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## #MeToo's Landmark, Yet Flawed, Impact on Dispute Resolution: The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

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# #MeToo's Landmark, Yet Flawed, Impact on Dispute Resolution: The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

Imre S. Szalai\*

## ABSTRACT

*On March 3, 2022, President Joe Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the Amendment) into law. This Amendment is the most significant change in the last several decades to the Federal Arbitration Act (the FAA), the main federal law governing arbitration since 1925. This landmark Amendment is also the most important federal legislation to arise thus far from the #MeToo movement. The Amendment invalidates predispute arbitration agreements in cases involving sexual harassment or sexual assault, thereby allowing survivors to proceed with their claims in public court with more robust procedural protections. With hundreds of millions of arbitration agreements in place covering consumers and workers, the Amendment can impact access to justice and shape how disputes are resolved.*

*While the goals of the Amendment are laudable, the Amendment suffers from several problems, including poor drafting that leads to at least three different interpretations of its scope. These ambiguities particularly arise when a survivor asserts a sexual harassment claim in addition to other types of claims. Furthermore, it is uncertain whether the Amendment applies in a labor setting with a collective bargaining agreement. The Amendment may also be unconstitutional as applied in certain settings involving state courts and state tort claims. Additionally, the Amendment raises deeper questions about the regulation of arbitration and proper role of arbitration in society. This Article clarifies some of the confusion regarding the Amendment by proposing a particular interpretation of the Amendment's scope: the Amendment should be construed to cover all claims that have a nexus with a sexual assault or sexual harassment claim. The justifications for the Amendment also suggest that future reforms of arbitration law should address discrimination and other forms of harassment.*

**Keywords:** arbitration, Federal Arbitration Act, dispute resolution, sexual assault, sexual harassment, #MeToo

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## INTRODUCTION

On March 3, 2022, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the Amendment) into law.<sup>1</sup> This Amendment is the most significant change in the last several decades to the Federal Arbitration Act (FAA), the main federal law governing arbitration since 1925. This landmark Amendment is also the most important federal legislation to arise thus far from the #MeToo movement. The Amendment invalidates predispute arbitration agreements in cases involving sexual harassment or sexual assault, thereby allowing survivors to proceed with their claims in public court where more robust procedural protections are available.<sup>2</sup> With hundreds of millions of arbitration agreements in place covering consumers and workers,<sup>3</sup> the Amendment can impact access to justice and shape how disputes are resolved.

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<sup>1</sup> Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 2 (2022).

<sup>2</sup> *Id.*

<sup>3</sup> ALEXANDER J. S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION 2 (Sept. 27, 2017), <https://files.epi.org/pdf/135056.pdf> (more than 60 million American workers are bound by arbitration agreements); Imre S. Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 234 (2019) (noting that more than 826 million consumer arbitration agreements were in force in the United States in 2018).

While the goals of the Amendment are laudable, the Amendment suffers from several problems. For example, the Amendment is limited in scope, and the justifications in favor of the Amendment support broader protections, such as prohibitions against confidentiality in connection with settlements of sexual assault or sexual harassment claims.<sup>4</sup> Further, the justifications underpinning the Amendment also support limiting arbitration for claims of gender discrimination, racial discrimination, and other forms of discrimination, instead of addressing solely sexual assault or sexual harassment claims.<sup>5</sup> The Amendment is also likely to cause confusion and give rise to litigation and conflicting court decisions because the Amendment is poorly drafted, with at least three different interpretations concerning its scope.<sup>6</sup> In addition to confusion about the scope of the Amendment, there are other interpretation problems with the Amendment related to whether an arbitration agreement should be characterized as a predispute or postdispute agreement.<sup>7</sup> Also, with respect to implementing the Amendment, there is no guidance for whether employers or companies should or must alter existing arbitration agreements or notify workers and consumers about the change in the law.<sup>8</sup> There is also uncertainty about how the Amendment applies in the labor setting with collective bargaining agreements.<sup>9</sup> Furthermore, the Amendment may be unconstitutional as applied in certain settings involving state courts and state tort claims.<sup>10</sup>

Courts need to clarify the uncertainties about the Amendment. Consumers or workers frequently ask courts to determine whether an arbitration agreement is valid, and the text of the Amendment provides that courts will determine the applicability of the Amendment to a particular arbitration agreement.<sup>11</sup> In other words, if there is a dispute regarding whether the Amendment invalidates an arbitration agreement, courts will make this determination. However, there is uncertainty about the correct interpretation of the Amendment, and litigation concerning the Amendment is counterproductive, costly, and time-consuming. Such litigation clogs up the judicial system and creates delays in the resolution of the underlying disputes.<sup>12</sup> With better drafting, Congress could have easily avoided this confusion.

The Amendment also raises deeper questions about arbitration and dispute resolution. It reveals a larger debate about how our society should resolve disputes and the proper role of arbitration in American society. In defining what can or cannot be arbitrated, arbitration law shapes the relationship between a government and its people by defining how the government is involved in resolving disputes. The Amendment raises a larger debate about what other types of disputes should be reserved for the courts. Furthermore, the Amendment, which purports to regulate how state courts handle state-created tort claims, also raises fundamental questions about federalism and the federal power to

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<sup>4</sup> See *infra* Part II.

<sup>5</sup> *Id.*

<sup>6</sup> See *infra* Part III.

<sup>7</sup> See *infra* Part IV.A.

<sup>8</sup> See *infra* Part IV.C.

<sup>9</sup> See *infra* Part IV.D.

<sup>10</sup> See *infra* Part IV.E.

<sup>11</sup> 9 U.S.C. § 402(b).

