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

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

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

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I. THE ENACTMENT AND EVOLUTION OF THE FEDERAL ARBITRATION ACT ............................................................... 2656
   A. Mandatory Arbitration: Definition and Scope .......... 2657
      1. The Benefits of Mandatory Arbitration .......... 2657
      2. The Drawbacks of Mandatory Arbitration ......... 2658
   B. Enactment of the Federal Arbitration Act .......... 2659
      1. *Gilmer v. Interstate/Johnson Lane Corp.*: The Transformation into a Super-Statute Begins .... 2661
      2. *Circuit City Stores, Inc. v. Adams*: Deciding the Exception’s Scope ........................................ 2662
   D. The Impact of the #MeToo Movement and Time’s Up Campaign on Sexual Harassment Claims ............ 2666
II. FEDERAL, STATE, AND CORPORATE RESPONSES TO MANDATORY ARBITRATION OF SEXUAL HARASSMENT CLAIMS.......................................................... 2669
   A. Federal Responses: Enacted and Proposed Legislation ........................................................................ 2669
      1. The Franken Amendment: Successfully Enacted Federal Legislation to Limit Mandatory Arbitration .......................................................... 2669
      2. The Fair Pay and Safe Workplaces Executive Order: A Revoked Attempt to Limit Mandatory Arbitration .................................................. 2672
      3. The Arbitration Fairness Act: A Broad Approach .......... 2674
      4. The Ending Forced Arbitration of Sexual Harassment Act: A Narrow Approach ............... 2675
   B. State Responses: Covert, Explicit, and Third-Party Action .......................................................... 2677
INTRODUCTION

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

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

3. Reese, supra note 1.
4. Id.
6. See infra Part I.C.
arbitration clauses, and the nondisclosure agreements that often accompany them, allow serial sexual predators to operate for decades before being held accountable. As Carlson herself stated, “Forced arbitration is a sexual harasser’s best friend: It keeps proceedings secret, findings sealed, and victims silent.”

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

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

I. THE ENACTMENT AND EVOLUTION OF THE FEDERAL ARBITRATION ACT

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


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

A. Mandatory Arbitration: Definition and Scope

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

Mandatory arbitration clauses have dramatically increased over the past twenty-eight years. In 1992, only 2 percent of employees in the United States were subject to mandatory arbitration. This figure rose to almost 25 percent by the early 2000s and exceeded 55 percent of employees in 2017. An estimated sixty million American employees are now subject to mandatory arbitration clauses.

1. The Benefits of Mandatory Arbitration

Mandatory arbitration agreements may benefit both the employer and employee. Without mandatory arbitration, an employer may wait out smaller claims under the assumption that employees will be unable to pursue...
such claims in court. At the same time, employees are unlikely to voluntarily arbitrate cases with potentially high jury awards. Proponents of mandatory arbitration argue that “no viable alternative” for resolving workplace disputes exists, especially for low-wage employees who may not be able to access the court system.

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

2. The Drawbacks of Mandatory Arbitration

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

21. See St. Antoine, supra note 19, at 790; see also Estreicher, supra note 20, at 563–64.
22. Estreicher, supra note 20, at 810.
25. See id.
26. See St. Antoine, supra note 19, at 792. In arbitration, parties are not required to follow strict court procedures that may require an attorney, such as the formal rules of evidence. See Stone & Colvin, supra note 23, at 17. Even with an attorney, arbitration may be more cost-effective because discovery and motions are more limited. Id. Additionally, arbitration may provide finality sooner than litigation because appeal rights are very limited. Id.; see also supra note 11 and accompanying text.
28. See Colvin, supra note 12, at 7 (arguing that mandatory arbitration is a growing threat to workers’ rights). Parties to a mandatory employment arbitration agreement usually do not have equal bargaining power, which may create a “take-it-or-leave-it” situation. See Alexander J. S. Colvin, Organizational Primacy: Employment Conflict in a Post-Standard Contract World, in Rethinking Workplace Regulation: Beyond the Standard Contract of Employment 194, 200 (Katherine V. W. Stone & Harry Arthurs eds., 2013). Critics of mandatory arbitration argue that the more the public learns about mandatory arbitration clauses, the more the public believes them to be “unjust and illegitimate.” See Victor D. Quintanilla & Alexander B. Avtgis, The Public Believes Predispute Binding
less likely to prevail in arbitration and, even if they do prevail, often recover less than they would through litigation.\textsuperscript{29} Mandatory arbitration may suppress meritorious claims and limit publicly accessible information due to nondisclosure agreements, which are often part of arbitration settlements.\textsuperscript{30}

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

\textbf{B. Enactment of the Federal Arbitration Act}

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

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\textsuperscript{29} \textit{See Colvin, supra} note 12, at 3. In successful employment cases, federal court recovery averages approximately $143,497 versus $23,548 in arbitration, and state court recovery averages approximately $328,008 versus $23,548 in arbitration. \textit{See Stone \& Colvin, supra} note 23, at 21.


\textsuperscript{31} \textit{Colvin, supra} note 12, at 3.

\textsuperscript{32} \textit{See Stone \& Colvin, supra} note 23, at 22–23. Repeat players may also have an advantage due to their ability to lobby for beneficial changes. \textit{See id.}

\textsuperscript{33} \textit{See id.} at 5; \textit{see also supra} note 11 and accompanying text.

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

\textsuperscript{35} Bales, \textit{ supra} note 10, at 16.


