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The Price Is (Not) Right: Mandatory Arbitration of Claims Arising Out of Sexual Violence Should Not Be the Price of Earning a Living

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The Price Is (Not) Right: Mandatory Arbitration of Claims Arising Out of Sexual Violence Should Not Be the Price of Earning a Living

ABSTRACT

As demonstrated by the #MeToo movement, current attempts to curtail systemic sexual violence in the workplace have fallen flat: approximately sixty million US workers are subject to mandatory arbitration clauses, which employers tend to bury deep within the fine print of employment contracts. These clauses, often coupled with confidentiality agreements, have provided offenders—and their employers—with a mechanism to escape liability and public scrutiny. Under the existing judicial framework, whether a court will allow victims of workplace sexual violence to escape binding arbitration remains unclear. Congress attempted to address this uncertainty by proposing the Ending Forced Arbitration of Sexual Harassment Act of 2017. Though well intentioned, Congress failed to properly tailor the bill to all forms of sexual violence in the workplace. This Note argues that employees should never be compelled to arbitrate claims of sexual violence, but rather should be afforded the choice to either arbitrate or instead resolve the matter in court. Moreover, this Note advocates for an amendment to the proposed bill—replacing the term “sex discrimination dispute” with “sexual violence dispute”—to explicitly prohibit employers from mandating binding arbitration of any claims of sexual assault, misconduct, or harassment. Through this modification, Congress can empower victims to share their stories if, when, and where they so choose.

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“Silence is the most powerful weapon of the harasser.”¹ As the #MeToo movement demonstrates, Hollywood refuses to stay silent any longer.² The #MeToo movement captured national attention when actress Alyssa Milano posted on social media about her personal experiences being harassed, further asking women who had been sexually harassed or assaulted to respond to her post with “Me too.”³ By the next day, Twitter users had tweeted “#MeToo” more than half a million times.⁴

As evidenced by the overwhelming flood of social media responses, sexual harassment and sexual assault reach far beyond the Hollywood Hills. At least one in four US women say they have experienced sexual harassment in the workplace,⁵ and it is estimated that there are more than forty-three thousand workplace rapes and sexual assaults per year.⁶ Studies suggest that these numbers vastly underestimate the actual figures because many victims are afraid to come forward due to retaliation concerns.⁷

Roughly 50 percent of women will experience sexual harassment during their careers.⁸ Unlike victims of other crimes, such as robbery

1. GRETCHEN CARLSON, BE FIERCE: STOP HARASSMENT AND TAKE YOUR POWER BACK 7 (2017).

2. For a more detailed account of the #MeToo movement, visit ME TOO., <https://metoomvmt.org/> [<https://perma.cc/VVM9-NVCZ>]; see also Chris Snyder & Linette Lopez, *Tarana Burke on Why She Created the #MeToo Movement—and Where It's Headed*, BUS. INSIDER (Dec. 13, 2017, 10:16 AM), <http://www.businessinsider.com/how-the-metoo-movement-started-where-its-headed-tarana-burke-time-person-of-year-women-2017-12> [<https://perma.cc/ME8A-WXM3>].

3. Lisa Respers France, *#MeToo: Social Media Flooded with Personal Stories of Assault*, CNN (Oct. 16, 2017, 7:12 PM), <http://www.cnn.com/2017/10/15/entertainment/me-too-twitter-alyssa-milano/index.html> [<https://perma.cc/TUD5-42B8>].

4. *Id.*

5. CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP. OPPORTUNITY COMM'N, REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 8 (2016). The US Equal Employment Opportunity Commission (EEOC) provided the first legal definition of sexual harassment in 1980 when it issued guidelines regarding two broad classes of prohibited behavior: (1) quid pro quo harassment, which is defined as “attempts to extort sexual cooperation by means of subtle or explicit threats of job-related consequences,” and (2) hostile work environment, which is defined as “pervasive sex-related verbal or physical conduct that is unwelcome or offensive,” regardless of a tangible employment-related consequence. Louise F. Fitzgerald, *Sexual Harassment: Violence Against Women in the Workplace*, 48 AM. PSYCHOLOGIST 1070, 1070 (1993). Although individuals may perceive sexual harassment differently, it “has become increasingly understood as any deliberate or repeated sexual behavior that is unwelcome to its recipient, as well as other sex-related behaviors that are hostile, offensive, or degrading.” *Id.*

6. Yuki Noguchi, *Underreporting Makes Sexual Violence at Work Difficult to Address*, NPR (Feb. 23, 2016, 6:04 PM), <http://www.npr.org/2016/02/23/467826376/underreporting-makes-sexual-violence-at-work-difficult-to-address> [<https://perma.cc/F6B6-CR28>].

7. FELDBLUM & LIPNIC, *supra* note 5, at 5, 16–17.

8. Melanie S. Harned et al., *Sexual Assault and Other Types of Sexual Harassment by Workplace Personnel: A Comparison of Antecedents and Consequences*, 7 J. OCCUPATIONAL HEALTH PSYCHOL. 174, 174 (2002). While the majority of the research and public discussion about sexual

or nonsexual physical assault, sexual assault and sexual harassment victims often must show subsequent emotional damage to be considered credible in either a court of law or the court of public opinion.⁹ Further, victims of sexual crimes or misconduct can expect negatively toned questioning, which attacks their credibility and calls their character into question.¹⁰

Many employees are subject to mandatory arbitration clauses within their employment contracts—a practice that critics describe as a “whole-scale privatization of the justice system.”¹¹ Approximately sixty million US workers are subject to such provisions, which are often buried deep within the fine print of a contract.¹² Generally speaking, a mandatory arbitration clause in an employment contract is an agreement not to pursue any legal action against one’s employer in court.¹³ Instead, the clause mandates adjudication in private arbitration, where a binding decision is made by a “neutral” third-party arbitrator.¹⁴ Arbitration clauses within employment contracts provide

harassment and assault focuses on the female victim, it is important not to overlook male victims. In studies from victims presenting to a sexual assault referral center or emergency department, males accounted for around 3 to 5 percent of victims. Clayton M. Bullock & Mace Beckson, *Male Victims of Sexual Assault: Phenomenology, Psychology, Physiology*, 39 J. AM. ACAD. PSYCHIATRY & L. 197, 199 (2011). However, other studies suggest that male victims severely underreport sexual assaults due to a variety of erroneous societal misconceptions, including: (1) that men in noninstitutionalized settings are rarely sexually assaulted; (2) that male victims are somehow responsible for their assaults; (3) that male victims are less traumatized by the experience; and (4) that the incidence of sexual assault of men is so rare as to not merit attention. *Id.* at 197, 200–01. These unfounded beliefs lead to greater social stigmas for male victims, which may ultimately preclude them from obtaining effective legal redress. *Id.* at 197–98.

9. Suresh Sahjpal & K. Edward Renner, *The New Sexual Assault Law: The Victim’s Experience in Court*, 16 AM. J. COMMUNITY PSYCHOL. 503, 511–12 (1988). The requirement placed upon victims to demonstrate emotional damage resulting from the sexual encounter is known as “rape trauma syndrome.” *Id.* at 511. In their capacity as expert witnesses, psychologists may actually be “contributing to a further victimization by implicitly requiring a victim of sexual assault to also become a mental health case in order to have others accept the first victimization as valid.” *Id.* Rape trauma syndrome as a prosecutorial strategy has been criticized as reinforcing stereotypes and counterproductive to true legal reform. *Id.*

10. *Id.* at 511.

11. Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, A ‘Privatization of the Justice System’*, N.Y. TIMES (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> [<https://perma.cc/57BJ-5ZDV>]; see also KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON POLICY INST., *THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS* 3 (2015), <https://www.epi.org/files/2015/arbitration-epidemic.pdf> [<https://perma.cc/B4RQ-ZWR6>].

12. Rachel Gillett, *More Than Half of American Workers Wouldn’t Be Able to Take Their Sexual Harassment Claims to Court*, BUS. INSIDER (Nov. 30, 2017, 4:27 PM), <http://www.businessinsider.com/mandatory-arbitration-clause-sexual-harassment-claims-2017-11> [<https://perma.cc/2UHB-AV3W>].

13. Robin Perkins, *Could an Arbitration Clause Block Your Sexual Harassment Claim?*, PERKINS & ASSOCS. (Mar. 15, 2017), <http://www.perkins-lawoffice.com/blog/2017/03/could-an-arbitration-clause-block-your-sexual-harassment-claim.shtml> [<https://perma.cc/Q4BX-HCV2>].

14. See *id.* For a further discussion of arbitrators’ potential biases, see *infra* Section II.A.2.

a cheaper and less formal method of resolution for disputes arising out of the employer-employee relationship.¹⁵ This Note argues that while efficient, arbitration is an inappropriate forum for resolving claims of sexual harassment or sexual assault because arbitration proceedings are often secret and do not create precedent to help resolve further disputes.¹⁶ Further, when combined with confidentiality agreements, mandatory arbitration clauses provide a shield for harassers and offenders to escape liability.¹⁷ This shield particularly damages efforts to address sexual harassment in the public sphere, because the secretive nature of mandatory arbitration safeguards harassers from accountability, perpetuates predatory behavior, and silences victims.¹⁸

This Note argues that the appropriate solution to the aforementioned issues is to amend the Ending Forced Arbitration of Sexual Harassment Act of 2017, which has been introduced in both the House and Senate. As currently drafted, the bill would prohibit employers from enforcing arbitration agreements with respect to employee allegations of workplace sexual harassment or any claim of gender discrimination that could be raised under Title VII of the Civil Rights Act¹⁹ (Title VII). This Note's proposed amendment would bar all private and public employers from entering into or enforcing mandatory arbitration provisions for any claims relating to or arising out of any forms of sexual violence, including sexual harassment, sexual assault, or sexual misconduct. This amendment would ensure that both sexual assault and sexual harassment victims get their day in court, if they so choose. Moreover, it would leave the door open for the use of valid binding arbitration agreements for nonsexual, workplace-related claims. Part I introduces the Federal Arbitration Act²⁰ (FAA),

15. Elizabeth A. Roma, Note, *Mandatory Arbitration Clauses in Employment Contracts and the Need for Meaningful Judicial Review*, 12 AM. U. J. GENDER SOC. POL'Y & L. 519, 520 (2004).

16. For a similar suggestion highlighting the weaknesses of arbitration over litigation, see generally 155 Cong. Rec. S10,028 (daily ed. Oct. 1, 2009) (statement of Sen. Franken) ("Arbitration has its place in our justice system. . . . But arbitration has its limits. Arbitration is conducted behind closed doors and doesn't bring persistent, recurring, and egregious problems to the attention of the public. Arbitration doesn't ever allow a jury of your peers. Arbitration doesn't establish important precedent that can be used in later cases.").

17. See Emily Martin, *Keeping Sexual Assault Under Wraps*, U.S. NEWS & WORLD REP. (Sept. 28, 2016, 2:10 PM), <https://www.usnews.com/opinion/articles/2016-09-28/fox-news-forced-arbitration-keeps-sexual-harassment-under-wraps/> [<https://perma.cc/8AXT-HVNR>]; Perkins, *supra* note 13.

18. *Id.*

19. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–16, 78 Stat. 241, 253–66 (1964) (codified as amended at 42 U.S.C. §§ 2000e–15 (2012)); Benjamin Dudek, *Could Congress Ban Arbitration of Sex Discrimination and Harassment Claims?*, FISHER PHILLIPS (Dec. 8, 2017), <https://www.fisherphillips.com/resources-alerts-could-congress-ban-arbitration-of-sex-discrimination> [<https://perma.cc/W3QY-JXQJ>].