<sup>12</sup> Parties may spend years in litigation trying to resolve the threshold issue of whether an arbitration agreement is enforceable. See, e.g., *In re Whataburger Rests. LLC*, 645 S.W.3d 188, 198 (Tex. 2022) (expressing frustration with nine years of litigation and appeals regarding the enforceability of an arbitration agreement).

regulate dispute resolution. Finally, the FAA is almost 100 years old. With the widespread use of arbitration throughout American society in settings not originally envisioned when Congress first enacted the FAA during the 1920s,<sup>13</sup> the Act would benefit from a comprehensive update beyond the new Amendment. Despite its flaws, the Amendment is a good starting point to shed light on arbitration and to prompt deeper public discourse about arbitration's future role in our legal system.

As a practical matter, the Amendment will likely force individual companies to review or reassess their company policies regarding arbitration. Now that the Amendment removes mandatory arbitration for certain claims, companies should analyze whether it makes sense to maintain arbitration for other types of claims. Much of this analysis ultimately depends on the precise scope of the Amendment, which remains unclear.

This Article seeks to clarify some of the Amendment's confusion. Part I provides background information regarding the FAA and an overview of the Amendment. Part II explores justifications for the Amendment and how the Amendment falls short of its goals. Part III then examines different, conflicting interpretations of the Amendment, along with suggested solutions to clear up the ambiguous drafting. Part IV discusses other concerns and problems with the Amendment, such as how drafting parties should implement the Amendment, whether the Amendment applies in the labor context in connection with collective bargaining agreements, and whether the Amendment is unconstitutional as applied to state courts in connection with substantive claims under state law. Finally, this Article concludes with a discussion of arbitration's role in society and suggestions for future reforms.

## I. OVERVIEW OF THE FAA AND AMENDMENT

### A. *The FAA and the Supreme Court's Expansion of the FAA*

This part of the Article will briefly summarize the FAA's original intent and some ways the Court has incorrectly expanded the FAA over time. The FAA, enacted in 1925, is the primary federal statute governing and facilitating arbitration in the United States.<sup>14</sup> Through arbitration, parties agree to submit their disputes to a neutral decision maker who conducts a private adjudication, and the parties agree that the arbitrator's decision is final and binding, even if the decision is seriously wrong.<sup>15</sup> The heart of the FAA declares an agreement to arbitrate is generally "valid, irrevocable, and enforceable."<sup>16</sup> Prior to the adoption of the FAA, there was a long-standing judicial hostility against arbitration whereby courts would generally not enforce predispute arbitration agreements.<sup>17</sup> Through

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<sup>13</sup> IMRE S. SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA 191–98* (2013) (explaining how the FAA, in light of its text and history, was never supposed to apply to employment agreements or take-it-or-leave-it, adhesionary, consumer contracts).

<sup>14</sup> 9 U.S.C. §§ 1–16.

<sup>15</sup> *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 572 (2013) (ruling that "an arbitrator's error—even his grave error—is not enough" for a court to reverse an arbitrator's award).

<sup>16</sup> 9 U.S.C. § 2.

<sup>17</sup> IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNALIZATION 19–20* (1992).

the FAA, courts must enforce such agreements and play a limited role in facilitating the arbitration process.<sup>18</sup>

With this government support of arbitration through the FAA, arbitration agreements proliferated throughout American society over decades, giving parties leave to take advantage of the potential benefits of arbitration. Arbitration offers the potential for relatively confidential proceedings that support speedy, final decisions from experts chosen by the parties to serve as arbitrators.<sup>19</sup> For example, two businesses, one in California and one in New York, involved in a shipping dispute could agree to submit their dispute to binding arbitration. They could choose as an arbitrator a third merchant who, applying industry norms, could probably reach a fair, final result more quickly and possibly more cheaply than formal court proceedings in California or New York. Arbitration can have benefits, but for certain types of disputes or settings, particularly where there is a strong imbalance of bargaining power or a strong public interest in the subject matter of the dispute, some drawbacks of arbitration may outweigh its potential benefits.

The FAA, as originally enacted, was limited in scope. Congress drafted the statute to cover contractual disputes between commercial interests involved with interstate shipments.<sup>20</sup> Congress also designed the statute to apply solely in federal courts<sup>21</sup> and never intended for the FAA to apply to employment or labor contracts.<sup>22</sup> Furthermore, the FAA was not supposed to apply to take-it-or-leave-it contracts.<sup>23</sup>

<sup>18</sup> See, e.g., 9 U.S.C. § 4 (providing for a judicial order compelling arbitration); *id.* § 5 (judicial appointment of arbitrator in case there is a breakdown in the parties' appointment of an arbitrator); *id.* § 9 (judicial confirmation of arbitral awards); *id.* § 10 (limited grounds for judicial vacatur of arbitral awards).

<sup>19</sup> 1 MARTIN DOMKE, GABRIEL WILNER, & LARRY E. EDMONSON, *DOMKE ON COMMERCIAL ARBITRATION* § 1:4 (3d ed. 2022).

<sup>20</sup> The FAA's coverage is limited to written provisions in a contract requiring parties "to settle by arbitration a controversy thereafter arising out of such contract." 9 U.S.C. § 2. Certain claims, such as tort claims or statutory claims, do not arise out of a contract and should not be covered by the text of the FAA. *Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong., 7 (1924) [hereinafter *1924 Hearings*] (statement of Charles L. Bernheimer, Chairman, Comm. on Arb. of the N.Y. Chamber of Com.) (The FAA is designed to cover "ordinary, everyday trade disputes," and "it is for them that this legislation is proposed."); *id.* at 7, 27 (in response to a Senator's questioning that "[w]hat you have in mind is that this proposed legislation relates to contracts arising in interstate commerce," Bernheimer responded, "Yes; entirely. The farmer who will sell his carload of potatoes, from Wyoming, to a dealer in the State of New Jersey, for instance."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 646 (1985) (Stevens, J., dissenting) ("The plain language of [the FAA] . . . does not encompass a claim arising under [statutory] law. . . . Nothing in the text of the [FAA], nor its legislative history, suggests that Congress intended to authorize the arbitration of any statutory claims."). For a detailed history of the FAA's enactment, see SZALAI, *supra* note 13.