\textsuperscript{37} Bales, \textit{ supra} note 10, at 33.

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} \textit{Id.} at 37.
Congress enacted the United States Arbitration Act\textsuperscript{40} (USAA), later recodified in 1947 as the Federal Arbitration Act.\textsuperscript{41}

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

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

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\item \textsuperscript{40} Pub L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16 (2012)).
\item \textsuperscript{42} Id.; \textit{Bales, supra} note 10, at 17.
\item \textsuperscript{43} 9 U.S.C. § 2 (2012).
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Id. § 1.
\item \textsuperscript{46} \textit{Bales, supra} note 10, at 33–34.
\item \textsuperscript{47} Id. at 34. Andrew Furuseth was also the president of the International Seamen’s Union of America. \textit{Id.} Courts often consider Congress’s intent to be the same as Furuseth’s when interpreting the § 1 exception. \textit{Id.}
\item \textsuperscript{48} Id.
\item \textsuperscript{49} \textit{Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary, 67th Cong. 9 (1923) [hereinafter Hearing]} (statement of W. H. H. Piatt, Chairman, ABA Committee on Commerce, Trade and Commercial Law).
\item \textsuperscript{50} Id. at 14.
\item \textsuperscript{51} Letter from Herbert Hoover, Sec’y of Commerce, to Thomas Sterling, U.S. Senate (Jan. 31, 1923), \textit{reprinted in Hearing, supra} note 49, at 14.
\item \textsuperscript{52} \textit{Bales, supra} note 10, at 36.
\item \textsuperscript{53} \textit{See id.} at 34, 37.
\end{itemize}

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

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

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

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

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54. *Id.* at 1.
55. See infra Part I.C.
56. Previous Supreme Court decisions began this process in the business and commercial contexts. From the 1980s onward, the Court held that statutory claims may be subject to arbitration under the FAA, including claims arising from the Sherman Act, the Securities Exchange Act of 1934, civil provisions of the Racketeer Influence and Corrupt Organizations Act (RICO), and the Securities Act of 1993. See generally, e.g., *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).
60. *Id.* at 23–24.
61. *Id.* at 27.
62. *Id.* at 31. The employee in *Gilmer* also claimed that additional inadequacies of arbitration included lack of written opinions, limited appellate review, biased panels, lack of discovery, lack of “broad equitable relief,” and lack of class actions. *Id.* at 30–33.
63. See *id.* at 35.
64. *Id.* at 24.
65. *Id.* at 26.
enforceable.\footnote{66} The Court also emphasized that judicial review of arbitration clauses must be analyzed with a “healthy regard” for the federal policy favoring arbitration.\footnote{67}

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

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

2. \textit{Circuit City Stores, Inc. v. Adams:} Deciding the Exception’s Scope

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

The Court explained that for an exception of the FAA to apply it must be premised on the language of § 1.\footnote{77} Based on a textual interpretation, including application of the ejusdem generis\footnote{78} canon, the Court held that the

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\item 66. Id. This argument ignores the “last-in-time” canon, which states that more current statutes are granted greater weight than former statutes. \textsc{William N. Eskridge Jr.}, \textsc{Interpreting Law: A Primer on How to Read Statutes and the Constitution} 136 (2016).


\item 68. Id. at 36 (Stevens, J., dissenting).

\item 69. \textit{See id.} at 39; \textit{see also supra} notes 46–52 and accompanying text.

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

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

\item 72. Id. at 43

\item 73. \textit{See id.} at 25 n.2 (majority opinion); \textit{see also Bales, supra} note 10, at 33.

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

\item 75. Id. at 109.

\item 76. Id.

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

\item 78. \textit{Ejusdem generis} is a canon of statutory interpretation that is used to “interpret a general term to reflect the class of objects reflected in more specific terms accompanying it.” \textsc{See William N. Eskridge Jr., Philip P. Frickey, Elizabeth Garrett & James J. Brudney}, \textsc{Cases and Materials on Legislation and Regulation} 1195 (5th ed. 2014); \textit{see also}, e.g., \textit{Ali v. Fed. Bureau of Prisons}, 552 U.S. 214, 223–25 (2008) (applying the ejusdem generis canon).
\end{thebibliography}
§ 1 exclusion provision should be read narrowly.\(^79\) The Court focused on the plain meaning of the words in the exception and reasoned that it was unnecessary to heavily weigh the legislative history.\(^80\)

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

In his dissenting opinion, Justice Stevens reiterated many points from his *Gilmer* dissent\(^85\) and argued that the FAA only applied to commercial arbitration agreements.\(^86\) Stevens pointed to legislative history, including Representative George S. Graham’s floor debate remarks in 1924, to signify that the bill was understood to apply to “commercial contracts and admiralty contracts.”\(^87\) Stevens understood the § 1 exception to be read broadly—not creating superfluous text, but instead providing clarification necessary to eliminate opposition to the bill.\(^88\)