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

subsequent Supreme Court opinions interpreting its application, and legislative attempts to limit its scope. Part I also examines recent Hollywood scandals regarding sexual violence and describes public responses to these scandals. Part II analyzes the dangers of subjecting sex-based claims to binding arbitration and details the current judicial framework for determining whether a sex-based claim is arbitrable under a binding arbitration clause within an employment contract. Part III proposes amending the Ending Forced Arbitration of Sexual Harassment Act by replacing the term “sex discrimination dispute” with “sexual violence dispute” to unambiguously prohibit employers from enforcing binding arbitration clauses in employment contracts for claims of all sexual assault, sexual misconduct, and sexual harassment. Part IV emphasizes the need for immediate legislative action to ensure that victims of sexual violence in the workplace are empowered to share their stories when and where they so choose.

I. BACKGROUND

Arbitration clauses within employment contracts are governed by the FAA.²¹ The Supreme Court liberally construes and generally upholds these provisions,²² which, in turn, has prompted numerous legislative attempts to limit the scope of the FAA.

A. *The Federal Arbitration Act*

The FAA governs all binding arbitration agreements between employers and employees.²³ Enacted in 1925, the FAA provides for contractually based, judicial facilitation of private dispute resolution.²⁴ The FAA describes arbitration agreements as follows:

[A] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter . . . arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.²⁵

Under such an arbitration provision, a dispute is submitted to one or more arbitrators, who enter a binding judgment that may include

21. *Id.*

22. For further discussion of the Supreme Court’s interpretations of the FAA, see *infra* Section I.B.

23. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 105 (2001).

24. *Id.* at 111; *Supreme Court Action: The Federal Arbitration Act Applies to the States*, DANIEL KRON, ESQ., <https://www.nylitigationfirm.com/supreme-court-action-the-federal-arbitration-act-applies-to-the-states/#> [https://perma.cc/JQU9-C5YW] (last visited Sept. 30, 2017).

25. 9 U.S.C. § 2 (2012).

an award.²⁶ Should any issues arise in enforcing the judgment, a court of law must confirm the award within one year,²⁷ and any objection by a challenging party must be brought within three months after the award is filed or delivered.²⁸ An arbitration ruling carries the same force and effect as a judgment rendered in a court of law.²⁹ By agreeing to arbitrate, both parties waive the right to appeal to a court on substantive grounds.³⁰

B. The Supreme Court's Interpretation of the FAA

Since the inception of the FAA, the Supreme Court has liberally construed and generally upheld mandatory arbitration provisions.³¹ In 1984, the Court held the FAA's application to state and federal courts is constitutional, which further expanded the reach of arbitration agreements into virtually every walk of life.³² According to the Court, the FAA represents a congressional declaration of a national policy favoring arbitration, and thus generally mandates state enforcement of arbitration agreements.³³

In *Alexander v. Gardner-Denver Co.*, the Supreme Court addressed binding arbitration clauses within employment contracts.³⁴ In accordance with the terms of his collective bargaining agreement³⁵ (CBA), Alexander—a discharged employee—filed a grievance with his union, which went to binding arbitration per the terms of his employment contract.³⁶ Immediately prior to the arbitration hearing,

26. See § 5 (providing more details about the appointment of arbitrators under the FAA).

27. § 9. According to the FAA, “at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.” *Id.*

28. § 12.

29. § 13.

30. § 10 (limiting the grounds for appeal of a final arbitration award).

31. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (“The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”).

32. *Southland Corp. v. Keating*, 465 U.S. 1, 17 (1984) (holding that the FAA was binding on the states, and that a conflicting California law was preempted by federal law and thus invalid).

33. *Id.* at 10.

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

35. A collective bargaining agreement is a binding, written legal contract between an employer and an organized labor parties that governs wages, hours, and other terms and conditions of employment. *Collective Bargaining Agreement: What Is a Collective Bargaining Agreement?*, SOC'Y FOR HUM. RESOURCE MGMT. (June 1, 2012), <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/collectivebargainingagreement.aspx> [https://perma.cc/6YEH-XPLG].

36. *Alexander*, 415 U.S. at 38–42.

Alexander alleged that he was fired due to racial discrimination.³⁷ The arbitration clause of the CBA limited the arbitrator's decision to solely an interpretation of the CBA itself, and the arbitrator ultimately ruled that Alexander was "discharged for just cause."³⁸ Alexander subsequently filed a claim in federal court under Title VII,³⁹ but the court held that he was precluded from litigating the Title VII claim based upon the arbitrator's adverse ruling.⁴⁰ The Supreme Court, however, held that an individual can sue under Title VII in court, despite his submission to arbitration under a CBA.⁴¹ The Court stated that "there can be no prospective waiver of an employee's rights under Title VII. . . . [T]he rights conferred can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII."⁴² The Court clarified that an employee who institutes an action under Title VII is not seeking review of the arbitrator's decision, but rather is "asserting a statutory right independent of the arbitration process."⁴³ Thus, allowing suit does not undermine the finality of the arbitral decision.⁴⁴ Further, the Court held that the federal courts must hear such Title VII claims de novo, without formal deference to the arbitrator, but may admit the arbitrator's decision as evidence.⁴⁵

Although the *Gardner-Denver* opinion suggested that employers were prohibited from using mandatory arbitration clauses in CBAs to prevent employees from filing statutory claims, the Supreme Court limited that seemingly broad protection in later decisions.⁴⁶ In *Gilmer v. Interstate/Johnson Lane Corp.*, the Court held that an employee's claim under the Age Discrimination in Employment Act of 1967⁴⁷ (ADEA) was subject to mandatory arbitration pursuant to an

37. *Id.* at 42.

38. *Id.*

39. 42 U.S.C. §§ 2000e to 2000e-15 (2012).

40. *Alexander*, 415 U.S. at 43.

41. *Id.* at 47-49 ("The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.").

42. *Id.* at 51.

43. *Id.* at 54.

44. *Id.*

45. *Id.* at 59-60.

46. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33-35 (1991). See generally *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, 628 (1985) ("[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

47. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, §§ 1-16, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (2012)).

arbitration clause in a securities registration application.⁴⁸ After rejecting multiple generalized attacks on the adequacy of arbitration proceedings,⁴⁹ the Court held that the plaintiff failed to meet his burden of showing that Congress had intended to preclude arbitration of claims under the ADEA.⁵⁰ In reaching this decision, the Court relied upon (1) the absence of an explicit prohibition of arbitration of specific claims within the FAA and its subsequent amendments;⁵¹ (2) a lack of legislative history evidencing an intent to preclude a waiver of judicial remedies;⁵² and (3) the absence of an “inherent conflict” between arbitration and the ADEA’s underlying purpose of reducing age discrimination.⁵³ Although section 1 of the FAA explicitly exempts contracts entered into by employees engaged in foreign or interstate commerce,⁵⁴ this exception did not apply to a securities registration application.⁵⁵ Thus, the Court did not clarify whether employment contracts are within the scope of the exemption within section 1 of the FAA.⁵⁶

48. *Gilmer*, 500 U.S. at 26.

49. *Id.* at 30–31, 33. The Court was unpersuaded by *Gilmer*’s argument that arbitration panels will be biased, citing protections in the NYSE’s rules against biased panels, including unlimited arbitrator selection challenges for cause and arbitrator conflict-of-interest disclosure requirements. *Id.* at 30–31. The Court also rejected *Gilmer*’s complaint that the limited nature of discovery within an arbitration proceeding “will prove insufficient to allow ADEA claimants such as *Gilmer* a fair opportunity to present their claims.” *Id.* at 31. The Court pointed to the implicit bargain inherent in an agreement to arbitrate, in which “a party ‘trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.’” *Id.* at 31 (citing *Mitsubishi*, 473 U.S. at 628). The Court further opined that “[m]ere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.” *Gilmer*, 500 U.S. at 33.

50. *Id.* at 26–27.

51. *Id.* at 20–21.

52. *Id.* at 26–27.

53. *Id.* at 26–27. The Court also stated that “judicial decisions addressing ADEA claims will continue to be issued because it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements.” *Id.* at 31.

54. 9 U.S.C. § 1 (2012) (“[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”).

55. *Gilmer*, 500 U.S. at 23.

56. It is interesting to note, however, that two Justices thought differently. In a dissent joined by Justice Marshall, Justice Stevens wrote that he believed that arbitration clauses contained in employment contracts are specifically exempt from coverage of the FAA. *Id.* at 36 (Stevens, J., dissenting). He cited the legislative history of the FAA in support of this belief:

At the Senate Judiciary Subcommittee hearings on the proposed bill, the chairman of the ABA committee responsible for drafting the bill assured the Senators that the bill “is not intended [to] be an act referring to labor disputes, at all. It is purely an act to give the merchants 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.”

Id. at 39 (alteration in original). Justice Stevens found that the exclusion in § 1 of the FAA “should be interpreted to cover any agreements by the employee to arbitrate disputes with the employer arising out of the employment relationship, particularly where such agreements to arbitrate are

Although the Court purported to have distinguished its holding in *Gilmer* from its holding in *Gardner-Denver*,⁵⁷ it again attempted to resolve the tension between the two cases in *Wright v. Universal Maritime Service Corp.*⁵⁸ In *Wright*, the Court acknowledged that by entering into a mandatory arbitration agreement, an employee could waive a statutory claim under the Americans with Disabilities Act of 1990.⁵⁹ Although *Gilmer* compelled this result, the Court held that a union-negotiated waiver of a statutory right to a judicial forum must be clear and unmistakable.⁶⁰ The Court held that because no such waiver existed, the employee could file a lawsuit in lieu of taking his claim to arbitration.⁶¹

A sharply divided Court clarified the ambiguities surrounding section 1 of the FAA in *Circuit City Stores, Inc. v. Adams*.⁶² The Court further limited employee protections by interpreting “contracts of employment” very narrowly, clarifying that only transportation workers’ employment contracts are exempted under the FAA.⁶³ Thus, nearly all mandatory arbitration clauses within employment contracts are generally upheld and construed liberally in favor of arbitration.⁶⁴

On May 21, 2018, the Supreme Court issued a highly anticipated decision in *Epic Systems Corp. v. Lewis*. *Epic Systems*, which involved binding arbitration clauses and class action waivers within employment contracts.⁶⁵ The Court ruled on three consolidated appeals,⁶⁶ each brought by employees who sought to litigate class actions in federal court after signing employment contracts that contained both a mandatory arbitration provision and a class action waiver.⁶⁷ These

conditions of employment,” and that the majority’s additional extension of the FAA was erroneous. *Id.* at 40, 43.

57. *Id.* at 35 (majority opinion). In *Gilmer*, the Court distinguished these holdings based upon the following: (1) the difference between contractual rights under a collective bargaining agreement and individual statutory rights; (2) the potential disparity in interests between a union and an employee; and (3) the limited authority and power of labor arbitrators. *Id.* The Court also highlighted that *Gardener-Denver* was not decided under the FAA. *Id.* (“Finally, those cases were not decided under the FAA, which, as discussed above, reflects a ‘liberal federal policy favoring arbitration agreements.’”) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985)).

58. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 70 (1998).

59. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. § 12101–12213 (2012)).

60. *Wright*, 525 U.S. at 80–81.

61. *Id.* at 80–82.

62. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

63. *Id.* at 105.

64. *See* STONE & COLVIN, *supra* note 11, at 4.

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

66. *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

67. *Epic Sys.*, 138 S. Ct. at 1616.

employees alleged that their respective employment agreements violated the National Labor Relations Act⁶⁸ (NLRA), which protects workers' rights to bargain collectively.⁶⁹ The parties further argued that their arbitration provisions were unenforceable due to a savings clause within the FAA, which prohibited mandatory arbitration if the arbitration agreement violates another federal law—in this case, the NLRA.⁷⁰ The Court held 5–4 that the arbitration provision and class action waiver were enforceable under federal law, reasoning that the FAA must be enforced as written.⁷¹ In his majority opinion, Justice Gorsuch noted that the Court had “never read a right to class actions into the NLRA” and that nothing within the NLRA suggested that Congress intended to displace the FAA.⁷² He reasoned that by enacting the FAA, Congress “instructed federal courts to enforce arbitration agreements according to their terms,” including those regarding individualized proceedings.⁷³ He further opined that “it’s the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them.”⁷⁴

The dissent in *Epic Systems*, which Justices Breyer, Sotomayor, Kagan, and Ginsburg joined, called the decision “egregiously wrong”⁷⁵—emphasizing that “[e]mployees’ rights to band together to meet their employers’ superior strength would be worth precious little if employers could condition employment on workers signing away those rights.”⁷⁶ Justice Ginsburg raised concerns that the Court “ignores the reality” that acting individually, “employees ordinarily are no match for the enterprise that hires them.”⁷⁷ Justice Ginsburg criticized the Court’s apparent willingness to enforce unbargained-for agreements between employers and employees.⁷⁸ Overall, the Court’s decision in *Epic Systems* slowed public momentum in favor of providing all workers with an unassailable right to be heard in court, sparking criticism that

68. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449, 449–57 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2012)).