<sup>21</sup> See generally MACNEIL, *supra* note 17; *Southland Corp. v. Keating*, 465 U.S. 1, 23 (1984) (O'Connor, J., dissenting) ("Congress intended to require federal, not state, courts to respect arbitration agreements."); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 285 (1995) (Scalia, J., dissenting) ("I will, however, stand ready to join four other Justices in overruling [*Southland*], since *Southland* will not become more correct over time . . ."); *id.* at 286–89 (Thomas, J., dissenting) (FAA not intended to apply in state courts at all).

<sup>22</sup> SZALAI, *supra* note 13, at 191–92.

<sup>23</sup> During Congressional hearings regarding the FAA, a Senator raised concerns about the enforcement of arbitration agreements drafted by a stronger party and presented on a "take-it-or-leave-it," non-negotiable basis. *A Bill Relating to Sales and Contracts to Sell in Interstate and Foreign Commerce; and a Bill to Make*

Congress designed the FAA to be limited in breadth. However, since the 1980s, the Supreme Court has transformed and expanded the statute beyond its original intent. For example, the FAA now applies to all types of statutory or tort claims and is routinely used against consumers to enforce arbitration agreements in take-it-or-leave-it contracts.<sup>24</sup> The Court has also held the FAA now governs in state courts.<sup>25</sup> Thus, state laws are at risk of preemption if a state attempts to regulate the enforcement of arbitration agreements in contravention of the FAA's objectives or purpose.<sup>26</sup> The Court has additionally expanded the FAA to cover employment relationships, which was not the original intent of the FAA.<sup>27</sup> As a result of the Supreme Court's expansion of the FAA beyond its original text and intent, arbitration agreements are now found in connection with all types of daily consumer transactions and employment relationships.<sup>28</sup> Millions of workers and consumers are now subject to arbitration agreements because of the Court's errors in expanding the FAA.<sup>29</sup>

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*Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or With Foreign Nations, Hearing on S. 4213 and S. 4214 Before the S. Subcomm. of the Judiciary, 67th Cong. 9 (1923).* The Senator gave examples of non-negotiable contracts, such as contracts drafted by insurance companies and railroad companies. *Id.* at 9–11. The Senator observed that such contracts were “not really voluntary” contracts. *Id.* at 9, 10. One of the FAA's drafters testifying in favor of the FAA agreed with the Senator and confirmed that the FAA was never intended to apply to such non-negotiable contracts. *Id.* at 10. Instead, the FAA was designed to cover situations where the parties knowingly and voluntarily agreed to arbitrate, which is fully consistent with the waiver of Constitutional rights, such as the right to a jury trial. *Cf. Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1948 (2015) (waiver of the right to Article III adjudication should be “knowing and voluntary”).

<sup>24</sup> *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017) (applying the FAA to wrongful death tort claims); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (reversing lower courts' refusal to enforce arbitration clause in non-negotiable cellular telephone contract); *James v. McDonald's Corp.*, 417 F.3d 672 (7th Cir. 2005) (McDonald's customer forced to arbitrate because of language appearing on a French fry carton); *Mitsubishi Motors*, 473 U.S. at 614 (applying FAA to statutory antitrust claims); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (applying the FAA to statutory civil rights claims).

<sup>25</sup> *Keating*, 465 U.S. at 1 (FAA applies in state courts).

<sup>26</sup> *Concepcion*, 563 U.S. at 352 (FAA preempts state laws that stand as an obstacle to the FAA's purposes or objectives); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012) (FAA preempts state law guaranteeing a state judicial forum for personal injury claims against nursing homes); *Dr.'s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (FAA preempts state law conditioning enforceability of an arbitration clause on compliance with special notice requirements).

<sup>27</sup> *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (FAA covers employment disputes). *But see* 9 U.S.C. § 1 (FAA does not apply to workers engaged in foreign or interstate workers); SZALAI, *supra* note 13, at 191–92 (exploring the FAA's history to demonstrate the FAA was never intended to cover employment disputes).

<sup>28</sup> *Maybaum v. Target Corp.*, No. 222CV00687MCSJEM, 2022 WL 1321246, at \*5 (C.D. Cal. May 3, 2022) (consumer ordered to arbitrate deceptive marketing claims against Target retail store); *Patrick v. Comcast Cable Commc'ns, LLC*, No. CV H-20-2352, 2021 WL 75770 (S.D. Tex. Jan. 8, 2021) (enforcing arbitration clause in Comcast agreement for residential cable, phone, and internet services); *In re StockX Customer Data Sec. Breach Litig.*, No. 19-12441, 2020 WL 7645597 (E.D. Mich. Dec. 23, 2020), *aff'd*, 19 F.4th 873 (6th Cir. 2021) (enforcing arbitration clause in terms of service for e-commerce platform where users can purchase and sell goods, fashion clothing, sneakers, and accessories); *McHenry v. J P Chase Morgan Bank NA*, No. 3:20-CV-00699, 2021 WL 264885 (W.D. La. Jan. 11, 2021), *report and recommendation adopted sub nom. McHenry v. JP Morgan Chase Bank, N.A.*, No. 3:20-CV-00699, 2021 WL 262044 (W.D. La. Jan. 26, 2021) (compelling arbitration of worker's discrimination claims).

<sup>29</sup> COLVIN, *supra* note 3; Szalai, *supra* note 3.