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

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

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79. *Circuit City*, 532 U.S. at 113–18.
80. Id.
81. See id. at 121–22.
83. Id. at 15–16; see also *Circuit City*, 532 U.S. at 122–24.
84. *Circuit City*, 532 U.S. at 122. The Supreme Court may consider legislative inaction when interpreting statutes. See ESKRIDGE ET AL., supra note 78, at 1202: Under “[a]cquiescence rules,” when Congress takes no action to overturn or amend a statute in response to consistent Supreme Court interpretations that it is aware of, those interpretations are presumed to be correct. See id.; see also, e.g., *Flood v. Kuhn*, 407 U.S. 258, 283–84 (1972) (analyzing legislative inaction as acquiescence).
85. See supra notes 68–72 and accompanying text.
86. *Circuit City*, 532 U.S. at 126 (Stevens, J., dissenting).
87. Id. at 125 (quoting 65 CONG. REC. 1931 (1924)). Stevens also quoted Representative Ogden L. Mills, who introduced the 1922 bill in the House and stated that the FAA “provides that where there are commercial contracts and there is disagreement under the contract, the court can [en]force an arbitration agreement.” Id. at 125 n.2 (alteration in original) (quoting 65 CONG. REC. 11,080 (1924)).
88. Id. at 128. For more information regarding opposition to the bill and the introduction of an exception by Secretary of Commerce Herbert Hoover, see supra notes 46–52 and accompanying text.
90. Id. at 339 (quoting 9 U.S.C. § 2).
“preserve state-law rules” that frustrate the intent of the FAA.\textsuperscript{91} The overarching purpose of the FAA, as articulated by the Court, was “to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”\textsuperscript{92}

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

Justice Breyer, dissenting, emphasized that the FAA’s saving clause permits courts to refuse enforcement of arbitration agreements for the same reasons a court would invalidate “\textit{any} contract.”\textsuperscript{95} Breyer argued that the California rule would “reinforce, not obstruct,” the purpose of the FAA and could not be characterized as targeting arbitration because it imposed equivalent limitations on litigation.\textsuperscript{96} Breyer also raised a federalism\textsuperscript{97} argument, specifically that contract defenses are normally decided by the states and that the saving clause reflected Congress’s intent to retain an important role for the states.\textsuperscript{98}

4. \textit{Kindred Nursing Centers Ltd. Partnership v. Clark}: Preempting Covert Hostility to the Federal Arbitration Act

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

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\item \textsuperscript{91} See \textit{id.} at 343. The Court held that the FAA preempts states from conditioning the enforcement of an arbitration agreement on the availability of class-wide arbitration procedures. \textit{See id.} at 340. The Court rejected the plaintiff’s argument that the California rule holding arbitration agreements unconscionable met the requirements of the saving clause. \textit{See id.} at 341. While \textit{Concepcion} focused on class-wide arbitration of consumer contracts, the holding also applies to employment contracts. \textit{id.}
\item \textsuperscript{92} \textit{id.} at 344.
\item \textsuperscript{93} \textit{id.} at 346–48.
\item \textsuperscript{94} \textit{id.} at 352. Justice Thomas’s concurrence argues that “[c]ontract defenses unrelated to the making of the agreement—such as public policy—could not be the basis for declining to enforce an arbitration clause.” \textit{Id.} at 355 (Thomas, J., concurring).
\item \textsuperscript{95} \textit{id.} at 359 (Breyer, J., dissenting) (quoting 9 U.S.C. § 2).
\item \textsuperscript{96} \textit{id.} at 362–64.
\item \textsuperscript{97} “Federalism” here refers to the vertical division of authority between the federal and state governments. \textsc{Erwin Chemerinsky, Constitutional Law: Principles & Policies} 3 (4th ed. 2011). Issues regarding the allocation of power between the federal and state governments often arise when determining whether to narrowly construe congressional authority or find federal laws unconstitutional for infringing on state sovereignty. \textit{id.} at 240.
\item \textsuperscript{98} \textit{Concepcion}, 563 U.S. at 367 (Breyer, J., dissenting). Breyer concluded by stating that the Court did “not honor federalist principles.” \textit{id.}
\item \textsuperscript{99} 137 S. Ct. 1421 (2017).
\item \textsuperscript{100} \textit{id.} at 1426.
\item \textsuperscript{101} In a short dissent, Justice Thomas argued that the FAA should not apply to proceedings in state courts. \textit{id.} at 1429–30 (Thomas, J., dissenting).
\end{itemize}
arbitration agreements for disfavored treatment and therefore violated the FAA.\textsuperscript{102} The Court reasoned that the FAA preempts any rule that “covertly” accomplishes discrimination against arbitration by disfavoring contracts that have “defining features” of arbitration agreements.\textsuperscript{103} Here, the Court found that the Kentucky Supreme Court had adopted a legal rule “tailor-made” to apply to arbitration agreements.\textsuperscript{104} By impeding the ability of “attorney[s]-in-fact” to enter into arbitration agreements, the Kentucky Supreme Court demonstrated a “hostility to arbitration”\textsuperscript{105} and disregarded the FAA’s requirement that courts “place arbitration agreements on equal footing with all other contracts.”\textsuperscript{106}

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

The most recent decision to reinforce the broad scope of the FAA was a consolidated decision rendered in May 2018. In Epic Systems Corp. v. Lewis,\textsuperscript{107} the Court held in a five-to-four decision that neither the FAA’s saving clause nor the National Labor Relations Act (NLRA)\textsuperscript{108} superseded Congress’s intent in the FAA to enforce arbitration agreements.\textsuperscript{109} The Court rejected the employees’ argument that the NLRA’s protection of concerted labor activities\textsuperscript{110} overrides the enforcement of individualized arbitration agreements.\textsuperscript{111} The Court reasoned that § 7 of the NLRA does not express approval or disapproval of arbitration and “does not even hint at a wish to displace” the FAA.\textsuperscript{112} The Court upheld the validity of individualized arbitration agreements given the amount of “strong[]” precedent and the absence of congressional action.\textsuperscript{113}