69. *Epic Sys.*, 138 S. Ct. at 1617.

70. *Id.* at 1622.

71. *Id.* at 1632.

72. *Id.* at 1619.

73. *Id.*

74. *Id.* at 1624.

75. *Id.* at 1633 (Ginsburg, J., dissenting).

76. *Id.* at 1641.

77. *Id.* at 1640. Further, Justice Ginsburg found that “[t]he FAA’s legislative history also shows that Congress did not intend the statute to apply to arbitration provisions in employment contracts.” *Id.* at 1643.

78. *Id.* at 1648–49.

companies are now able to completely prohibit employees from banding together either privately or through the judicial system.⁷⁹

C. Legislative Responses to the FAA

1. The Franken Amendment

Within the defense-contracting sector specifically, Congress has already acknowledged the impropriety of forcing claims of sexual violence into binding arbitration proceedings.⁸⁰ In 2010, Congress passed the Franken Amendment, which limits the ability of certain Department of Defense contractors and subcontractors to enter into or enforce certain mandatory arbitration agreements with their employees.⁸¹ Namely, the Franken Amendment limits contractors' ability to enter into or enforce mandatory arbitration provisions regarding the following:

(1) claims under Title VII of the Civil Rights Act of 1964; or (2) tort claims related to or arising out of sexual assault or harassment including sexual assault and battery; intentional infliction of emotional distress; false imprisonment; or negligent hiring, supervision or retention (collectively . . . "covered claims").⁸²

The Franken Amendment does not address the use of mandatory arbitration agreements for noncovered claims, such as wage disputes.⁸³

Jamie Leigh Jones's chilling story of sexual assault was the impetus behind the Franken Amendment.⁸⁴ Jones alleged that her colleagues gang-raped her while working in Iraq.⁸⁵ Her complaint stated that after being subjected to sexual harassment in her predominantly male, employer-provided housing accommodation, she

79. See *id.* at 1646 ("The inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."); Nitasha Tikku, *Supreme Court Rules Against Workers in Arbitration Case*, WIRED (May 21, 2018, 6:04 PM), <https://www.wired.com/story/supreme-court-rules-against-workers-in-arbitration-case/> [https://perma.cc/Y73A-AV8W].

80. See Department of Defense Appropriations Act, 2010, H.R. 3326, 111th Cong. § 8116 (2009) (enacted) ("Franken Amendment").

81. H.R. 3326 § 8116; Frank Murray, *Assessing the Franken Amendment*, LAW360 (Feb. 16, 2011), <https://www.foley.com/files/Publication/b7719898-db14-44bc-bc2d-b47ede0b7e6c/Presentation/PublicationAttachment/fdc6a5db-da4a-4517-bc83-b6679194089b/AssessingTheFrankenAmendment.pdf> [https://perma.cc/2M2E-G35T].

82. For a more thorough assessment of the Franken Amendment, including definitions of "contractor," "covered contracts," and "flow down" requirements, see Murray, *supra* note 81.

83. See *id.*

84. See *Jones v. Halliburton Co.*, 583 F.3d 228 (5th Cir. 2009).

85. *Id.* at 231; see also Jeffrey D. Polsky, *Can't You Be for Arbitration and Against Rape?*, FOX ROTHSCCHILD LLP (Feb. 17, 2011), <https://californiaemploymentlaw.foxrothschild.com/2011/02/articles/discrimination/cant-you-be-for-arbitration-and-against-rape/> [https://perma.cc/GR94-JFGR].

requested to move to a safer location.⁸⁶ Jones contended that her employer—a US engineering, construction, and private military contracting company—took no action and as a result, several of her coworkers drugged, beat, and gang-raped her in her bedroom the next evening.⁸⁷ Upon her return to the United States, Jones attempted to sue her employer for various tort claims—including assault and battery, intentional infliction of emotional distress, and negligent hiring, retention, and supervision of employees—based on the alleged sexual assault.⁸⁸ Her employer sought to compel arbitration of her claims based on her employment contract, which mandated arbitration of any claims “related to her employment” or based on personal injury “arising in the workplace.”⁸⁹

After undertaking a fact-specific analysis, the US Court of Appeals for the Fifth Circuit held that her claims did not “relate to” her employment, focusing much of its analysis on the location of the assault.⁹⁰ The court opined that the “provision’s scope certainly stops at the bedroom door.”⁹¹ Since she was assaulted after work hours while off-duty in her bedroom, which was “some distance from where she worked,” the court held that her personal injury claims did not arise in or about the workplace.⁹²

Jones’s story not only compelled the US Court Appeals for the Fifth Circuit to rule that her arbitration agreement did not prohibit her from pursuing her claims for sexual assault in court, but it also caused lawmakers to take notice.⁹³ Shocked by Jones’s experiences, then-Senator Al Franken of Minnesota argued that a statutory amendment was necessary to protect against further attempts by defense contractors to force their employees to arbitrate claims arising out of sexual assault or harassment.⁹⁴ In his floor statement, Senator Franken opined that arbitration is an inappropriate forum to resolve “claims of sexual assault and egregious violations of civil rights” because it is “conducted behind closed doors” and thereby shields violators from public accountability.⁹⁵

86. *Jones*, 583 F.3d at 231.

87. *Id.*; see also *Our Company*, KBR, <https://www.kbr.com/pages/Who-We-Are.aspx> [<https://perma.cc/625B-6HNL>] (last visited Oct. 6, 2018).

88. *Id.* at 230; see also Murray, *supra* note 81.

89. *Jones*, 583 F.3d at 230–31; see also Polsky, *supra* note 85.

90. *Jones*, 583 F.3d at 240–41.

91. *Id.* at 239.

92. *Id.* at 239–41.

93. See Murray, *supra* note 81.

94. See *id.*

95. See 155 Cong. Rec. S10,028 (daily ed. Oct. 1, 2009). Ironically, it was public accountability of this very nature that led Senator Franken to resign from the Senate amidst a

2. Unsuccessful Congressional Attempts to Limit the Scope of the FAA

In the past ten years, Congress made numerous unsuccessful attempts to extend the reach of the Franken Amendment beyond the defense sector.⁹⁶ One such attempt, the Rape Victims Act of 2009, endeavored to invalidate any arbitration agreement between an employer and employee “with respect to any claim related to a tort arising out of rape.”⁹⁷ This statute would have been simultaneously narrower and broader than the Franken Amendment. While it would only prohibit mandatory arbitration of torts arising out of rape claims, it would have applied to all employees, rather than only those receiving funds under the 2010 Department of Defense Appropriations Act.⁹⁸ The bill expired with the close of the 111th Congress.⁹⁹ Had the Rape Victims Act passed, Congress surely would have demonstrated its intent to “preclude a waiver of judicial remedies” that the Supreme Court requires under *Gilmer*.¹⁰⁰

Senators and Representatives alike have further attempted—and failed—to broadly amend the FAA by invalidating predispute arbitration agreements arising out of employment, franchise, consumer, and civil rights disputes.¹⁰¹ Two such attempts included the Arbitration Fairness Act of 2009 and the Arbitration Fairness Act of 2013.¹⁰² However, the subcommittee in charge of considering the Arbitration Fairness Act of 2009 was discharged on June 21, 2010, and

series of claims of sexual impropriety, including groping women while posing with them for photographs. 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/G6SK-JMLT>]. During his resignation speech, Mr. Franken described himself as a “champion for women,” stating that as a nation, “[w]e were finally beginning to listen to women about the ways in which men’s actions affect them.” *Full Text: Al Franken’s Resignation Speech on the Senate Floor*, POLITICO (Dec. 7, 2017, 1:19 PM), <https://www.politico.com/story/2017/12/07/al-franken-resignation-speech-transcript-full-text-285960> [<https://perma.cc/NW37-GZLY>]. For a more detailed account of his resignation, see Stolberg, Alcindor & Fandos, *supra*.

96. See Rape Victims Act of 2009, S. 2915, 111th Cong. (2009).

97. *Id.* § 3(a).

98. Eric Koplowitz, Note, “*I Didn’t Agree to Arbitrate That!*”—How Courts Determine if Employees’ Sexual Assault and Sexual Harassment Claims Fall Within the Scope of Broad Mandatory Arbitration Clauses, 13 CARDOZO J. CONFLICT RESOL. 565, 572 (2012).

99. S.2915 – Rape Victims Act of 2009, CONGRESS.GOV, <https://www.congress.gov/bill/111th-congress/senate-bill/2915/actions> [<https://perma.cc/G455-LZ6Y>] (last visited Sept. 9, 2018).

100. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

101. See Arbitration Fairness Act of 2013, S. 878, 113th Cong. (2013); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009).

102. S. 878; H.R. 1020.

the Arbitration Fairness Act of 2013 expired with the close of the 113th Congress in 2014.¹⁰³

3. Currently Proposed Legislation to Limit the Scope of the FAA

a. The Arbitration Fairness Act

On March 7, 2017, Senator Franken and Representative Hank Johnson re-introduced the Arbitration Fairness Act.¹⁰⁴ The goal of the Arbitration Fairness Act is to ensure access to meaningful legal recourse by eliminating predispute forced, binding arbitration clauses in employment, consumer, civil rights, and antitrust cases.¹⁰⁵ Interestingly, the bill exempts arbitration provisions pursuant to collective bargaining agreements, although it further clarifies that arbitration agreements cannot force an employee to waive his or her rights under the US Constitution, a state constitution, a federal or state statute, or related public policy.¹⁰⁶ In a press release, Representative Johnson emphasized that forced arbitration undermines the Constitution's fundamental protections.¹⁰⁷ Senator Patrick Leahy further condemned the lack of clear notice given to signatories.¹⁰⁸ He noted that most employees are unaware of binding arbitration clauses hidden in their employment contracts, which result in forcing individuals "to face wealthy corporations behind closed-doors" without the opportunity for meaningful judicial review.¹⁰⁹

According to the Arbitration Fairness Act's sponsors, the FAA's legislative history demonstrates that it was "intended to target commercial arbitration agreements between two companies of generally comparable bargaining power," rather than arbitration agreements between employers and employees.¹¹⁰ The sponsors argue that the Supreme Court has erroneously broadened the scope of the FAA well

103. *H.R. 1020 – Arbitration Fairness Act of 2009*, CONGRESS.GOV, <https://www.congress.gov/bill/111th-congress/house-bill/1020/all-actions> [<https://perma.cc/H2BH-G35D>] (last visited Sept. 9, 2018); *S.878 – Arbitration Fairness Act of 2013*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/878/all-actions> [<https://perma.cc/6FGA-QQPJ>] (last visited Sept. 9, 2018);

104. Arbitration Fairness Act of 2017, H.R. 1374, 115th Congress (2017); Arbitration Fairness Act of 2017, S.537, 115th Congress § 402 (2017).

105. Press Release, Rep. Hank Johnson, Sen. Al Franken and Rep. Hank Johnson Lead Fight to End Unfair Forced Arbitration Agreements (Mar. 7, 2017), <https://hankjohnson.house.gov/media-center/press-releases/sen-al-franken-and-rep-hank-johnson-lead-fight-end-unfair-forced> [<https://perma.cc/PZ4R-E2UC>].