### *B. The Amendment*

Under the Supreme Court’s broad interpretations of the FAA since the 1980s, courts have compelled consumers and workers to arbitrate their sexual harassment and sexual assault claims pursuant to predispute arbitration clauses found in their contracts or employment agreements.<sup>30</sup> However, the Amendment provides that predispute arbitration agreements are no longer valid or enforceable, at the election of the worker or consumer, for sexual assault or sexual harassment disputes arising after March 3, 2022.<sup>31</sup> Additionally, the Amendment contains definitions of such disputes, which include claims under Federal, Tribal, or State law.<sup>32</sup>

The Amendment declares that its “applicability” and the “validity and enforceability of an agreement” to which the Amendment applies “shall be determined by a court, rather than an arbitrator.”<sup>33</sup> In *Rent-A-Center, West, Inc. v. Jackson*, the Supreme Court approved of delegation clauses, secondary arbitration clauses whereby parties agree to arbitrate whether a primary arbitration clause is binding.<sup>34</sup> Through delegation clauses, parties delegate issues to the arbitrator regarding the enforceability or scope of a primary or main arbitration agreement. For example, a worker’s employment agreement may contain a primary arbitration clause covering all disputes that may arise between the worker and employer, such as wage or discrimination claims. The employer may have additionally drafted, like a box within a box, a delegation clause or secondary arbitration clause whereby the parties must arbitrate any disputes about the validity of the primary arbitration clause. In effect, a worker may have to arbitrate, before an arbitrator with a financial interest to keep an arbitration going, the issue of whether they agreed to arbitrate the underlying merits dispute, such as a wage claim. The Court in *Rent-A-Center* found such delegation clauses

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<sup>30</sup> See, e.g., *Budzyn v. KFC Corp.*, No. 21 C 4152, 2022 WL 595735 (N.D. Ill. Feb. 28, 2022) (compelling arbitration of claims related to restaurant worker’s allegations of sexual assault and harassment); *Matthews v. Gucci*, No. CV 21-434-KSM, 2022 WL 462406 (E.D. Pa. Feb. 15, 2022) (compelling arbitration of worker’s sexual harassment claims); *Doe 1 v. Darden Rests., Inc.*, No. 3:20-CV-00862, 2022 WL 265949 (M.D. Pa. Jan. 27, 2022) (compelling arbitration of sexual assault claims of Longhorn Restaurant workers); *Oviedo v. Admiral Linen & Unif. Serv. by ALSCO Inc.*, No. 3:19-CV-01636-X, 2021 WL 5505655 (N.D. Tex. Nov. 23, 2021) (sexual assault and harassment claims of two workers sent to arbitration); *Pambakian v. Blatt*, 859 F. App’x 808 (9th Cir. 2021) (affirming order compelling arbitration of claims of worker who was sexually assaulted during workplace holiday party); *Doe v. Massage Envy Franchising, LLC*, No. CV S20C-05-025 RFS, 2020 WL 7624622 (Del. Super. Ct. Dec. 21, 2020) (compelling arbitration of customer’s claims regarding sexual assault).

<sup>31</sup> 9 U.S.C. § 402(a). The Amendment mentions such invalidity or unenforceability is “at the election” of the alleged victim. *Id.* Thus, it appears a victim may still choose to honor a predispute arbitration agreement if the victim so desires. See *id.* The Amendment also declares invalid and unenforceable predispute “joint-action waivers” in connection with such claims. *Id.* These waivers are agreements that prohibit or waive the right of parties to participate in a joint, class, or collective action. *Id.* § 401. Such joint-action waivers are not necessarily linked to an arbitration clause, and such waivers are not the focus of this Article.

<sup>32</sup> *Id.* § 401 (“The term ‘sexual assault dispute’ means a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 or similar applicable Tribal or State law, including when the victim lacks capacity to consent.”); *id.* (“The term ‘sexual harassment dispute’ means a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.”). Note that these definitions do not expressly cover local laws, but as explained in this Article, the Amendment likely covers related claims. As a result, the Amendment may also cover sexual harassment or assault claims under local laws that relate to such claims under Federal, Tribal, or State law.

<sup>33</sup> 9 U.S.C. § 402(b).

<sup>34</sup> *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63 (2010).



are fully enforceable unless the challenging party makes the difficult showing of a narrow and specific challenge to the delegation clause, as opposed to challenging the main arbitration agreement covering the substantive disputes between the parties.<sup>35</sup>

As a result of the *Rent-A-Center* decision, courts effectively rubber-stamp arbitration clauses, ordering arbitration, even when a party argues the primary arbitration clause is defective.<sup>36</sup> After *Rent-A-Center*, courts lost some ability to supervise arbitration agreements for fairness before compelling arbitration.<sup>37</sup> Instead, arbitrators with a financial interest in conducting an arbitration are tasked with deciding whether an arbitration agreement is valid. In the sexual assault and harassment context, the Amendment effectively overrides *Rent-A-Center*, invalidates second-order arbitration delegation provisions, and ensures agreements to arbitrate will be construed and applied by courts, not arbitrators.<sup>38</sup>

Structurally, how Congress codified the Amendment can implicate how the Amendment is construed. The original FAA is found in Chapter 1 of Title 9, and the most important provision of the original FAA declared that arbitration agreements are fully binding, except upon grounds for contract revocation.<sup>39</sup> The Amendment's standards are codified in the new Chapter 4 of Title 9;<sup>40</sup> Congress referenced this new chapter in Chapter 1.<sup>41</sup> If one focuses solely on the text or standards set forth in Chapter 4, the Amendment appears to stand alone; the Amendment does not facially link to the original FAA. Hence, one may construe the Amendment as applying to all arbitration agreements, even arbitration agreements beyond the scope of the FAA, such as arbitration provisions in a collective bargaining agreement. However, Chapter 1's explicit reference to Chapter 4 suggests that the Amendment and Chapter 1 are inextricably intertwined, and the Amendment should not be interpreted as existing independently from the FAA. How one conceptualizes Chapter 4's relationship to the FAA can impact how the Amendment is interpreted, particularly with respect to the labor setting, as explored below.<sup>42</sup>

## II. WHY THE AMENDMENT FALLS SHORT OF ITS GOALS

This Part argues that the Amendment should have been broader in scope. Exploring the justifications for the Amendment reveals that Congress should have enacted broader

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<sup>35</sup> *Id.* at 72.