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

\begin{itemize}
\item \textsuperscript{102} Id. at 1425 (majority opinion).
\item \textsuperscript{103} Id. at 1426.
\item \textsuperscript{104} Id. at 1427.
\item \textsuperscript{105} Id. at 1427–28.
\item \textsuperscript{106} Id. at 1424 (quoting DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 465 (2015)).
\item \textsuperscript{107} 138 S. Ct. 1612 (2018).
\item \textsuperscript{109} Epic Sys., 138 S. Ct. at 1622, 1632.
\item \textsuperscript{110} 29 U.S.C. § 157. Section 7 of the NLRA guarantees workers “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Id.
\item \textsuperscript{111} See Epic Sys., 138 S. Ct. at 1624.
\item \textsuperscript{112} Id. Once again, the majority opinion ignores the canon that statutes enacted later in time control. See ESKRIDGE, supra note 66, at 136.
\item \textsuperscript{113} Epic Sys., 138 S. Ct. at 1628. In his concurrence, Justice Thomas argued that the saving clause does not apply to nonenforcement of a contract on public policy grounds. Id. at 1633 (Thomas, J., concurring). Justice Thomas wrote a similar concurrence in Concepcion. See supra note 94.
\item \textsuperscript{114} Epic Sys., 138 S. Ct. at 1633 (Ginsburg, J., dissenting).
\end{itemize}
the FAA does not require suppression of workers’ collective-action rights.\textsuperscript{115} Referring to the remarks of Representative Graham and Senator Thomas J. Walsh before the USAA’s enactment,\textsuperscript{116} Ginsburg stressed that Congress intended the USAA to apply to “voluntary, negotiated agreements” and that the Court’s “exorbitant application of the FAA” stretched the statute far beyond the contractual disputes it was intended to govern.\textsuperscript{117}

Ginsburg’s dissent also argued that invalidating mandatory arbitration here did not overrule precedential cases like \textit{Concepcion} and \textit{Kindred Nursing} because the NLRA does not discriminate against arbitration on its face or by “covert operation[s].”\textsuperscript{118} Ginsburg also argued that the FAA and NLRA could be read harmoniously.\textsuperscript{119} Over the last twenty-eight years, the Supreme Court’s interpretation of the FAA has broadly increased its scope and replaced judicial access with arbitration for an estimated sixty million Americans.\textsuperscript{120} The FAA, as construed by the Supreme Court, requires arbitration of statutory claims that were created decades after the FAA was passed, such as claims under Title VII of the Civil Rights Act of 1964 (“Title VII”)\textsuperscript{121} and the ADEA.\textsuperscript{122} Sexual harassment claims fall under Title VII, meaning that arbitration agreements are enforced for sexual harassment claims.\textsuperscript{123}

\textbf{D. The Impact of the #MeToo Movement and Time’s Up Campaign on Sexual Harassment Claims}

The #MeToo movement and Time’s Up campaign brought the widespread issue of sexual harassment into the national spotlight in late 2017.\textsuperscript{124} Under

\begin{itemize}
\item \textsuperscript{115} See id. at 1643.
\item \textsuperscript{116} See id.; see also Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 125 (2001); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 39 (1991) (Stevens, J., dissenting) (quoting Senator Walsh’s extended remarks at the 1923 Senate Judiciary Committee hearing: “The trouble about the matter is that a great many of these contracts that are entered into are really not [voluntary] things at all. . . . A man says, ‘These are our terms. All right, take it or leave it.’ Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.” (quoting Hearing, supra note 49, at 9)); supra note 87 and accompanying text (describing Representative Graham’s remarks).
\item \textsuperscript{117} See Epic Sys., 138 S. Ct. at 1643–44 (Ginsburg, J., dissenting).
\item \textsuperscript{118} Id. at 1646.
\item \textsuperscript{119} See id. at 1645. The dissent also included information about the increase in employment arbitration clauses after \textit{Gilmer} and \textit{Circuit City}, stating that in 1992 only 2.1 percent of nonunionized companies imposed mandatory arbitration agreements while the number increased to 53.9 percent in 2017. See id. at 1644.
\item \textsuperscript{120} COLVIN, supra note 12, at 2.
\item \textsuperscript{121} 42 U.S.C. § 2000e (2012).
\item \textsuperscript{122} See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); see also supra Part I.C.1 (discussing \textit{Gilmer} and the Supreme Court’s enforcement of arbitration for an ADEA claim).
\item \textsuperscript{124} Alix Langone, #MeToo and Time’s Up Founders Explain the Difference Between the 2 Movements—and How They’re Alike, TIME (Mar. 22, 2018), http://time.com/5189945/
Title VII, workplace sexual harassment claims are filed as discrimination claims with the Equal Employment Opportunity Commission (EEOC). In fiscal year 2018, the number of sexual harassment claims filed with the EEOC increased by 13.6 percent compared to fiscal year 2017. This increase can be attributed to the rise of two groundbreaking women’s empowerment movements aimed at eradicating sexual harassment and sexual assault: #MeToo and Time’s Up.