106. Arbitration Fairness Act of 2017, S. 537, 115th Congress § 402(b)(2) (2017–2018).

107. Press Release, Rep. Hank Johnson, *supra* note 105.

108. *Id.*

109. *Id.*

110. *Id.*

beyond its original purpose.¹¹¹ The Arbitration Fairness Act, its proponents argue, will reflect the drafters' original intent by allowing parties entering into agreements to arbitrate only after the dispute has arisen.¹¹² By facilitating a voluntary—rather than mandatory—system of arbitration, workers would have a meaningful choice regarding how to proceed once a claim arises.¹¹³

b. The Ending Forced Arbitration of Sexual Harassment Act

On December 6, 2017, a bipartisan group of lawmakers¹¹⁴ introduced legislation aimed at eliminating forced arbitration of workplace sexual harassment and sex discrimination claims.¹¹⁵ The bill, titled the Ending Forced Arbitration of Sexual Harassment Act of 2017, provides that “no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of a sex discrimination dispute.”¹¹⁶ The bill defines the term “sex discrimination dispute” as follows:

[A] dispute between an employer and employee arising out of conduct that would form the basis of a claim based on sex under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) if the employment were employment by an employer (as defined in section 701(b) of that Act (42 U.S.C. 2000e(b))), regardless of whether a violation of such title VII is alleged.¹¹⁷

As currently drafted, the bill “prohibit[s] employers from enforcing arbitration agreements with respect to employee allegations of workplace sexual harassment or any claim of gender discrimination” that could be raised under Title VII.¹¹⁸ The bill also allows binding arbitration provisions in CBAs, provided that they do not have the effect of “waiving the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States,

111. *Id.*

112. *Id.*

113. *Id.*

114. The bill's sponsors are Representatives Cheri Bustos (D-Ill.) and Senator Kirsten Gillibrand (D-N.Y.). Ending Forced Arbitration of Sexual Harassment Act of 2017, H.R. 4570, 115th Cong. (2017); Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017). A later version of the House bill was introduced on December 26, 2017. *See* H.R. 4734, 115th Cong. (2017).

115. Jessica Guynn, ‘Enough Is Enough’: Gretchen Carlson Says Bill Ending Arbitration Would Break Silence in Sexual Harassment Cases, USA TODAY (Dec. 6, 2017, 7:17 PM), <https://www.usatoday.com/story/money/2017/12/06/bipartisan-bill-would-eliminate-forced-arbitration-break-silence-sexual-harassment-cases/925226001/> [https://perma.cc/2U6G-4UPC].

116. H.R. 4734; S. 2203.

117. H.R. 4734; S. 2203.

118. Dudek, *supra* note 19.

a State Constitution, a Federal or State statute, or public policy arising therefrom.”¹¹⁹

The proper interpretation of the proposed bill is not completely clear: some believe that it would mandate litigation of any sexual harassment claims,¹²⁰ whereas others believe that it would allow employees to choose whether to litigate or instead submit their claims to arbitration.¹²¹ The bill summary, authored by the Congressional Research Service, states that the bill “prohibits a predispute arbitration agreement from being valid or enforceable if it requires arbitration of a sex discrimination dispute,” which implies that if an arbitration agreement contains an offending clause, the entire agreement could be deemed unenforceable.¹²²

Although the bill was designed to address concerns about sexual harassment in the workplace, the broad language of the bill may have unintended and far-reaching consequences.¹²³ As currently written, it is unclear whether courts are granted the power to invalidate arbitration solely as it relates to claims of sexual harassment, or if they would be able to invalidate entire arbitration agreements.¹²⁴ Under the latter interpretation, existing employment arbitration agreements may be in jeopardy of being completely unenforceable in the event of any employer-employee dispute.¹²⁵ Critics are concerned that the bill may thus drastically alter employment litigation by completely eradicating predispute arbitration agreements between employers and employees.¹²⁶

Less than two weeks after the bill was introduced, Microsoft became the first Fortune 100 Company to endorse the legislation.¹²⁷

119. S. 2203.

120. See Joe Liburt, Allison Riechert Giese & Akasha Perez, *The Ending Forced Arbitration of Sexual Harassment Act: A Legislative Response to #MeToo*, ORRICK: EMP. L. & LITIG. (Dec. 14, 2017), <https://blogs.orrick.com/employment/2017/12/14/the-ending-forced-arbitration-of-sexual-harassment-act-a-legislative-response-to-metoo/> [<https://perma.cc/9WQH-SRTN>].

121. See Gynn, *supra* note 115.

122. S. 2203 – *Ending Forced Arbitration of Sexual Harassment Act of 2017*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/2203/all-actions> [<https://perma.cc/EB8W-TXU8>] (last visited Oct. 7, 2018). Although the bill summary itself would not be enacted, it demonstrates the ambiguity surrounding the Act’s language.

123. See Dudek, *supra* note 19.

124. *Id.*

125. *Id.*

126. Michael Campbell, *The Ending Forced Arbitration of Sexual Harassment Act May Apply to More than Sexual Harassment*, SHEPPARD MULLIN: LAB. & EMP. L. BLOG (Dec. 22, 2017), <https://www.laboremploymentlawblog.com/2017/12/articles/uncategorized/pre-dispute/> [<https://perma.cc/FZH7-2GKX>].

127. Brad Smith, *Microsoft Endorses Senate Bill to Address Sexual Harassment*, MICROSOFT (Dec. 19, 2017), <https://blogs.microsoft.com/on-the-issues/2017/12/19/microsoft-endorses-senate-bill-address-sexual-harassment/> [<https://perma.cc/946V-5TDG>].

Recognizing the tension between supporting the legislation and requiring its own employees to arbitrate sexual harassment claims, the company simultaneously ended its own requirement that employees' sexual harassment claims be subject to binding arbitration.¹²⁸ Similarly, in May of 2018, Uber announced that it would eliminate forced arbitration for riders, drivers, or administrative employees who allege any claims of sexual assault or harassment.¹²⁹ In explaining Uber's decision to the media, its Chief Legal Officer cited the importance of allowing a victim of sexual violence to seek redress in the venue of his or her choice, given the "uniquely personal and difficult set of claims."¹³⁰ Just hours after Uber's announcement, Lyft ended its own policy of forcing sexual assault victims into binding arbitration and stated that it would no longer require confidentiality agreements as conditions of settlement.¹³¹ The speed of these respective eliminations demonstrates the viability of excluding sexual violence claims from binding arbitration agreements.¹³²

As of this writing, the House version of the bill has been referred to the Subcommittee on Regulatory Reform, Commercial and Antitrust Law.¹³³ The Senate version of the bill has been referred to the Committee on Health, Education, Labor, and Pensions.¹³⁴

128. Harper Neidig, *Microsoft Backs Bill to End Forced Arbitration for Sexual Harassment Claims*, HILL (Dec. 19, 2017, 10:15 AM), <http://www.thehill.com/policy/technology/365583-microsoft-backs-bill-that-would-end-forced-arbitration-for-sexual> [https://perma.cc/S8X3-9UAT].

129. Johana Bhuiyan, *Uber Will Now Allow Riders, Drivers and Employees to Pursue Individual Claims of Sexual Assault in Open Court*, RECODE (May 15, 2018, 6:00 AM), <https://www.recode.net/2018/5/15/17353978/uber-lawsuit-sexual-assault-arbitration-open-court> [https://perma.cc/6GH4-MAXX]. Uber also stated that, notwithstanding the amount of settlement agreements, it will waive any confidentiality requirement for those who settle claims of sexual violence against the company. *Id.* In an additional effort to promote transparency within the organization, Uber will now also publish a safety report of the cases of sexual assault reported to Uber. *Id.*

130. *Id.* (quoting Tony West, Uber's Chief Legal Officer) ("We've heard over and over from the dozens of advocacy groups we've spoken with that few experiences deprive an individual of control more than sexual assault or sexual harassment. And we've heard what's most important is for us to restore some sense of control to survivors.").

131. Sara Ashley O'Brien, *Lyft Joins Uber to End Forced Arbitration for Sexual Assault Victims*, CNN (May 15, 2018, 3:03 PM), <https://money.cnn.com/2018/05/15/technology/lyft-forced-arbitration/index.html> [https://perma.cc/6XU2-GJRT].

132. The Author acknowledges that Microsoft, Uber, and Lyft are wealthy companies that can easily absorb the costs of litigation resulting from eliminating forced arbitration of sexually based claims, whereas smaller companies with less funds may face additional challenges.

133. *H.R. 4734 – Ending Forced Arbitration of Sexual Harassment Act of 2017*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/4734/all-actions> [https://perma.cc/R7WJ-78DW] (last visited Oct. 7, 2018).

134. *S. 2203 – Ending Forced Arbitration of Sexual Harassment Act of 2017*, *supra* note 122. Additionally, the Senate is active in its pursuits to eliminate sexual harassment in the workplace. See Guynn, *supra* note 115. In November 2017, the Senate passed a resolution requiring sexual harassment training for senators and staff. S. Res. 330, 115th Cong. (2017). In

*D. Public Response to Mandatory Arbitration of Sexual Claims—
Hollywood Scandals and the Serial Abuser Who Incited a Movement*

1. Gretchen Carlson and the Power of Celebrity

Workplace sexual harassment in Hollywood first became a national topic of conversation when Fox News commentator Gretchen Carlson sued her boss, Roger Ailes, the cofounder, CEO, and chairman of Fox.¹³⁵ Carlson was allegedly terminated by Fox News after her show received poor ratings in a viewer bracket that was particularly important to advertisers.¹³⁶ In her complaint, however, Carlson alleged that Ailes made sexual advances toward her, and then fired her because she complained about the harassment.¹³⁷ Ailes's lawyers tried to compel the case into arbitration, arguing that Carlson broke the terms of her employment contract by attempting to bring her claims in court.¹³⁸ Carlson's employment contract contained the following binding arbitration clause: "Any controversy, claim or dispute arising out of or relating to this Agreement or [Carlson's] employment shall be brought before a mutually selected three-member arbitration panel and held in New York City"¹³⁹ Carlson circumvented this clause by suing Ailes directly, rather than suing Fox itself.¹⁴⁰ Carlson's public allegations ultimately prompted six additional women to speak out publicly, stating that Ailes had sexually harassed them as well.¹⁴¹ By

May 2018, the Senate passed a bill to reform the congressional complaint process in an effort to provide better protections for accusers. S. 2952, 115th Cong. (2018).

135. See John Koblin, *Gretchen Carlson, Former Fox Anchor, Speaks Publicly About Sexual Harassment Lawsuit*, N.Y. TIMES (July 12, 2016), https://www.nytimes.com/2016/07/13/business/media/gretchen-carlson-fox-news-interview.html?_r=0 [<https://perma.cc/SQN4-QPZP>]; Martin, *supra* note 17; Erik Ortiz, *Roger Ailes, Former Fox News CEO and Founder, Dies at 77*, NBC NEWS (May 18, 2017, 7:48 AM), <https://www.nbcnews.com/news/us-news/fox-news-ex-ceo-roger-ailes-dead-reports-say-n761451> [<https://perma.cc/2TQV-Q6H3>].

136. Koblin, *supra* note 135.

137. Elizabeth Dias & Eliana Dockterman, *The Teeny Tiny Fine Print That Can Allow Sexual Harassment Claims to Go Unheard*, TIME (Oct. 21, 2016), <http://time.com/4540111/arbitration-clauses-sexual-harassment/> [<https://perma.cc/JXQ3-H6RE>].

138. Erik Wemple, *Roger Ailes Opts for Secrecy, Cowardice in Face of Gretchen Carlson Suit*, WASH. POST (July 9, 2016), https://www.washingtonpost.com/blogs/erik-wemple/wp/2016/07/09/roger-ailes-opts-for-secrecy-cowardice-in-face-of-gretchen-carlson-suit/?utm_term=.b23dbd35d3d3 [<https://perma.cc/N83R-JVNF>].

139. *Id.*

140. *Id.* In response to Carlson's case, Democratic Senator Richard Blumenthal opined that, "[i]f Ms. Carlson had adhered strictly to the terms of her employment contract, her case would have remained a secret forever." Dias & Dockterman, *supra* note 137.