<sup>36</sup> *See, e.g.,* *Brumley v. Austin Ctrs. for Exceptional Students Inc.*, No. CV-18-00662-PHX-DLR, 2019 WL 1077683 (D. Ariz. Mar. 7, 2019) (relying on *Rent-A-Center* and holding that disabled student's challenges to the validity of the arbitration clause in student handbook must be resolved by arbitrator); *Lloyd v. BRSI, LLC*, No. 15 Civ. 964, 2016 WL 234861 (W.D. Okla. Jan. 19, 2016) (relying on *Rent-A-Center* to summarily compel arbitration and directing arbitrator to rule on all challenges to the enforcement of the arbitration clause).

<sup>37</sup> *See* cases cited *supra* note 36.

<sup>38</sup> 9 U.S.C. § 402(b).

<sup>39</sup> The key provision of the former, pre-Amendment version of Chapter 1 declares that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

<sup>40</sup> *Id.* § 401.

<sup>41</sup> The key provision of Chapter 1 now declares that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4." *Id.* § 2.

<sup>42</sup> *See infra* Part IV.D.

protections for survivors of sexual assault and harassment. Additionally, this Part discusses some harms of arbitrating sexual assault and harassment claims. These harms suggest Congress should limit the use of arbitration for claims beyond sexual assault and harassment.

The #MeToo social movement exposed the prevalence of sexual assault and harassment in our society. One study found “81% of women and 43% of men reported experiencing some form of sexual harassment and/or assault in their lifetime.”<sup>43</sup> Another study focusing on employed adults found that in the workplace 42% of women and 15% of men had experienced workplace sexual harassment.<sup>44</sup> The trauma and impact of such wrongful conduct are terrible and not easily captured in statistics. Survivors of such incidents experience negative impacts on their mental and physical health, reduced opportunities for economic advancement, forced job changes, unemployment, abandoned careers, as well as loss of productivity and other costs.<sup>45</sup>

Survivors may experience more difficulty proving their claims in arbitration than litigation. Millions of binding arbitration agreements<sup>46</sup> have blocked survivors from pursuing relief in court. Prior to the Amendment, consumers and workers with broad predispute arbitration agreements would have to bring sexual harassment or assault claims in private arbitration proceedings. Such proceedings tend to have limited procedural protections compared to more robust procedural protections available in court, such as broad discovery rights, collective action rights, and appellate rights.<sup>47</sup> The broader procedural protections in court, particularly discovery rights to uncover evidence or proof of the harassment or assault, can assist survivors in proving their claims.

In addition to the harms from limited procedural rights, the confidential nature of arbitration<sup>48</sup> is also problematic. The confidentiality associated with arbitration can help conceal the full extent of sexual harassment and assault in our society. Court proceedings are typically open to the public, and court filings are a matter of public record. However, the public generally does not have an automatic right to access arbitration proceedings or filings made in arbitration. Although the degree of confidentiality in arbitration may vary, and certain information may become public if parties seek judicial review or confirmation

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<sup>43</sup> HOLLY KEARL, STOP ST. HARASSMENT, THE FACTS BEHIND THE #METOO MOVEMENT: A NATIONAL STUDY ON SEXUAL HARASSMENT AND ASSAULT (Feb. 2018), <https://www.raliance.org/wp-content/uploads/2018/05/Full-Report-2018-National-Study-on-Sexual-Harassment-and-Assault.pdf>.

<sup>44</sup> Anita Raj, Nicole E. Johns, & Rupa Jose, *Gender Parity at Work and Its Association with Workplace Sexual Harassment*, 68 WORKPLACE HEALTH & SAFETY 279 (2020).

<sup>45</sup> Elyse Shaw, Ariane Hegewisch, & Cynthia Hess, *Sexual Harassment and Assault at Work: Understanding the Costs*, INST. FOR WOMEN’S POL’Y RSCH. 5–6 (2018).

<sup>46</sup> COLVIN, *supra* note 3; Szalai, *supra* note 3.

<sup>47</sup> 1 DOMKE, WILNER & EDMONSON, *supra* note 19, § 1:4; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (through arbitration, one “trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration”).

<sup>48</sup> 1 DOMKE, WILNER & EDMONSON, *supra* note 19, § 1:4; *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (“Indeed, the plaintiffs’ attack on the confidentiality provision is, in part, an attack on the character of arbitration itself.”); *Guyden v. Aetna, Inc.*, 544 F.3d 376, 385 (2d Cir. 2008) (“[C]onfidentiality clauses are so common in the arbitration context that [an] ‘attack on the confidentiality provision is, in part, an attack on the character of arbitration itself.’”); *Carmax Auto Superstores, Inc. v. Sibley*, 215 F. Supp. 3d 430, 437 (D. Md. 2016) (upholding confidentiality provision in arbitration agreement), *aff’d*, 730 F. App’x 174 (4th Cir. 2018).

of an arbitral award,<sup>49</sup> the confidential nature of arbitration can impede the public's awareness of sexual harassment and assault.