The #MeToo movement was originally inspired by activist Tarana Burke. In 2006, Burke started a nonprofit, with the motto “Me Too,” that focuses on helping victims of sexual harassment and assault. The #MeToo movement gained national attention after allegations of sexual assault and harassment by Harvey Weinstein broke in the New York Times. In solidarity with women speaking out against Weinstein, Hollywood actress Alyssa Milano posted on Twitter asking her followers to reply with “me too” if they had been sexually assaulted or harassed. Within twenty-four hours, the hashtag “#MeToo” appeared in more than 500,000 tweets and twelve million Facebook posts. The #MeToo movement launched an important
discussion regarding sexual harassment and became a global phenomenon.\textsuperscript{135} Time magazine named “The Silence Breakers” as its 2017 “Person of the Year,” honoring all of the women and men involved in confronting their harassers.\textsuperscript{136}

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

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

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

A. Federal Responses: Enacted and Proposed Legislation

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

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

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

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


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

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

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


150. 155 CONG. REC. 23,403 (2009).
151. Id.
152. Id. Jones was able to bring her suit against KBR following litigation regarding enforcement of the arbitration provision. But ultimately, the jury found for the defendant KBR. See Daniel Gilbert, Jury Favors KBR in Iraq Rape Trial, WALL ST. J. (July 9, 2011), https://www.wsj.com/articles/SB10001424052702303365804576434031221391760 [https://perma.cc/W6SX-FV96].

154. Id.
155. Id.
156. 155 CONG. REC. 23,562 (2009).
157. 155 CONG. REC. 23,558 (2009); see supra Parts I.A.1–2 (discussing the benefits and drawbacks of mandatory arbitration).
158. 155 CONG. REC. 23,558 (2009).
159. Id. But see supra note 29 (discussing statistics that suggest employees are less successful in arbitration).
160. 155 CONG. REC. 23,558 (2009). Senator Sessions also stated that invalidating employment agreements would violate the due process rights of both employers and
In response, Senator Franken stressed that the amendment did not seek to eliminate arbitration completely but would merely eliminate it in cases of rape or sexual assault.161

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

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

The Franken Amendment was itself amended during a conference negotiation between the defense appropriations committees of the House and Senate.168 The original Senate version did not include the $1 million contract threshold or the national-security waiver.169 These changes were incorporated following criticism from the Obama administration’s DOD, the chairman of the Senate Committee on Appropriations, and Senate Republicans.170 The DOD opposed the amendment and expressed concern...
because “[e]nforcement would be problematic.” 171 A White House spokesperson responded that the DOD’s opposition was overstated and that the Obama administration supported the “intent” of the Franken Amendment and was working to ensure that it would be enforceable. 172 Critics of the Franken Amendment considered narrowing the scope of included claims. 173 However, attempts to remove the Title VII provision were met with public outcry, which likely helped the provision remain in the final bill. 174

The Franken Amendment has been reenacted each year and was included within the DOD’s $674.4 billion budget for fiscal year 2019. 175 However, the Franken Amendment is limited in scope and does not prohibit a federal contractor from requiring employees to sign a mandatory arbitration agreement regarding other claims. 176 The legislation also does not cover race, age, or disability discrimination claims. 177

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

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

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172. Id.

173. Id.

174. Id.


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


The Obama administration originally expressed concerns regarding the Franken Amendment, but the passage of the FPSW order indicated support for this approach.\(^\text{182}\)

The majority of the FPSW order, and the administrative rule that was promulgated pursuant to the order, never went into effect.\(^\text{183}\) A preliminary injunction partially enjoined the rule and accompanying guidance, including the prohibition on mandatory arbitration agreements.\(^\text{184}\) Additionally, on March 27, 2017, President Trump issued Executive Order 13,782, revoking the FPSW order.\(^\text{185}\) On the same day, President Trump also signed a resolution disapproving of the FPSW order’s rule\(^\text{186}\) under the Congressional Review Act (CRA).\(^\text{187}\) The repeal was part of the Trump administration’s campaign to revoke various Obama administration regulations, characterized as “overreaching federal rulemaking.”\(^\text{188}\)

Unlike the Franken Amendment, the FPSW order was subject to legal challenges based on its contradiction of the FAA.\(^\text{189}\) In October 2016, the United States District Court for the Eastern District of Texas held that the FPSW order and rule violated the FAA.\(^\text{190}\) The district court’s reasoning mirrored that of a prior Fifth Circuit opinion\(^\text{191}\): when Congress passes legislation in an area, such as the FAA, an executive order to the contrary is

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

\(^{182}\) See Grim, supra note 171.


\(^{189}\) STONE & COLVIN, supra note 23, at 26.


\(^{191}\) Chamber of Commerce v. Reich, 74 F.3d 1322, 1324, 1339 (D.C. Cir. 1996) (holding that an executive order that conflicted with the NLRA was preempted by the legislation).
preempted. The Obama administration originally appealed the district court’s injunction, but the case was dismissed following Trump’s inauguration.

3. The Arbitration Fairness Act: A Broad Approach

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

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

192. See Associated Builders & Contractors, 2016 WL 8188655, at *14; see also Reich, 74 F.3d at 1324.
195. See S. 987 § 3. (“Notwithstanding any other provision of this title, no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, or civil rights dispute.”).
196. See id.
197. H.R. 3010.
198. See S. 987; see also S. 2591.
200. S. 2591.
In February 2019, after Democrats won a majority of seats in the House, the renamed Forced Arbitration Injustice Repeal (FAIR) Act, with identical language to the AFA, garnered 172 cosponsors. The FAIR Act was also introduced in the Senate and garnered thirty-four cosponsors.