141. Koblin, *supra* note 135. In a similar manner, it was revealed that at least five women accused Dov Charney, the founder and chief executive of American Apparel, of sexual harassment, when four of the five women sued to invalidate their arbitration clauses. See Martin, *supra* note 17.

bringing the alleged harassment into the public domain, Carlson became a huge threat to Fox, and the company quickly moved to resolve the matter.¹⁴² The case settled for \$20 million and a public apology, and Ailes resigned within two weeks after an investigation into his behavior began.¹⁴³ Upon his resignation, Ailes reportedly received \$40 million—the full amount due for the balance of his contract term, which ran through 2018.¹⁴⁴ As Carlson’s story demonstrates, publicly “sharing a story in court can be a powerful way to make change—but few of us have Carlson’s celebrity and influence to pull it off.”¹⁴⁵

2. Harvey Weinstein—The Spark That Incited a Movement

Perhaps the most infamous recent sexual assault scandal involved producer Harvey Weinstein, whose own company fired him following allegations of sexual harassment, assault, and rape.¹⁴⁶ Although he denied all accusations, eighty-seven women have come forward to speak out at the time of this writing.¹⁴⁷ Since the allegations regarding Weinstein first surfaced in October of 2017, 140 public figures—most within Hollywood—have been accused of sexual misconduct.¹⁴⁸ This figure continues to grow, as the list is updated

142. *Id.*

143. *Id.*; Joe Flint, *Roger Ailes Steps Down from Fox News with \$40 Million Exit Package*, WALL STREET J. (July 21, 2016, 7:22 PM), <https://www.marketwatch.com/story/roger-ailes-steps-down-from-fox-news-with-40-million-exit-package-2016-07-21> [<https://perma.cc/HMM5-NETW>].

144. Flint, *supra* note 143; Reid Nakamura, *Details of Roger Ailes’ \$40 Million Deal to Exit Fox News*, THE WRAP (July 21, 2016, 6:09 PM), <https://www.thewrap.com/details-of-roger-ailes-40-million-deal-to-exit-fox-news/> [<https://perma.cc/45N8-MSAG>].

145. See Martin, *supra* note 17.

146. For a complete timeline of the scandal involving Harvey Weinstein, see *Harvey Weinstein Timeline: How the Scandal Unfolded*, BBC NEWS (May 25, 2018), <http://www.bbc.com/news/entertainment-arts-41594672> [<https://perma.cc/J7GT-KEV7>].

147. Sara M. Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY (June 1, 2018, 4:51 PM), <https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001/> [<https://perma.cc/F2KE-9EK9>]. Note that numerous other allegations against powerful men in Hollywood arose before and after the Harvey Weinstein scandal. For details regarding the investigation detailing how Fox News anchor Bill O’Reilly settled allegations of sexual misconduct with five women for \$13 million, see Ricardo Lopez, *California Lawmaker Calls for Ban on Secret Settlements for Sexual Harassment*, VARIETY (Oct. 18, 2017, 4:46 PM), <http://variety.com/2017/biz/news/bill-settlement-ban-sexual-harassment-harvey-weinstein-1202593778/> [<https://perma.cc/6X94-GQUQ>]. In late 2017, numerous allegations of sexual assault and misconduct were made against actor Kevin Spacey. For a list of the accusations made against Kevin Spacey, see Maria Puente, *Kevin Spacey Scandal: A Complete List of the 15 Accusers*, USA TODAY (Nov. 16, 2017, 12:04 AM), <https://www.usatoday.com/story/life/2017/11/07/kevin-spacey-scandal-complete-list-13-accusers/835739001/> [<https://perma.cc/3VBV-8L7V>].

148. Samantha Cooney, *Here Are All the Public Figures Who’ve Been Accused of Sexual Misconduct After Harvey Weinstein*, TIME (Sept. 13, 2018, 9:28 AM), <http://time.com/5015204/harvey-weinstein-scandal/> [<https://perma.cc/UCZ4-9WZJ>].

nearly on a daily basis.¹⁴⁹ The scandal sparked a national conversation about sexual misconduct and sexual assault and breathed new life into the #MeToo movement.¹⁵⁰

On January 1, 2018, *The New York Times* announced the Time's Up legal defense fund—an antiharassment initiative founded by powerful women in Hollywood.¹⁵¹ The initiative aims to counter systemic sexual harassment not only in Hollywood, but also in blue-collar workplaces across the country.¹⁵² In just two months, the initiative's legal defense fund garnered \$21 million in donations to help "provide[] subsidized legal services for individuals subjected to workplace sexual harassment and abuse."¹⁵³ Time's Up is also currently working on legislation to "penalize companies that tolerate persistent harassment, and to discourage the use of nondisclosure agreements to silence victims."¹⁵⁴ Hundreds of celebrities and politicians have worn Time's Up pins to a variety of major events in 2018—including the Golden Globes, Grammy Awards, BAFTA Film Awards, women's marches, and the State of the Union—to demonstrate support for the initiative.¹⁵⁵

149. *Id.*

150. For further discussion of the #MeToo movement, see France, *supra* note 3. TIME Magazine awarded its 2017 Person of the Year award to "The Silence Breakers," who were defined as those "whom had summoned extraordinary personal courage to speak out about sexual harassment at their jobs." See Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *TIME Person of the Year 2017: The Silence Breakers*, TIME, <http://time.com/time-person-of-the-year-2017-silence-breakers/> [https://perma.cc/Q68Z-S3ET] (last visited Oct. 6, 2018).

151. 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/4W2A-A8EA].

152. *Id.*

153. Alix Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements – And How They're Alike*, TIME (Mar. 8, 2018, 5:21 PM), <http://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements> [https://perma.cc/2BLJ-XCMW]; TIME'S UP, <https://www.timesupnow.com/home> [https://perma.cc/53YD-3MTP] (last visited Oct. 6, 2018).

154. Buckley, *supra* note 151. For further discussion regarding the use of nondisclosure agreements in the context of sexual assault and sexual harassment claims, see *infra* Section III.A.2.c.

155. Claire Coghlan, *How Hollywood, Award Shows Helped Expand Time's Up into a Worldwide Cause*, VARIETY (Mar. 1, 2018, 8:00 AM), <http://variety.com/2018/biz/news/times-up-metoo-hollywood-oscars-1202713699/> [https://perma.cc/J6D6-RKSY].

II. ANALYSIS

A. *The Merits of Binding Arbitration Within Employment Contracts*

1. Benefits of Binding Arbitration

Generally, binding arbitration is lauded for its efficiency.¹⁵⁶ In the absence of unlimited judicial resources, arbitration keeps many employer-employee disputes out of an already overworked judicial system.¹⁵⁷ Arbitrators often have specialized knowledge, primarily “to the law of the shop” regarding the employer’s industry.¹⁵⁸ This familiarity with industry norms can be beneficial for both parties, as this specialized knowledge may lead to a more finetuned, well-reasoned judgment.¹⁵⁹

Arbitration is generally more informal and less thorough than the judicial fact-finding process.¹⁶⁰ Civil trial procedures, such as discovery, cross-examination, and rules of evidence, are limited in scope or do not apply.¹⁶¹ However, these informalities make arbitration much faster and less expensive than a civil lawsuit.¹⁶² Additionally, arbitration decisions are almost impossible to appeal, thus providing concrete finality for both parties.¹⁶³

Beyond efficiency, one of arbitration’s greatest strengths lies in its privacy, which can benefit both employers and employees.¹⁶⁴ Employees generally want to continue working in the same industry after getting into a dispute with their employers.¹⁶⁵ Thus, these employees are wary of coming forward in a public setting, such as a

156. See STONE & COLVIN, *supra* note 11, at 13.

157. Norman J. Wiener, *Is Arbitration an Answer?*, 15 NAT. RESOURCES LAW. 449, 449 (1982).

158. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581–83 (1960).

159. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974).

160. *Id.* at 57–58.

161. *Id.*; see also *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956) (“Arbitration carries no right to trial by jury that is guaranteed . . . by the Seventh Amendment Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial.”); *Wilko v. Swan*, 346 U.S., 427, 435–38 (1953).

162. *Gardner-Denver*, 415 U.S. at 58.

163. See STONE & COLVIN, *supra* note 11, at 3.

164. See *5 Benefits of Arbitration as an ADR Method*, PROWSE CHOWNE LLP (July 24, 2017), <https://prowsechowne.com/benefits-of-arbitration-as-an-adr-method/> [https://perma.cc/JEZ6-8UBK].

165. See S.M., *How Non-Disclosure Agreements Can Protect Workplace Abusers*, ECONOMIST (Oct. 20, 2017), <https://www.economist.com/blogs/democracyinamerica/2017/10/we-did-not-know> [https://perma.cc/73QE-EZHS].

court, because they fear employers will view them as litigious or difficult.¹⁶⁶ In the sexual harassment context, fear of retaliation—including damage to one’s career and reputation—often dissuades victims from coming forward.¹⁶⁷ As stated by an attorney who represented women in sexual harassment cases for over thirty years, “Of all the women I know who have publicly complained, not one is working in her chosen career today.”¹⁶⁸ Victims of sexual misconduct in the workplace often bear insurmountable personal¹⁶⁹ and professional costs if they wish to come forward in a public setting.¹⁷⁰ Arbitration provides a private forum for these potential plaintiffs, in which they are not required to publicly air their grievances. Proponents of binding arbitration argue that this enables victims to address and resolve claims that may otherwise remain unheard.¹⁷¹

2. Drawbacks of Binding Arbitration

Although arbitration proceedings are generally less expensive and offer greater privacy than a lawsuit, the lack of formal rights and procedures drastically undermine the integrity of the dispute resolution process.¹⁷² The Supreme Court has recognized that “arbitrators have no obligation to the court to give their reasons for an award.”¹⁷³ Additionally, the payouts in arbitration tend to be smaller than the damages plaintiffs may receive in court.¹⁷⁴ On average, employees and consumers prevail less often and receive much lower damages in

166. See *id.*

167. FELDBLUM & LIPNIC, *supra* note 5, at 16–17. According to the EEOC, this fear of retaliation is well-founded: a 2003 study found that 75 percent of employees who reported workplace mistreatment were retaliated against in some form. *Id.* Employees generally fail to report the offending behavior due to fears of hostility and reprisal, as well as organizational indifference or trivialization. See *id.*

168. CARLSON, *supra* note 1, at 7.

169. See Haley Miles-Mclean et al., “Stop Looking at Me!”: Interpersonal Sexual Objectification as a Source of Insidious Trauma, 39 PSYCHOL. WOMEN Q. 363, 369–70 (2015). Studies have shown that sexual harassment can be classified as “insidious trauma” in which small, everyday discriminatory events lead to cumulative trauma over time. See *id.* Gretchen Carlson described the related phenomenon of victim shaming as follows: “Here’s the way it works: You are shamed . . . [T]herefore you are *ashamed*.” CARLSON, *supra* note 168, at 12.

170. See e.g., FELDBLUM & LIPNIC, *supra* note 5, at 16–17.

171. See STONE & COLVIN, *supra* note 11, at 26. The EEOC estimates that between 87 and 94 percent of individuals who experience workplace harassment do not file a formal complaint. FELDBLUM & LIPNIC, *supra* note 5, at 16. For a more detailed review of reporting norms in the workplace, see Lilia M. Cortina & Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, in 1 THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR 469, 469–96 (Julian Barling & Cary L. Cooper eds., 2008).