Although arbitration has potential efficiency benefits, one societal cost of arbitration involves its confidential and private nature. Arbitration clauses may hinder workers from discovering the true extent of sexual harassment and assault in a workplace. For example, employees at Jared and Kay Jewelers experienced terrible sexual harassment and discrimination at their workplace.<sup>50</sup> Hundreds of employees provided declarations explaining that they were inappropriately touched, demeaned, and urged to engage in sexual activity with management in order to stay employed. In addition to the horrible sexual assault and harassment, the company systematically paid women less than men and passed over women for promotions.<sup>51</sup> However, the confidential nature of arbitration prevented employees from discovering the full extent of these incidents. An attorney representing workers from these stores observed, “[m]ost of [the survivor employees] had no way of knowing that the others had similar disputes, because that was all kept confidential.”<sup>52</sup> If sexual harassment or assault claims are heard through open court proceedings with public filings instead of being sent to arbitration, society can increase awareness of such work environments and push government representatives or private parties to take corrective actions. The widespread use of arbitration hinders the public's awareness of harassment and assault in society.

Predispute arbitration agreements may restrict access to legal representation for consumers and workers, without which they are disadvantaged. Some attorneys may be hesitant to represent a worker or consumer if an arbitration clause binds them; the author has interviewed several attorneys who said they generally do not accept clients who are bound by arbitration agreements. Attorneys have expressed concerns about arbitral awards being less than court awards, and the limited procedural protections in arbitration make it more challenging to prove claims.<sup>53</sup> Additionally, some companies appear to discourage workers from using attorneys in arbitration proceedings. Major retailers with tens of thousands of workers, such as Macy's, Bloomingdale's, and BJ's Wholesale Club, have arbitration agreements with their workers that provide neither the worker nor the employer

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<sup>49</sup> *Lohnn v. Int'l Bus. Machs. Corp.*, No. 21-CV-6379 (LJL), 2022 WL 36420, at \*13 (S.D.N.Y. Jan. 4, 2022) (even if arbitration is covered by confidentiality provisions, information may become public when parties attempt to confirm or vacate an arbitration award); *News+Media Cap. Grp. LLC v. Las Vegas Sun, Inc.*, 495 P.3d 108, 114 n.4 (2021) (“While the parties may have chosen arbitration in part to preserve their privacy and confidentiality, they both then chose to seek judicial review and so necessarily gave up some measure of confidentiality.”); Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1235 (2006) (“Parties may agree to confidentiality provisions in their arbitration contracts that preclude them from disclosing information about any arbitration proceedings to third parties. The scope of these confidentiality provisions varies with respect to the information and people they cover.”).

<sup>50</sup> Drew Harwell, *Hundreds of Workers at Company Behind Jared, Kay Say Culture Fostered Harassment*, BOS. GLOBE (Feb. 28, 2017, 8:15 PM), <https://www.bostonglobe.com/business/2017/02/27/hundreds-former-workers-company-behind-jared-kay-say-culture-fostered-harassment/hsBpL49yWysFzAu93EksXL/story.html>.

<sup>51</sup> *Id.*

<sup>52</sup> Rachel Martin, *No Class Action: Supreme Court Weighs Whether Workers Must Face Arbitrations Alone*, NPR (Oct. 6, 2017, 4:22 AM), <https://n.pr/34n1FHI>.

<sup>53</sup> Alexander J.S. Colvin, *The Metastasis of Mandatory Arbitration*, 94 CHI.-KENT L. REV. 3, 18 (2019) (citing empirical study showing that “arbitration claims are less likely to succeed than claims brought to court and, when damages are awarded, they are likely to be significantly smaller than court-awarded damages”) (emphasis in original).

will be represented by counsel at arbitration hearings.<sup>54</sup> However, if the worker brings an attorney to the hearing, the corporate retailer will also use an attorney.<sup>55</sup> Although such an arbitration clause with these limitations regarding counsel may appear facially neutral, workers in practice may be disadvantaged by such clauses. For example, a *pro se* Macy's worker who attempts to arbitrate without a lawyer will likely face the company's non-lawyer representative who may have extensive prior experience with arbitration. Further, because the arbitration clause restricts the presence of a lawyer at the proceeding, a *pro se* Macy's worker may not realize a lawyer may still have been working behind the scenes on behalf of Macy's by providing detailed, step-by-step guidance and legal advice to the Macy's non-lawyer representative in arbitration. As such, companies may improperly attempt to discourage unsophisticated workers from using lawyers during arbitration proceedings. With the Amendment and access to court proceedings, survivors of sexual harassment and assault may have an easier time finding legal representation.

The Amendment aims to increase accountability, transparency, and access to justice in connection with sexual assault and sexual harassment claims. The Amendment gives survivors a stronger voice to bring their claims against perpetrators in open court, instead of secretive proceedings. By giving survivors a more public voice, the Amendment helps restore respect for human dignity. With public proceedings, society can also more easily become aware of harassment and assault, and the public nature of court proceedings can have potentially punitive and deterrent effects on perpetrators. Additionally, as a result of the Amendment, survivors (as well as perpetrators) have broader procedural protections available in court, such as discovery rights to help prove their claims or defenses.<sup>56</sup>

However, the Amendment falls short of its goals of increased accountability and transparency because confidential settlements are still allowed. Confidentiality is a typical component of settlements,<sup>57</sup> and most court proceedings settle.<sup>58</sup> Despite the Amendment's attempt to reform arbitration and enable greater access to courts, the Amendment still allows for the possibility that the perpetrator may remain shrouded in secrecy through confidentiality provisions associated with settlements or severance agreements.

In the wake of the #MeToo movement, some states took legislative action to ban or restrict confidentiality provisions. For example, California banned non-disclosure provisions in settlement agreements.<sup>59</sup> At first, the California ban covered sexual harassment and discrimination claims,<sup>60</sup> but later expanded to cover all forms of

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<sup>54</sup> Paxton v. Macy's W. Stores, Inc., No. 118CV00132LJOSKO, 2018 WL 4297763, at \*3 (E.D. Cal. Sept. 7, 2018); Hawthorne v. BJ's Wholesale Club, No. 3:15CV572, 2016 WL 4500867, at \*6 (E.D. Va. Aug. 26, 2016); Jones-Mixon v. Bloomingdale's, Inc., No. 14-CV-01103-JCS, 2014 WL 2736020, at \*2 (N.D. Cal. June 11, 2014) ("If the employee elects not to be represented by an attorney, Bloomingdale's is not allowed to have an attorney present at the arbitration proceedings.").