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

In December 2017, Democratic Senator Kirsten Gillibrand and Democratic Representative Cheri Bustos introduced the Ending Forced Arbitration of Sexual Harassment Act. This bill is narrower than the AFA and prohibits pre-dispute arbitration agreements for “sex discrimination dispute[s].” The House version of the bill garnered thirty-eight cosponsors and the Senate version had eighteen cosponsors. In contrast to the AFA, House and Senate sponsorship for the bill did not follow strict party lines, indicating stronger bipartisan support. For example,
Republican Senator Lindsey Graham introduced the bill alongside Senator Gillibrand.211

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

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

Shortly after the letter from the attorneys general, Representative Bustos wrote an open letter to Paul Ryan, then the Republican Speaker of the House,
urging him to call for a vote, but no further congressional action occurred. This inaction may have been due to quiet lobbying against the legislation by business leaders who were hesitant to publicly denounce it for fear of criticism that they were silencing victims of sexual harassment.

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

Thirty-two states introduced bills inspired by #MeToo and Time’s Up in 2017 and 2018. Some states explicitly prohibited mandatory arbitration for sexual harassment claims while others pursued a more “covert” or third-party approach. Any prohibition or limitation on mandatory arbitration for sexual harassment claims remains in effect until a law is challenged in court. The legislative history of these bills indicates an awareness that a court would likely find that these statutes prohibiting mandatory arbitration are preempted by the FAA.


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

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


220. Marina Fang, Business Groups Might Be Quietly Killing a Bill That Would Bring Sexual Abuse Claims to Light, HUFFINGTON POST (May 17, 2018, 4:02 PM), https://www.huffingtonpost.com/entry/forced-arbitration-sexual-harassment_us_5afda846e4b0a59b4e019eda [https://perma.cc/7CXW-YYVA].


224. Id.

225. WASH. REV. CODE § 49.44.085 (2019).
of employees.226 Discussing these bills, the chair of the committee and the bill’s sponsor, Democratic Senator Karen Keiser, stated that SB 6313 was the “thorniest” bill of the three because federal law preempts state regulation of mandatory arbitration agreements.227 Experts in the field spoke to the committee, providing support for the bill and discussing concerns that the bill was preempted and could negatively impact workers subject to other types of unlawful harassment or discrimination.228

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

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

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

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

227. Id.
228. Id. These experts included members of the Washington Employment Lawyers Association and Washington Coalition of Sexual Assault Programs. See id. The bill was amended in response to these concerns. See SB 6313—2017–18, WASH. ST. LEGISLATURE, https://app.leg.wa.gov/billsummary?BillNumber=6313&Initiative=false&Year=2017 [https://perma.cc/54WQ-LJP7] (last visited Apr. 10, 2019). For example, the legislature likely included the confidentiality provision to address the desire to limit confidential arbitration and likely removed explicit language regarding sexual harassment claims to avoid negatively impacting workers subject to other types of discrimination. When SB 6313 was introduced on January 12, 2018, the original language referenced an “employee’s right to file a complaint or cause of action arising from sexual harassment or sexual assault.” See S. 6313 § 1, 65th Leg., Reg. Sess. (Wash. 2018) (original Senate bill) (emphasis added). For more information about concerns regarding sexual harassment–focused legislation, see supra note 144.
229. See supra Part I.A.
231. See WASH. REV. CODE § 49.44.085 (2019).
232. WASH. REV. CODE § 49.44.210 (2019).
234. Id.
requires mandatory arbitration to resolve sexual harassment claims. The law states, “Except where inconsistent with federal law, . . . prohibited clause[s] . . . shall be null and void.” This provision was not part of the original bill and was added as part of Governor Cuomo’s “women’s agenda.” Floor debate on the amended version addressed the preemption issue. Republican Senator Catharine Young, then the chair of the Senate Finance Committee, acknowledged that federal law preempts any state law that treats arbitration less favorably than other agreements. When asked what protections the provision offered, Senator Young replied that some “extra protections” may exist, but she did not provide specifics. Democratic Senator Liz Krueger, then the ranking member of the Senate Finance Committee, pointed out that the provision did “not appear” to provide any new protections.

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

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

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236. Id.
239. Id.
240. Id.
241. Id.
243. See supra Part II.B.1; see also supra notes 224–25 and accompanying text.
244. See supra Part I.C.4.
245. See supra Part I.C.
247. See Mishra & Haigh, supra note 246.
disclosure of the underlying facts and circumstances to the claim or action unless the condition of confidentiality is the complainant’s preference.”

This prohibition of nondisclosure agreements applies to all settlements, agreements, or claim resolutions. By prohibiting the nondisclosure of underlying facts, the bill allows the disclosure of the perpetrator’s identity while keeping the settlement amount confidential.

3. California: A Veto in Anticipation of Preemption

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

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

249. Id.
250. Id.
254. Assemb. B. 3080 § 3 (stating that “[a] person shall not, as a condition of employment, continued employment, the receipt of any employment-related benefit, or as a condition of entering into a contractual agreement, require any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act . . . including the right to file and pursue a civil action or a complaint”). The language of AB 3080 resembles the language of Washington SB 6313. See supra notes 224–25 and accompanying text.
256. See OFFICE OF SENATE FLOOR ANALYSES, THIRD, Assemb. B. 3080, 2017–2018 Reg. Sess., at 6–7 (Cal. 2018) (concluding that it was a “mischaracterization” to understand AB 3080 as a bill that “prohibits, discriminates against, or discourages arbitration agreements”).
257. See id.; see also supra Parts I.C.3, I.C.5.
259. Id.
Kindred Nursing, Governor Brown stated that a rule “selectively” invalidating agreements as “improperly formed” is preempted by the FAA, just like a rule “selectively refusing” to enforce a valid arbitration agreement is preempted.260 AB 3080 had passed the state assembly by forty-seven votes to twenty-five and the state senate by twenty-six votes to twelve.261 While the votes were close to the two-thirds needed to override a veto,262 the lack of a vote to override the veto likely indicates that the legislature expected both the governor’s veto and federal preemption.