172. See STONE & COLVIN, *supra* note 11, at 3–4.

173. United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 598 (1960).

174. Dias & Dockterman, *supra* note 137.

arbitration than they do in court.¹⁷⁵ Further, data indicates that the vast majority of arbitrators are men.¹⁷⁶

Overall, arbitration is often biased against the employee.¹⁷⁷ There are multiple factors that account for this phenomenon, including a potential lack of arbitrator impartiality.¹⁷⁸ Often, arbitration clauses will contain language that allows the employer to unilaterally choose the arbitrator.¹⁷⁹ Further, “employers tend to win cases more often when they appear before the same arbitrator in multiple cases, indicating that they have a ‘repeat-player advantage’ over employees” stemming from consistent involvement in arbitration.¹⁸⁰

Beyond a potentially biased arbitrator, arbitration poses yet another hurdle to employees—lack of access to evidence.¹⁸¹ Companies have access to corporate documents and records that the employee does

175. See STONE & COLVIN, *supra* note 11163, at 17–19; Dias & Dockterman, *supra* note 137. A study found that employees in mandatory arbitration recover only approximately 21.4 percent of the time, which is only 59 percent as often as in federal courts and 38 percent as often as in state courts. See STONE & COLVIN, *supra* note 11, at 19. A 2007 Chicago-wide survey found that median sexual harassment settlements were roughly \$30,000, compared to a national study from a researcher at Columbia University in 2006, which found that employees who take their case to trial win \$217,000 on average. Dias & Dockterman, *supra* note 137 (citing Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111 (2007)).

176. Stephanie J. Ball, *Ending Gender and Minority Bias in ADR Selection Through Education*, NAT’L ARB. & MEDIATION (Nov. 2017), <http://www.namadr.com/publications/ending-gender-and-minority-bias-in-adr-selection-through-education/> [https://perma.cc/5WDF-GEU2]. A 2014 ABA Dispute Resolution Section survey found that for cases with between one and ten million dollars at issue, 89 percent of arbitrators were men. *Id.* (citing Gina Viola Brown & Andrea Kupfer Schneider, *Gender Differences in Dispute Resolution Practice: Report on the ABA Section of Dispute Resolution Practice Snapshot Survey* (Marquette Univ. Law Sch. Legal Studies Research Paper Series, Research Paper No. 14-04, 2014)). A 2016 study found that female arbitrators were involved in only 4 percent of cases involving one billion dollars or more. Ball, *supra* (citing Christine Simmons, *Where Are the Women and Minorities in Global Dispute Resolution?*, AM. LAWYER, <https://www.law.com/americanlawyer/almID/1202769481566/?sreturn=20180907222307> [https://perma.cc/XB22-MUV5] (last visited Oct. 7, 2018)). Data indicates that men struggle with understanding the gravity of sexual harassment claims made by women, as an online survey of 750 men indicated that two out of three respondents “did not think that repeated, unwanted invitations to drinks, dinner, or dates is sexual harassment.” Brionna Lewis, *1 in 3 Men Don’t Think Catcalling is Sexual Harassment*, INSTAMOTOR, <https://instamotor.com/blog/1-in-3-men-dont-think-catcalling-is-sexual-harassment> [https://perma.cc/HJ8V-EG38] (last visited Sept. 12, 2018). Further, one in five respondents believed that sexual harassment should not be a fireable offense. *Id.*

177. See STONE & COLVIN, *supra* note 11163, at 23.

178. See *id.* at 18–20.

179. *Id.* at 17.

180. *Id.* at 3. One study discovered that “the first time an employer appeared before an arbitrator, the employee had a 17.9 percent chance of winning . . . and after 25 cases before the same arbitrator the employee’s chance of winning dropped to only 4.5 percent.” *Id.* at 23 (citing Alexander Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 INDUS. & LAB. REL. REV. 1019 (2015)).

181. See *id.* at 3–4.

not have access to outside of the formal discovery process.¹⁸² Arbitration proceedings do not provide for a mandatory discovery process akin to that of a civil lawsuit, so often the employee must overcome a significant amount of information asymmetry.¹⁸³

Perhaps most importantly, most employees do not have the option to negotiate their arbitration agreements.¹⁸⁴ The general disparity in bargaining power between employers and employees often enables employers to unilaterally dictate employment terms.¹⁸⁵ In certain industries, employees are viewed as a disposable commodity—if an employee attempts to negotiate contractual terms, there are hundreds, if not thousands, of others lining up for the offered position.¹⁸⁶ According to the basic principles of supply and demand, companies are thus able to require their employees to sign contracts of adhesion that include mandatory arbitration provisions.¹⁸⁷ Employees are then faced with a take-it-or-leave-it offer: either sign on the dotted line or forgo the job entirely.¹⁸⁸ Although most employees choose to sign employment contracts that contain mandatory arbitration provisions, they often do so without full knowledge of the rights being waived.¹⁸⁹ This is due in part to a lack of clear notice, as courts have held that individuals do not have to actually sign anything to be bound by a binding arbitration clause.¹⁹⁰

182. See *id.*

183. See H.C., *What Is Information Asymmetry?*, *ECONOMIST* (Sept. 5, 2016), <https://www.economist.com/the-economist-explains/2016/09/04/what-is-information-asymmetry> [<https://perma.cc/T8WW-3FAU>].

184. See Robert J. Landry & Benjamin Hardy, *Mandatory Pre-Employment Arbitration Agreements: The Scattering, Smothering and Covering of Employee Rights*, 19 U. FLA. J.L. & PUB. POL'Y 479, 494 (2008); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1656, 1660 (2005); Catherine Riley, Note, *Signing in Glitter or Blood?: Unconscionability and Reality Television Contracts*, 18 N.Y.U. J. INTELL. PROP. & ENT. L. 107, 112–13 (2013).

185. See generally Daniel D. Barnhizer, *Foreword: Power, Inequality and the Bargain: The Role of Bargaining Power in the Law of Contract – Symposium Introduction*, 2006 MICH. ST. L. REV. 841 (2006).

186. See, e.g., Riley, *supra* note 184, at 112–13.

187. *Id.* at 136. For a discussion of why courts are hesitant to deem these contracts unconscionable, see generally *id.* at 117–23.

188. Perkins, *supra* note 13.

189. *Id.*

190. Dias & Dockterman, *supra* note 137. For example, Netflix subscribers agree to arbitration in the terms of use before picking a movie, and Macy's employees waive certain rights in the materials that are given upon acceptance of the job. *Id.*

B. Binding Arbitration and Sexual Violence—A Dangerous Combination

1. The Costs of Sexual Violence in the Workplace

Sexual assault and harassment within the workplace have a significant impact on employees' health and well-being, proving costly to employers and society as a whole.¹⁹¹ The government loses approximately \$100 million per year in actual and productivity costs as a result of sexual harassment in the workplace.¹⁹² The US Department of Labor "estimates that American businesses lose almost \$1 billion annually from absenteeism, low morale, and new employee training replacement costs due to sexual harassment."¹⁹³ These costs also include direct expenditures for victims' health care and increased employee turnover.¹⁹⁴ Harassment can further harm an organization's bottom line in the form of workers' compensation claims, as evidence shows that exposure to workplace harassment increases risk for illness and injury.¹⁹⁵ The financial risk that sexual harassment poses to a company cannot be understated; companies collectively paid over \$2 billion in employment practices liability insurance (EPLI) premiums in 2016 to help mitigate this risk.¹⁹⁶

Harassment in the workplace leads to indirect adverse consequences for the employer. When workers experience harassment directly, it can lead to adverse effects, such as distress and disruption.¹⁹⁷ However, harassment impacts more than just the victim—witnesses of workplace harassment may feel that the workplace is both unsafe and unfair, which can lead to workplace conflicts.¹⁹⁸ Additionally, an employee's perception that his or her organization is tolerant of sexual

191. Harned et al., *supra* note 8, at 175.

192. Fitzgerald, *supra* note 5, at 1071.

193. Elissa L. Perry, Carol T. Kulik, & Anne C. Bourhis, *The Reasonable Woman Standard: Effects on Sexual Harassment Court Decisions*, 28 L. & HUM. BEHAV. 9, 9 (2004).

194. See Harned et al., *supra* note 8, at 175–76.

195. Kathleen M. Rospenda et al., *Is Workplace Harassment Hazardous to Your Health?*, 20 J. BUS. & PSYCHOL. 95, 107 (2005).

196. Rachel Gillet, *Sexual Harassment Isn't a Hollywood, Tech, or Media Issue – It Affects Everyone*, BUS. INSIDER (Nov. 30, 2017, 10:49 AM), www.businessinsider.com/sexual-harassment-affects-nearly-everyone-2017-11 [https://perma.cc/9KS6-HJ7E].

197. Jeanne Murphy et al., *"They Talk Like That, But We Keep Working": Sexual Harassment and Sexual Assault Experiences Among Mexican Indigenous Farmworker Women in Oregon*, 17 J. IMMIGRANT MINORITY HEALTH 1834, 1838 (2015).

198. *Id.*

harassment leads to a decrease in job satisfaction.¹⁹⁹ A decrease in job satisfaction, in turn, leads to a decrease in employee productivity.²⁰⁰

Beyond an individual's decreased job satisfaction, he or she may be subjected to adverse employment actions as a direct result of filing a complaint.²⁰¹ A study "reported that fully 50% of the women who filed a complaint with the state of California were fired; another 25% resigned due to the stresses of the complaint process or the harassment itself."²⁰² These actions further compound the turnover costs faced by the employer.

2. Forced Arbitration of Sexual Violence Claims—Further Complications

When combined with confidentiality agreements, mandatory arbitration clauses provide a shield for employers—especially serial sexual abusers—to minimize liability and continue abusive practices.²⁰³ Many serial predators are "able to skirt years and sometimes decades of allegations of sexual harassment or assault through the use of settlements or contracts that included nondisclosure agreements."²⁰⁴ For example, Olympic gold medalist McKayla Maroney recently wrote a victim-impact statement regarding sexual abuse she suffered by former USA Gymnastics team doctor, Larry Nassar.²⁰⁵ Maroney first spoke out about the abuse via social media in October 2017.²⁰⁶ Her

199. Harned et al., *supra* note 8, at 176.

200. *Id.* at 176–80. An analysis of 22,372 military women demonstrates the potential consequences not only for victims, but for the workforce overall. *Id.* at 180 ("[o]f the 22,372 women sampled, 941 (4.2 percent) reported an experience of sexual assault by workplace personnel" and a staggering "16,204 (72.4 percent) experienced other types of sexual harassment" within the previous 12 months). *Id.* Out of the 941 women who reported being sexually assaulted, only 20 percent filed a formal complaint, while 32 percent considered leaving military service altogether. *Id.* Of the 16,204 women who reported being sexually harassed, only 4 percent filed a formal complaint, while 23 percent considered leaving the military. *Id.*

201. See Fitzgerald, *supra* note 5, at 1072.

202. *Id.*

203. Perkins, *supra* note 13.

204. James Rufus Koren, *Weinstein Scandal Puts Nondisclosure Agreements in the Spotlight*, N.Y. TIMES (Oct. 23, 2017, 6:15 PM), <http://www.latimes.com/business/la-fi-weinstein-nondisclosure-agreements-20171023-story.html> [<https://perma.cc/BF42-GMSY>].