<sup>55</sup> See cases cited *supra* note 54.

<sup>56</sup> I DOMKE, WILNER & EDMONSON, *supra* note 19, § 1:4 (2022) (noting procedural differences between arbitration and litigation).

<sup>57</sup> Ann Fromholz & Jeanette Laba, *#MeToo Challenges Confidentiality and Nondisclosure Agreements*, 41 L.A. LAW. 12 (2018) ("Confidentiality provisions are a common and material component of nearly every settlement agreement resolving a legal dispute.").

<sup>58</sup> Jessica Bregant, Jennifer K. Robbennolt, & Verity Winship, *Perceptions of Settlement*, 27 HARV. NEGOT. L. REV. 93 (2021) (noting the pervasiveness of settlement in the United States legal system).

<sup>59</sup> Silenced No More Act, S.B. 331, 2021–2022 Leg., Reg. Sess. (Cal. 2021).

<sup>60</sup> S.B. 820, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

harassment and discrimination.<sup>61</sup> New York adopted similar restrictions.<sup>62</sup> The Amendment paves the way for increased accountability and public awareness by granting survivors access to the courts. However, many states still allow settlement or severance agreements to contain enforceable confidentiality provisions that shield the perpetrator from public scrutiny. Without adopting protections like California and New York legislation, such confidentiality provisions undercut the potential value of the Amendment.

Another critique of the Amendment involves its narrow scope. The justifications for the Amendment, such as increased accountability, transparency, and access to justice, apply equally to other forms of harassment based on race, national origin, religion, or disability, among others. The Amendment does not cover gender discrimination or other forms of discrimination. Furthermore, harassment is often intersectional, involving overlapping motives related to racism and sexism to target one's "gendered racial identity,"<sup>63</sup> among other marginalized traits. Importantly, the Amendment, with its narrow focus on sexual harassment and assault, falls short of offering more robust protections to workers and consumers. The justifications for the Amendment apply to any substantive protections for vulnerable workers or consumers, such as laws regarding workplace and product safety, minimum wages, or overtime wages. Although the Amendment is a step forward in terms of arbitration reform, the Amendment should have a broader scope to offer stronger protections to workers and consumers.

### III. THE AMENDMENT IS POORLY DRAFTED AND SUBJECT TO AT LEAST THREE INTERPRETATIONS

There is some uncertainty surrounding how the Amendment operates in practice. In particular, it is not clear how the Amendment interacts with additional claims that a worker or consumer files concurrently with a sexual harassment or sexual assault claim. For concurrent sexual harassment or assault claims and additional claims, there are at least three interpretations of the Amendment's application.

#### A. *The Easy Case*

The Amendment's application is clear when a consumer or worker exclusively asserts claims for sexual assault or sexual harassment with no additional claims. Before the Amendment took effect, a survivor subject to a broad predispute arbitration clause generally had no choice but to arbitrate such claims.<sup>64</sup> However, the Amendment gives survivors the authority and autonomy to invalidate a predispute arbitration agreement for a sexual assault or sexual harassment claim.<sup>65</sup> The Amendment declares that predispute arbitration agreements are not valid or enforceable with respect to a sexual assault or sexual

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<sup>61</sup> S.B. 331.

<sup>62</sup> N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2019) (banning confidentiality in settlement agreements regarding discrimination claims). In December 2022 at the federal level, President Joe Biden signed into law a prohibition against predispute nondisclosure agreements in connection with sexual harassment or assault disputes. Speak Out Act, Pub. L. No. 117-224, 136 Stat. 2290 (2022). However, this federal law does not address nondisclosure provisions in postdispute settlement agreements.

<sup>63</sup> Jamillah Bowman Williams, *Maximizing #metoo: Intersectionality & the Movement*, 62 B.C.L. REV. 1797, 1812 (2021).

<sup>64</sup> See cases cited *supra* note 30.

<sup>65</sup> 9 U.S.C. § 402(a).

harassment claim “at the election of the person” alleging such claims.<sup>66</sup> A person who previously entered into a broad arbitration clause and who subsequently experiences sexual assault or sexual harassment now has a postdispute choice whether to proceed with arbitration as provided in the predispute arbitration agreement or to pursue other means of dispute resolution, such as litigation or mediation.

*B. The More Challenging Case & Three Interpretations of the Amendment*

One area of confusion surrounding the Amendment arises when a plaintiff asserts sexual assault or sexual harassment claims together with additional claims. When a plaintiff files a multi-count lawsuit that includes sexual harassment or sexual assault claims as well as additional claims, there is a potential for uncertainty as to how the Amendment applies, and courts may take different approaches to construing the Amendment.

To help illustrate this uncertainty, consider a hypothetical case where a worker files a four-count complaint with the following claims: (1) a claim of sexual harassment under federal law; (2) a claim of gender discrimination under federal law; (3) a claim for racial discrimination and racial harassment under federal law; and (4) a wage claim or breach of contract claim under state law. Under the Amendment, it is clear the survivor is not required to arbitrate count one for sexual harassment pursuant to a predispute arbitration agreement. However, it is not clear whether the Amendment invalidates a predispute arbitration agreement with respect to the other counts.