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

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

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

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

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

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


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

little to no impact on the governor’s decisions. SB 820 is not subject to the FAA because it does not address arbitration, and Governor Brown cited Kindred Nursing, not Epic Systems, to support his veto of AB 3080.

4. Massachusetts: A Side-Door Approach

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

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

In Waffle House, the Court recognized that Congress directed the EEOC, a public agency, to exercise Title VII enforcement, remedies, and procedures. The Supreme Court allowed the EEOC to pursue the claim, deferring to Congress’s clear intent that the EEOC be “the master of its own case.”

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

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

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

\begin{footnotesize}
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\item \textsuperscript{282} See H.R. 4323, 190th Reg. Sess. (Mass. 2018).
\item \textsuperscript{283} See Waffle House, 534 U.S. at 289.
\item \textsuperscript{284} This Note addresses federal and state legislative actions to limit the FAA. However, the FAA has also been challenged in the state court system, such as the Kentucky Supreme Court in Northern Kentucky Area Development District v. Snyder, No. 2017-SC-000277-DG, 2018 WL 4628143 (Ky. Sept. 27, 2018). The court held that the FAA does not preempt a Kentucky statute that bars employers from “requir[ing] as a condition or precondition of employment that any employee . . . waive, arbitrate, or otherwise diminish any existing or future claim, right, or benefit.” \textit{Id.} at *3. Specifically referencing \textit{Kindred Nursing}, the Kentucky Supreme Court stated that “the broad preemptive effect of the FAA is undeniable.” \textit{Id.} at *4. However, the court “fail[ed] to see how a law . . . that does not actually attack, single out, or specifically discriminate against arbitration agreements must yield to the FAA.” \textit{Id.} The court further clarified that the “statute only proscribes \textit{conditioning employment on agreements to arbitration, not the act of agreeing to arbitration.” \textit{Id.} A petition for a rehearing was filed on October 17, 2018. Docket, N. Ky. Area Dev. Dist. v. Snyder, No. 2017-SC-000277-DG (Ky. Sept. 27, 2018). If challenged in the U.S. Supreme Court, the Court would likely hold that the FAA preempts the state statute. See \textsuperscript{supra} Part I.C. The Kentucky Supreme Court is attempting to sever the formation of arbitration agreements from their enforcement, a distinction the Court explicitly rejected in \textit{Kindred Nursing}. See \textsuperscript{supra} Part I.C.4.
\item \textsuperscript{286} Brad Smith, Microsoft Endorses Senate Bill to Address Sexual Harassment, MICROSOFT ON ISSUES (Dec. 19, 2017), https://blogs.microsoft.com/on-the-issues/2017/12/19/microsoft-endorseSenateBillAddressSexualHarassment/[https://perma.cc/VQ27-D4H4].
\item \textsuperscript{287} See \textit{id.}
\item \textsuperscript{288} See \textit{id.}
\end{itemize}
\end{footnotesize}
pressure. In May 2018, Uber decided to waive mandatory arbitration of sexual harassment claims after over a dozen women sued the company for sexual harassment and sexual assault. Lyft followed suit, voluntarily waiving mandatory arbitration clauses and removing confidentiality requirements for sexual harassment claims. In November 2018, Google announced a mandatory arbitration waiver following a 20,000-employee walkout protesting the company’s handling of previous sexual misconduct allegations. Facebook, eBay, and Airbnb quickly followed Google’s lead. Airbnb also waived mandatory arbitration for all discrimination claims, including those involving sexual harassment, race, gender, religion, or age. In February 2019, Google announced that it would no longer enforce mandatory arbitration provisions for employment disputes with any employees, including temporary staff, contract workers, and vendors.

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


291. Id.


294. See Alba & O’Donovan, supra note 293.


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

\section*{III. Federal, State, and Third-Party Options to Prohibit Mandatory Arbitration for Sexual Harassment Claims}

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

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

\begin{itemize}
\item[297.] Id.
\item[300.] Genevieve Hanft, Note, Giving Arbitration Some Credit: The Enforceability of Arbitration Clauses Under the Credit Repair Organizations Act, 79 FORDHAM L. REV. 2761, 2803 (2011); see also Thomas E. Carboneau, The Revolution in Law Through Arbitration, 56 CLEV. ST. L. REV. 233, 238 (2008) (“At every stage of arbitration’s ascendance, the Court has provided the necessary doctrinal pronouncements and political muscle to confirm the gains achieved and to advance the process to the next level of its reformation.”).
\item[302.] See supra Part I.C.
\item[303.] See supra Part II.
\end{itemize}
harassment claims and prohibiting nondisclosure agreements for sexual harassment settlements, unless requested by the claimant.