205. Abigail Abrams, *'I Thought I Was Going to Die': Read McKayla Maroney's Full Victim Impact Statement in Larry Nassar Trial*, TIME (Jan. 19, 2018), <http://time.com/5109011/mckayla-maroney-larry-nassar-victim-impact-statement/> [<https://perma.cc/DF3Y-NG3V>]. In November of 2017, Nassar pled guilty to seven counts of criminal sexual contact with underage girls. *Id.* In Maroney's statement, she emphasized the complicity of three major institutions—USA Gymnastics, the United States Olympic Committee, and Michigan State University—in perpetuating Nassar's behavior by failing to respond to numerous complaints. *Id.*

206. Alice Park & Billy Perrigo, *'It Started When I Was 13 Years Old.' Olympic Gymnast McKayla Maroney Says U.S. Team Doctor Molested Her*, TIME (Oct. 18, 2017, 11:59 AM), <http://time.com/4987066/mckayla-maroney-metoo-molested/>.

statement was read aloud in open court during Nassar's sentencing hearing in January 2018, despite the fact that she previously executed a confidentiality agreement with USA Gymnastics as part of a \$1.25 million settlement.²⁰⁷ According to the confidentiality agreement, USA Gymnastics could pursue a monetary penalty of \$100,000 if Maroney publicly discussed the abuse allegations.²⁰⁸ After severe public backlash, including multiple celebrities offering to pay Maroney's fine, USA Gymnastics released a statement that is "has not sought and will not seek any money from McKayla Maroney for her brave statements made in describing her victimization and abuse by Larry Nassar."²⁰⁹

However, the average nondisclosure agreement signatory is not an Olympic athlete.²¹⁰ Most victims of workplace harassment or assault simply do not have large enough public personas to garner the type of public outcry that McKayla Maroney's story triggered—public outcry that ultimately allowed Maroney to escape rigid contractual obligations.²¹¹

Most employees lack meaningful bargaining power when it comes to negotiating the terms of their employment agreements, including clauses related to mandatory arbitration.²¹² In particular, individuals in low-wage jobs "have the least leverage to push back against forced arbitration," yet simultaneously "experience sexual harassment at disproportionately high rates."²¹³ For instance, women working in the restaurant industry, who are subject to a federal minimum wage of only \$2.13 due to their status as tipped employees,²¹⁴ are particularly vulnerable to workplace harassment.²¹⁵ Although only 7 percent of US women work in the restaurant industry, nearly 37 percent of all sexual harassment complaints made to the Equal

207. Abrams, *supra* note 205.

208. Alice Park, *McKayla Maroney Won't Be Fined for Speaking Out About Sexual Abuse, USA Gymnastics Says*, TIME (Jan. 17, 2018), <http://time.com/5106664/mckayla-maroney-no-fine-usa-gymnastics/> [<https://perma.cc/W8PA-ZNDT>].

209. *Id.*

210. *Id.*

211. *Id.* See generally Martin, *supra* note 17.

212. See *supra* Section II.A.2.

213. Martin, *supra* note 17.

214. Although the federal minimum wage for non-tipped workers is \$7.25 per hour, "[a]n employer of a tipped employee is only required to pay \$2.13 per hour in direct wages if that amount combined with the tips received at least equals the federal minimum wage." *Tips*, U.S. DEPT LAB., <https://www.dol.gov/general/topic/wages/wagestips> [<https://perma.cc/GQK5-B6RU>] (last visited Feb. 22, 2018); accord U.S.C. § 206(a)(1)(C) (2012).

215. The EEOC identified the restaurant industry as "the 'single largest' source of sexual harassment claims." See THE REST. OPPORTUNITIES CTRS. UNITED FORWARD TOGETHER, *THE GLASS FLOOR: SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY* 5 (2014), http://rocunited.org/wpcontent/uploads/2014/10/REPORT_TheGlassFloor_Sexual-Harassment-in-the-Restaurant-Industry.pdf [<https://perma.cc/R724-D6CK>].

Employment Opportunity Commission from January to November 2011 came from the restaurant industry.²¹⁶ Studies suggest that this data still underreports the true rate of sexual harassment, as this behavior has been normalized within the industry as “kitchen talk.”²¹⁷

Poverty has been identified as a key reason why some may tolerate sexual harassment in the workplace.²¹⁸ In a study regarding indigenous Mexican female farmworkers, many “[w]omen reported engaging in tactics including ignoring or even pretending to consent to harassment, worried that reporting the behavior would lead to losing their jobs.”²¹⁹ Study participants were burdened by a desperate need to work and “linked sexual harassment to threats of losing, or needing to leave, farm jobs.”²²⁰

C. The Current Judicial Framework for Determining Whether a Sexual Claim Is Arbitrable Under a Binding Arbitration Clause

As the law now stands, claims arising out of sexual harassment or assault are usually arbitrable under the FAA, depending on the specific facts of the plaintiff's claim.²²¹ Generally, when courts decide whether to compel a party to arbitrate, they first determine whether the parties have agreed to arbitrate the dispute based upon (1) whether there exists a valid agreement to arbitrate and (2) whether the dispute at issue is within the scope of the arbitration agreement.²²² The Supreme Court has emphasized that “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.”²²³

In order to determine whether a plaintiff's claim is within the scope of an arbitration clause, courts undergo a fact-specific analysis to determine whether the plaintiff's factual allegations “relate to” or “arise out of” his or her employment.²²⁴ This analysis varies among federal circuits, as there exist two distinct tests: (1) the “but for” test and (2) the “significant aspects” test. The “but for” test is extremely broad and

216. *Id.*

217. *Id.* at 1 (“Restaurant workers in focus groups gathered through this study noted that sexual harassment is ‘kitchen talk,’ a ‘normalized’ part of the work environment and that many restaurant workers are reluctant to publicly acknowledge their experiences with sexual harassment.”).

218. Murphy et al., *supra* note 197, at 1838.

219. *Id.* at 1834–35.

220. *Id.* at 1838.

221. See, e.g., *Barker v. Halliburton Co.*, 541 F. Supp. 2d 879 (S.D. Tex. 2008).

222. *Koplowitz, supra* note 98, at 572–73.

223. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

224. *Koplowitz, supra* note 98, at 574.

classifies a claim as arbitrable “if the challenged actions would not have arisen but for the employer-employee relationship.”²²⁵ Thus, a plaintiff in a circuit employing the “but for” test would most likely be forced to arbitrate a claim involving sexual harassment or assault at work or a work-related function.²²⁶ To demonstrate, imagine that an actress working on a film produced by the Weinstein Company wants to bring a sexual assault claim against Harvey Weinstein. Under the “but for” test, the actress would be barred from litigating such a claim because but for her employment, the parties would never have met. On the other hand, the “significant aspects” test²²⁷ analyzes the factual allegations to determine whether they involved significant aspects of the employment relationship itself (such as implicating customers or involving the plaintiff’s job performance).²²⁸ It is less clear when a court utilizing the “significant aspects” test would find a plaintiff’s claim of sexual assault or harassment arbitrable.

In order for an employee’s sexual assault or harassment claim to be subject to binding arbitration, the employer must demonstrate that both parties intended to include such claims in the employment agreement’s arbitration provision.²²⁹ Within the employment context, “[d]etermining the parties’ intent with respect to arbitration is especially difficult . . . because arbitration is not the main subject of the employment contract.”²³⁰ Rather, employees are likely much more concerned with other terms, such as compensation, hours, or grounds for termination.²³¹ Additionally, as noted above, many employees sign employment contracts containing binding arbitration agreements without truly understanding and, in some cases, having no knowledge at all of the procedural rights they are waiving.²³² The general disparity of bargaining power between employers and employees further increases the difficulty of determining the parties’ intent—since many employees cannot meaningfully bargain for the terms of their employment contracts, the question of whether an employee’s intent to arbitrate can be meaningfully ascertained at all remains open.²³³

225. *Id.*

226. *Id.* at 574–75.

227. *See Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163, 1167 (8th Cir. 1984). The “significant aspects” test was implemented by the Eighth Circuit regarding workplace claims of a nonsexual nature. *Id.* For further analysis of this case, see Koplowitz, *supra* note 98, at 574–76.

228. Koplowitz, *supra* note 98, at 574–76.

229. *Id.* at 582.

230. *Id.* at 573.

231. *Id.*

232. *See supra* Section III.A.2.

233. *See generally* Barnhizer, *supra* note 185.

Most employment contracts contain extremely broad terms that mandate arbitration of any controversy, claim, or dispute relating to the employment.²³⁴ Although this ultimately boils down to an exercise of contract interpretation, courts universally seem to struggle with determining the parties' intent when faced with such broad, sweeping language.²³⁵ Generally, when parties use a broad arbitration clause, courts will "find that the parties meant for the clause to cover all claims touching upon the contract."²³⁶

Once a court has determined that the dispute is within the scope of a valid arbitration agreement, it then looks to "whether any 'federal statute or policy renders the claims nonarbitrable.'"²³⁷ According to the Supreme Court, "[a]lthough all statutory claims may not be appropriate for arbitration, 'having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'"²³⁸ The Court has further stated that until Congress clearly evidences such an intent, nothing "prevents a party from excluding statutory claims from the scope of an agreement to arbitrate."²³⁹

III. SOLUTION

A. The Ending Forced Arbitration of Sexual Harassment Act Should Be Modified to Prohibit Employers from Enforcing Mandatory Arbitration of Any Claims of Sexual Violence

As demonstrated by the #MeToo movement, current approaches designed to address the systemic issue of sexual violence in the workplace have proven insufficient.²⁴⁰ An employee should never be compelled by his or her employer to arbitrate any claim arising out of sexual harassment, misconduct, or assault. Rather, due to the sensitive nature of these claims, a victim should be afforded the right to choose the legal forum which he or she believes will best represent his or her interests.

Under the current judicial framework, it is unclear whether a court will allow a victim of sexual assault or harassment to escape a

234. See Koplowitz, *supra* note 98, at 565.

235. *Id.* at 573, 582.

236. *Id.* at 582.

237. *Id.* at 572 (quoting *JP Morgan Chase & Co. v. Conegie ex rel. Lee*, 492 F.3d 596, 598 (5th Cir. 2007)).

238. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

239. *Mitsubishi Motors*, 473 U.S. at 628.

240. See Smith, *supra* note 127.

binding arbitration clause within an employment contract.²⁴¹ As stated by Justice Gorsuch, “[I]t’s the job of Congress by legislation, not [the Supreme] Court by supposition, both to write the laws and to repeal them.”²⁴² Thus, Congress should amend the proposed Ending Forced Arbitration of Sexual Harassment Act to prohibit all public and private employers from entering into or enforcing mandatory arbitration agreements regarding any claims of sexual assault, sexual harassment, or sexual misconduct. This revision would allow sexual assault victims to have their day in court while simultaneously ensuring that most non-sexual workplace-related claims are still held in arbitration proceedings, thus preserving the efficiency of arbitration more generally.²⁴³ As evidenced by the #MeToo movement, society has begun to recognize the power imbalance inherent in the employer-employee relationship—an imbalance further magnified by allegations of sexual misconduct. By forcing victims into binding—and likely biased—arbitration proceedings, employers further tilt the scales against the employees. By modifying and subsequently enacting the Ending Forced Arbitration of Sexual Harassment Act to allow victims to choose *after the dispute has arisen* whether to enter into arbitration or instead resolve the matter in court, lawmakers can begin to correct this imbalance.

1. Weaknesses of the Bill as Currently Drafted

As currently written, the Ending Forced Arbitration of Sexual Harassment Act is simultaneously too broad and too narrow to address the systemic issue of sexual violence in the workplace. Presently, although the bill appears to cover claims of sexual harassment, it does not explicitly address claims of sexual assault at all.²⁴⁴ Thus, a victim

241. For further analysis of the current judicial framework, see *supra* Section II.C.

242. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018).

243. In 2016, the American Arbitration Association responded to a request for information on employment disputes involving sexual harassment, and found that only 4 percent of employment-plan cases in 2014 involved sexual harassment. Dias & Dockterman, *supra* note 137. Thus, arbitration between employers and employees would remain largely unchanged.

244. Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Congress (2017). Note that some may argue that as drafted, the bill implicitly includes claims of sexual assault. The bill utilizes the term “sexual discrimination dispute,” which encompasses claims of sexual harassment, but not necessarily those of sexual assault. Further, the EEOC qualifies workplace sexual harassment by requiring it to “explicitly or implicitly affect an individual’s employment.” *Facts About Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/publications/fs-sex.cfm> [<https://perma.cc/ZRM7-F7ZM>] (last visited Nov. 1, 2018). It is thus possible for a clever defense attorney to claim that the conduct in question did not affect the individual’s employment. This Note seeks to circumvent any present ambiguity to ensure that both sexual harassment and sexual assault are explicitly covered by the bill.

of both workplace sexual assault and harassment²⁴⁵ may be faced with a logistical nightmare—one could be required to pursue a sexual harassment claim in court while simultaneously submitting the sexual assault claim to arbitration.²⁴⁶ This issue is further compounded by the fact that the test used by courts to determine the arbitrability of sexual assault claims (i.e., whether sexual assault and harassment claims “relate to” or “arise out of” the employment relationship) varies among circuits.²⁴⁷ Victims within a circuit utilizing the “but for” test would likely be forced to arbitrate a claim involving sexual harassment or sexual assault, whereas victims within a circuit utilizing the “significant aspects” test may be able to escape their arbitration agreements.²⁴⁸ By amending the proposed language of the Act, Congress can remedy this uncertainty by rendering all pre-dispute arbitration agreements regarding sexual violence in the workplace unenforceable.

