Dushku.³⁴¹ The CBS board referenced its investigation as the primary consideration in denying the exit pay, but the board was likely influenced by public concerns after a year of sexual harassment allegations.³⁴²

2. The State "Side-Door" Approach: Prohibiting Nondisclosure Agreements

States should enact legislation to prohibit nondisclosure agreements in settlements related to claims of sexual harassment.

Nondisclosure agreements are criticized for creating a culture of impunity³⁴³ and for being susceptible to misuse by perpetrators to evade accountability.³⁴⁴ The case of Harvey Weinstein offers a poignant example of the lasting harm nondisclosure agreements may cause to both victims and the public.³⁴⁵ Nondisclosure agreements are not subject to the FAA.³⁴⁶ States, therefore, may enact statutes that prohibit the most nefarious consequences of nondisclosure agreements, while protecting settlement benefits that sexual harassment victims may desire.³⁴⁷ Some victims of sexual harassment seek nondisclosure agreements because they believe such agreements will protect them from unwanted negative attention and retaliation.³⁴⁸ Additionally, there is a concern that, without nondisclosure

337. *See supra* Part II.C.

338. *See supra* Part II.C.

339. *See supra* Part II.C.

340. *Former CBS Boss Les Moonves Denied \$120m Exit Pay*, BBC (Dec. 18, 2018), <https://www.bbc.co.uk/news/business-46599490> [<https://perma.cc/H7W8-LT2C>].

341. *See Rachel Abrams & John Koblin, CBS Paid the Actress Eliza Dushku \$9.5 Million to Settle Harassment Claims*, N.Y. TIMES (Dec. 13, 2018), <https://www.nytimes.com/2018/12/13/business/media/cbs-bull-weatherly-dushku-sexual-harassment.html> [<https://perma.cc/QD5G-L9RU>].

342. *See John Koblin, The Year of Reckoning at CBS: Sexual Harassment Allegations and Attempts to Cover Them Up*, N.Y. TIMES (Dec. 17, 2018), <https://www.nytimes.com/2018/12/14/business/media/cbs-sexual-harassment-timeline.html> [<https://perma.cc/V2MA-QXT4>].

343. Jia Tolentino, *Harvey Weinstein and the Impunity of Powerful Men*, NEW YORKER (Oct. 30, 2017), <https://www.newyorker.com/magazine/2017/10/30/harvey-weinstein-and-the-impunity-of-powerful-men> [<https://perma.cc/PX3V-4XGJ>].

344. Ronan Farrow, *Harvey Weinstein's Secret Settlements*, NEW YORKER (Nov. 21, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements> [<https://perma.cc/M255-9DV7>].

345. *See id.*; *see also* Hafiz, *supra* note 7.

346. *See supra* Part I.B.

347. *See supra* Parts II.B.1–2.

348. *See* Wasserman, *supra* note 27.

agreements, settlement amounts will decrease.³⁴⁹ States have already incorporated statutes that address these concerns by allowing both nondisclosure agreements when requested by the claimant and confidential settlement amounts.³⁵⁰ Laws that make perpetrators' names public while keeping settlement amounts confidential still incentivize employers to settle and put the public on notice regarding perpetrators' identities. Current laws vary in how broadly they prohibit nondisclosure agreements.³⁵¹ For example, New York's statute applies to all settlements, while California's only applies to settlements of civil suits.³⁵² To protect the maximum number of victims, states should follow New York's lead and use the broadest enacted statutes as a model for legislation.³⁵³

CONCLUSION

In the three months following the outpouring of sexual assault allegations against Harvey Weinstein, nearly one hundred "powerful people" were accused of sexual harassment—averaging one person every twenty hours.³⁵⁴ Victims of sexual harassment should have the option to pursue litigation if they so choose. Arbitration may have benefits within a commercial context, but the limitations of arbitrating sexual harassment claims are clear.

The public outrage over the enforcement of mandatory arbitration agreements for sexual harassment claims continues over a year after the #MeToo movement began.³⁵⁵ However, the Supreme Court is unlikely to break its twenty-eight-year trend of expanding the scope of the FAA. Therefore, it is up to Congress to pass legislation to ensure that victims of sexual harassment receive their day in court. In the absence of congressional action, states must continue to pass legislation prohibiting mandatory arbitration of sexual harassment claim in the hope of pressuring Congress and corporations to act. Finally, as an alternative option, state "side-door"

349. *See id.*

350. In addition to the examples of Washington, New York, and California discussed above, Arizona, Maryland, New Jersey, Tennessee, and Vermont have also enacted legislation prohibiting the use and enforcement of nondisclosure provisions in settlement agreements for sexual harassment claims. *See Wells, supra* note 221; *see also* Maxine Neuhauser, Jeremy M. Brown & Denise Merna Dadika, *New Jersey Responds to the #MeToo Era by Broadly Banning "Waiver of Rights" and Nondisclosure Provisions in Employment Agreements*, NAT'L L. REV. (Mar. 26, 2019), <https://www.natlawreview.com/article/new-jersey-responds-to-metoo-era-broadly-banning-waiver-rights-and-nondisclosure> [<https://perma.cc/3J4T-MEBL>].

351. *See Wells, supra* note 221.

352. *See supra* Parts II.B.2–3.

353. *See supra* Part II.B.2. On the federal level, a statute prohibiting nondisclosure agreements should also be passed. The Ending the Monopoly of Power over Workplace Harassment Through Education and Reporting (EMPOWER) Act is a bipartisan effort to prohibit NDAs regarding sexual harassment as a condition for employment. S. 2994, 115th Cong. (2017). The EMPOWER Act was reintroduced in March 2019. EMPOWER Act, H.R. 1521, 116th Cong. (2019); EMPOWER Act, S. 575, 116th Cong. (2019).

354. Swetha Kannan & Priya Krishnakumar, *A Powerful Person Has Been Accused of Misconduct at a Rate of Nearly Once Every 20 Hours Since Weinstein*, L.A. TIMES (Dec. 29, 2017), <https://www.latimes.com/projects/la-na-sexual-harassment-fallout/> [<https://perma.cc/ZX3S-A2SC>].

355. *See Gerstein, supra* note 144.

actions can limit the impact of mandatory arbitration provisions on sexual harassment claims.