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

The rise in EEOC claims and the number of claims filed with the Time’s Up Defense Fund are strong indicators of the public’s current desire to pursue claims of sexual harassment. 304 Mandatory arbitration results in fewer claims, with lower chances of success and lower damages. 305 Additionally, dissenting opinions in Supreme Court cases that interpret the FAA provide a strong argument that the FAA was never meant to apply to employment contracts. 306 However, based on the Supreme Court’s FAA analysis, mandatory arbitration extends to sexual harassment claims and state action to the contrary is likely preempted. 307 Congress should therefore create a federal exception to the FAA, either broadly with the FAIR Act 308 or narrowly with the Ending Forced Arbitration of Sexual Harassment Act. 309

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

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

304. See supra notes 128, 140 and accompanying text.
305. See supra notes 29–30 and accompanying text.
306. See supra Part I.C.
307. See supra Part I.C.
308. See Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (2019); Forced Arbitration Injustice Repeal Act, S. 610, 116th Cong. (2019); see also supra Part II.A.3.
310. See supra Part II.B.
311. See supra notes 139–44 and accompanying text.
312. See supra Part II.A.4.
313. See supra Part II.A.1.
314. See supra note 175 and accompanying text.
contracts. Re-legislating the Franken Amendment’s limit on mandatory arbitration each year is not as impactful or permanent as passing the Ending Forced Arbitration of Sexual Harassment Act, but this approach may be the only way to maintain bipartisan support.

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

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

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

315. See supra note 175–177 and accompanying text. The DOD budget makes up the largest portion of the federal budget. See supra note 175 and accompanying text.
319. See supra Part II.A.2.
320. See supra Part II.B.2.
321. See supra notes 246–47 and accompanying text.
322. In addition to the examples of Washington and New York discussed above, Maryland, New Jersey, and Vermont have also enacted legislation prohibiting mandatory arbitration by prohibiting provisions that waive substantive or procedural rights or remedies for sexual harassment claims. See Gena B. Usenheimer, Nila Merola, Anne R. Dana & Vlada Feldman, #MeToo Inspires Legislative Changes Across the United States, SEYFARTH SHAW (Mar. 28, 2019), https://www.seyfarth.com/publications/MA032819-LE [https://perma.cc/Z529-4B8G]. New Jersey’s legislation is the most expansive and prohibits mandatory arbitration for any discrimination, retaliation, or harassment claim. See id.
323. See Mishra & Haigh, supra note 246.
324. See Fang, supra note 220.
325. See supra Part I.C.
Ginsburg’s recent dissent in *Epic Systems*, lay out a method for interpreting statutes without conflicting with the FAA.\(^{326}\)

**B. Alternative Options for Indirectly Attacking Mandatory Arbitration**

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

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

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

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

Massachusetts should pass the pending bill\(^{332}\) to empower its attorney general, and other states should follow suit.\(^{333}\) Allowing state actors to pursue sexual harassment claims, despite the existence of a valid arbitration agreement between the employer and the employee, would begin to limit the impact of mandatory arbitration agreements.\(^{334}\) Additionally, empowering attorneys general to pursue sexual harassment claims returns some power to the states, power the FAA currently restricts with its broad preemption scope.\(^{335}\)

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

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327. *See supra* Parts II.B.4, II.C.
328. *See supra* Parts II.B.4, II.C.
331. *See id.*
335. *See supra* Part II.B.4; *see also supra* note 97 and accompanying text.
336. *See supra* Part II.C.
harassment claims.337 Ideally, companies will voluntarily waive these agreements. However, public pressure has proven effective in this area.338 Google and top law firms changed their practices following social pressure.339 Additionally, CBS’s board of directors announced in December 2018 that it would deny its ex-CEO $120 million in exit pay after an investigation into allegations of sexual harassment and assault.340 The board announced its decision days after information leaked about a $9.5 million sexual harassment settlement between CBS and Eliza Dushku.341 The CBS board referenced its investigation as the primary consideration in denying the exit pay, but the board was likely influenced by public concerns after a year of sexual harassment allegations.342

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

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

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

337. See supra Part II.C.
338. See supra Part II.C.
339. See supra Part II.C.
345. See id.; see also Hafiz, supra note 7.
346. See supra Part I.B.
347. See supra Parts II.B.1–2.
348. See Wasserman, supra note 27.
agreements, settlement amounts will decrease. States have already incorporated statutes that address these concerns by allowing both nondisclosure agreements when requested by the claimant and confidential settlement amounts. Laws that make perpetrators’ names public while keeping settlement amounts confidential still incentivize employers to settle and put the public on notice regarding perpetrators’ identities. Current laws vary in how broadly they prohibit nondisclosure agreements. For example, New York’s statute applies to all settlements, while California’s only applies to settlements of civil suits. To protect the maximum number of victims, states should follow New York’s lead and use the broadest enacted statutes as a model for legislation.

CONCLUSION

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

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

349. See id.
351. See Wells, supra note 221.
352. See supra Parts II.B.2–3.
353. See supra Part II.B.2. On the federal level, a statute prohibiting nondisclosure agreements should also be passed. The Ending the Monopoly of Power over Workplace Harassment Through Education and Reporting (EMPOWER) Act is a bipartisan effort to prohibit NDAs regarding sexual harassment as a condition for employment. S. 2994, 115th Cong. (2017). The EMPOWER Act was reintroduced in March 2019. EMPOWER Act, H.R. 1521, 116th Cong. (2019); EMPOWER Act, S. 575, 116th Cong. (2019).
355. See Gerstein, supra note 144.
actions can limit the impact of mandatory arbitration provisions on sexual harassment claims.