However, even if Congress amended the Act to include claims arising out of sexual violence more broadly, the sheer breadth of the Act’s language may be fatal to its successful implementation. Courts may interpret the current language so broadly as to preclude enforcement of the entire arbitration agreement at issue, rather than only the arbitration of sexual harassment claims.²⁴⁹ This may lead to the unintended consequence of drastically altering employment litigation by rendering many predispute arbitration agreements null and void.²⁵⁰ Congress can address this issue through a more careful drafting of the statutory language, as discussed below.

2. Modifying the Proposed Bill

a. Replace “Sex Discrimination Dispute” with “Sexual Violence Dispute”

The bill, as proposed, prohibits enforcement of an arbitration agreement between an employer and employee with respect to any “sex discrimination dispute,” which includes claims “arising out of conduct

245. Experiencing both types of sexual violence in the workplace is not uncommon. See Harned et al., *supra* note 8, at 175–80. In a study of 22,372 military women, 941 reported “an experience of sexual assault by workplace personnel.” *Id.* at 180. Of these 941 women, 938 (99.7 percent) also experienced at least one other type of sexual harassment within the previous 12 months. *Id.* at 180.

246. Cf. Liburt, Giese & Perez, *supra* note 120.

247. Koplowitz, *supra* note 98, at 573–76.

248. *Id.* at 574.

249. See Dudek, *supra* note 19.

250. Campbell, *supra* note 126.

that would form the basis of a claim based on sex” under Title VII.²⁵¹ This Note proposes that legislators replace the statutory term “sex discrimination dispute” with “sexual violence dispute,” which would be defined as:

[A] dispute between an employer and employee related to or arising out of (1) conduct that would form the basis of a claim based on sex under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) if the employment were employment by an employer (as defined in section 701(b) of that Act (42 U.S.C. 2000e(b))), regardless of whether a violation of such title VII is alleged, or (2) sexual assault and battery, including claims of intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision or retention.²⁵²

Amending the Act would provide a more appropriate solution to the systemic issue of sexual violence in the workplace by allowing victims of sexual misconduct or assault to file suit, if they so desire. By modifying the language of the Act to also include claims arising out of sexual assault, the Act would address the dual-forum issue facing victims of both workplace sexual assault and harassment.²⁵³ Additionally, Congress would alleviate the discrepancy among circuits regarding the arbitrability of claims of sexual violence in the workplace.²⁵⁴ Rather than leaving the issue of arbitrability of sexual violence claims up to individual judges, all predispute arbitration agreements regarding sexual violence would be completely unenforceable. This would ultimately ease the burden on victims, as they would face one less hurdle in their attempts to seek justice.

b. Add a Specific Provision Delineating the Breadth of the Act

In addition to modifying the types of claims covered by the Act, the Act should be amended to include a specific provision that defines the scope of unenforceability to avoid the potential unintended consequence of invalidating the entire arbitration agreement. The Act should add a provision to the effect of: “Notwithstanding the foregoing, all disputes other than ‘sexual violence disputes’ are subject to the terms of the predispute arbitration agreement.”

This short clause would (1) assuage the fears that entire arbitration agreements would be invalidated by the passage of the Act and (2) ensure that other types of claims can still be heard in the most efficient and cost-effective forum. This may make passage of the bill

251. Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Congress (2017).

252. This language is derived from the current bill, S. 2203, as well as the Franken Amendment. See H.R. 3326 111th Cong. § 8116 (2010).

253. See *supra* Section III.A.1.

254. See generally Koplowitz, *supra* note 98.

more likely, as it would more effectively represent the interests of pro-business and pro-arbitration representatives.

c. Add a Specific Provision Regarding Nondisclosure Agreements

The recent Hollywood sexual harassment and assault scandals have led to public scrutiny regarding the use of nondisclosure agreements within employment contracts.²⁵⁵ Although this Note argues that nondisclosure agreements are generally inappropriate when involving claims of sexual misconduct, a blanket elimination of nondisclosure agreements within employment contracts would be inapposite. Nondisclosure agreements serve the important purpose of protecting sensitive information, such as confidential financial information or trade secrets.²⁵⁶ A complete elimination of confidentiality provisions in the employment context would, at best, lead to waste by forcing companies to execute project-specific confidentiality agreements. At worst, this would expose employers to severe risk regarding the safety of confidential—and valuable—company information. Additionally, contrary to popular belief, all nondisclosure agreements “allow victims to report harassment, discrimination and criminal activity to authorities.”²⁵⁷ Thus, regardless of what an employee has signed, he or she always maintains the right to contact the Equal Employment Opportunity Commission or file a police report.²⁵⁸

Instead of a blanket prohibition against nondisclosure agreements in employment contracts, Congress could add a provision to the Act that requires all nondisclosure agreements within employment contracts to contain an exception for claims involving sexual misconduct or assault. Congress could use language similar to the following: “Any restriction as to the disclosure of Confidential Information shall not apply to any claims related to or arising out of sexual assault, misconduct, or harassment.”

This would enable employers to continue to use confidentiality agreements within employment contracts, but would also allow victims to publicly air their grievances if they so choose.

255. See Buckley, *supra* note 151.

256. Koren, *supra* note 204.

257. See *id.*

258. *Id.*; see also Dias & Dockterman, *supra* note 137.

B. Why a Victim's Right to Choose the Legal Forum Is of Vital Importance

There is an inherent tension in sexual harassment or assault cases between the best interests of the victim and the best interests of society at large. On the one hand, a “rational” victim interested in self-preservation would likely choose to settle a case—or potentially even avoid reporting misconduct altogether—in order to avoid the associated personal and professional costs.²⁵⁹ On the other hand, releasing information into the public sphere about potential aggressors benefits society at large.

Giving victims the right to choose the legal forum would ultimately help address the inherent conflict between self-preservation and helping society at large. If victim employees are empowered to choose the forum, they may be more willing to report misconduct—as they would be able to opt out of a potentially biased arbitration proceeding. Should the victim particularly value the anonymity or timeliness of arbitration, he or she could choose to submit the dispute to an arbitrator.

By their very nature, claims arising out of sexual harassment or assault are often traumatic. Survivors’ responses to sexual trauma “are complex and unique to each individual,” and while “[s]ome survivors experience severe and chronic psychological symptoms, . . . others experience little or no distress.”²⁶⁰ There is no such thing as a “typical” survivor,²⁶¹ and thus there is no correct, one-size-fits-all forum for resolution of these claims.

The victim of sexual harassment or sexual assault should be empowered to choose which forum—if any—he or she feels is within his or her best interests. In every other context, the legal system gives plaintiffs the option to settle while concealing information; why should claims arising out of sexual misconduct within the employment sphere be any different? If anything, the sensitive and traumatic nature of these experiences suggests that the legal system is obligated to afford victims the right to be heard on their own terms.

259. CARLSON, *supra* note 168, at 8.

260. NICOLE P. YUAN, MARY P. KOSS & MIRTO STONE, THE PSYCHOLOGICAL CONSEQUENCES OF SEXUAL TRAUMA 1, 11 (2006), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_PsychConsequences.pdf [<https://perma.cc/3F86-DK2D>]. Immediate effects, including shock, fear, anxiety, confusion, and social withdrawal, as well as PTSD symptoms, such as emotional detachment, flashbacks, and sleeping problems, are common psychological consequences of sexual trauma. *Id.* at 5. Rape survivors, in particular, report rates of PTSD symptoms between 30 and 65 percent, depending on the method and timing of assessment. *Id.*

261. *Id.* at 1 (“The wide range of consequences may be attributed to assault characteristics, environmental conditions, survivor attributes, and availability of social support and resources.”).

IV. CONCLUSION

The easiest mistake any employer can make is to assume that “this could never happen here.” While it is natural to hope and believe that is the case, one of the fundamental lessons of recent months is that people’s voices need to be heard if their problems are to be addressed.²⁶²

The #MeToo movement empowered victims of workplace sexual harassment and assault to speak out and share their stories. Eventually, the social media frenzy will die down, as it always does.²⁶³ The hashtag #MeToo will be buried beneath the newest political scandal or clever celebrity tweet, and will no longer receive the consistent recognition that it deserves. Thus, it is important that Congress enacts carefully drafted legislation now, while public outcry is strong enough to propel the movement forward.

Although celebrity activism brought the pervasive reality of sexual misconduct in the workplace to the national stage, the issue “belong[s] to virtually every profession and walk of life.”²⁶⁴ In her victim impact statement, McKayla Maroney emphasized that “[p]eople should know that sexual abuse . . . is not just happening in Hollywood, in the media or in the halls of Congress. This is happening everywhere. Wherever there is a position of power, there seems to be potential for abuse.”²⁶⁵

For the average employee, the personal and professional cost of workplace sexual harassment or sexual assault can be insurmountable.²⁶⁶ This is further compounded by mandatory arbitration provisions within employment contracts, which “prevent exactly the type of media coverage which has made the #[M]e[T]oo movement so effective.”²⁶⁷

Sexual harassment and assault are nonpartisan issues that demand an immediate legislative response. As Gretchen Carlson aptly stated, “[W]hen somebody decides to sexually harass you, they don’t ask

262. Smith, *supra* note 127.

263. For example, before the Harvey Weinstein scandal broke and reinvigorated the #MeToo movement, society was outraged by the tech industry’s “bro-culture” problem. See Laura Colby, *Why So Few Women Break Through Tech’s Bro Culture*, BLOOMBERG (June 2, 2017, 10:28 AM), <https://www.bloomberg.com/news/articles/2017-06-02/why-so-few-women-break-through-tech-s-bro-culture-quicktake-q-a> [<https://perma.cc/D8VU-5H9Z>]. Before “bro-culture” made national headlines, the nation was captivated and appalled by Gretchen Carlson’s story of workplace harassment. See Koblin, *supra* note 135; Wemple, *supra* note 138.

264. CARLSON, *supra* note 1, at 4.

265. Abrams, *supra* note 205.

266. See CARLSON, *supra* note 1, at 8.

267. Alli Mandoske, *Forced Arbitration Silences Victims of Sexual Harassment*, FITE L. (Feb. 12, 2018), <http://fitelawgroup.com/forced-arbitration-silences-victims-sexual-harassment/> [<https://perma.cc/C6AW-JLDJ>].

you if you are a Republican or a Democrat or an independent [sic] They just do it.”²⁶⁸ Unfortunately, currently proposed legislation aimed at combating institutionalized sexual harassment fails to address other forms of sexual violence, including sexual assault, and may have the unintended and far-reaching consequence of completely invalidating many employer-employee predispute arbitration agreements.²⁶⁹ By modifying the proposed Ending Forced Arbitration of Sexual Harassment Act to include all claims of sexual violence, Congress can empower victims to choose the legal forum in which to share their stories. The victim’s right to choose how and where—if at all—to share his or her experiences is of utmost importance. Forcing every employee to endure the public judgment accompanying trial is an inappropriate legislative response, as it takes their control away in a similar manner as subjecting them to mandatory arbitration. Arbitration and trial each present their own costs and benefits, and the determination of which forum is most appropriate should ultimately be left to the employee. The clock is ticking for Congress, which has the power to transform what could be just another fleeting Hollywood moment into permanent legislation that protects victims of sexual violence nationwide. “No more silence. No more waiting. No more tolerance for discrimination, harassment or abuse. Time’s up.”²⁷⁰

Nicolette Sullivan*

268. Guynn, *supra* note 115.

269. See Dudek, *supra* note 19.

270. See TIME’S UP, *supra* note 153.

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