When there are multiple claims, there are at least three interpretations of the Amendment, which this Article will call the Narrow View, the Broad View, and the Nexus View. Under any of these views, the main effect of the Amendment is on the enforceability and validity of an arbitration clause, but the scope of this effect is uncertain. With the multi-count hypothetical, one can analyze the uncertainty by considering at least three possible ways of interpreting the scope of the Amendment:

- (1) narrowly and solely with respect to a sexual assault or harassment claim (Narrow View);
- (2) broadly with respect to the entire case and for all claims asserted in a case, even if the claims are unrelated, as long as the lawsuit contains at least one sexual assault or sexual harassment claim (Broad View); or
- (3) reasonably with respect to a bundle of claims that have a nexus with or arise from the same transaction or core set of facts as a sexual assault or sexual harassment claim (Nexus View).<sup>67</sup>

The three subparts below analyze each view in more detail by explaining the textual arguments in favor of each view.

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<sup>66</sup> *Id.*

<sup>67</sup> These three different views (and the confusion about which is correct) are explored below in connection with the enforceability of an arbitration agreement. The same confusion over these three views would also apply in connection with the prohibition against joint-action waivers. For example, it is a question whether the prohibition against joint-action waivers applies narrowly and solely with respect to sexual assault or harassment claims, or more broadly to related claims or even all claims asserted in a lawsuit, even if they are unrelated. Such waivers are not the focus of this Article.

## 1. Narrow View

Under the Narrow View, the Amendment is construed such that only sexual assault or sexual harassment claims are not subject to a predispute arbitration agreement, at the election of the survivor. Any predispute arbitration agreement purporting to cover these two claims is generally not enforceable or valid, and courts remain available to hear these two particular claims if the survivor desires litigation. However, other types of claims asserted in the same lawsuit, even if related to a sexual assault or sexual harassment claim, would remain subject to a broad predispute arbitration agreement under the Narrow View. Under the Narrow View, only count one in the four-count lawsuit example would remain in court at the election of the survivor, while counts two, three, and four would be sent to arbitration pursuant to a broad predispute arbitration agreement.

The textual basis for this Narrow View is found in the last clause of § 402(a) of the Amendment,<sup>68</sup> which states:

[N]o predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.<sup>69</sup>

A court or party adopting or advocating for the Narrow View would focus on the last phrase and argue the arbitration agreement is invalid only insofar as it “relates to the sexual assault dispute or the sexual harassment dispute.”<sup>70</sup> Under the Narrow View, the “relates to” language is construed narrowly as referring exclusively and solely to sexual assault or sexual harassment claims. Put another way, the Amendment invalidates arbitration agreements to a certain degree, and the “relates to” language helps focus the object of this invalidation narrowly.<sup>71</sup> However, any other dispute remains covered by such an arbitration agreement. This textual analysis demonstrates that predispute arbitration agreements are invalid in connection with, or insofar as the agreement purports to cover, sexual harassment or sexual assault claims.

The phrase in § 402 regarding a “case which is filed” is not superfluous under the Narrow View. Consider the impact of this phrase by imagining it did not exist. Without this phrase, the Amendment could expansively declare every broad arbitration agreement as automatically invalid. For example, suppose an employment agreement contains a broad arbitration clause stating all disputes between an employee and employer are subject to binding arbitration. Without the Amendment’s phrase regarding a “case which is *filed*,” one could argue this hypothetical agreement is, from the very beginning and without filing any lawsuit, invalid and unenforceable for any circumstance, simply because the clause is

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<sup>68</sup> 9 U.S.C. § 402(a).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> A counterargument is that the phrase “relates to” should not be construed in such a narrow, limiting manner, and instead, the phrase should be interpreted more flexibly to capture any other claims that have a logical relationship with or connection to a sexual harassment or assault claim. As explained below, *see infra* subpart III(B)(3), III(C), the author of the Article prefers this different view, which the author calls the “Nexus View.” Under this Nexus View, the phrase “relates to” expands the scope of claims covered by the Amendment to include any claim that “relates to” or has a logical relationship with a sexual harassment or assault claim.

broad and purports to cover a sexual harassment claim. Thus, if an employer wishes to enforce such a broad agreement with respect to a claim for religious discrimination, the Amendment (without the “case” limitation) already declares such an agreement invalid *ab initio*, even with respect to a claim for religious discrimination, simply because the agreement, as drafted, purports to cover sexual harassment claims. The phrase “case which is filed” ensures the Amendment is not expansively construed as striking down every broadly worded arbitration clause in existence. Instead, the Amendment, by virtue of this filed “case” limitation, only comes into operation when there is an active “case which is filed.” When one construes the “case” limitation as well as the “relates to” phrase in such a manner, the Narrow View indicates the Amendment comes into play when a party files a case, and then the Amendment invalidates arbitration agreements in this setting only with respect to sexual harassment or sexual assault claims.

There is an additional interpretation regarding the “case which is filed” language. One can also construe this phrase as intended to clarify that the Amendment applies, regardless of whether the survivor is relying on State, Federal, or Tribal law. Under the Amendment, predispute arbitration agreements are not valid or enforceable for sexual harassment or assault claims, and to provide the broadest protection for survivors, the source for those claims, whether State, Federal, or Tribal law, is irrelevant.

To trigger the Amendment under the Narrow View, there are two qualifications regarding the filed case: one of which is both inclusive and expansive, and the other of which is limiting. First, the expansive phrase ensures any case that is filed, regardless of whether the case is filed under State, Federal, or Tribal law, can potentially be subject to the Amendment. Second, the limiting phrase “relates to” ensures that the effect of the invalidation is narrow and focused; the invalidation relates only to sexual assault or sexual harassment disputes.

## 2. Broad View

Under the Broad View of the Amendment, *every* claim asserted in a lawsuit that includes a claim for sexual assault or sexual harassment could be litigated in court, at the election of the survivor. Pursuant to the Broad View, a predispute arbitration agreement is not valid or enforceable with respect to an entire case filed in court as long as the case includes a sexual assault or sexual harassment claim. Under the Broad View, all four counts in the above hypothetical could remain in court, even if some of the claims are completely unrelated<sup>72</sup> to the sexual assault or sexual harassment claim.<sup>73</sup>

Under the Narrow View, the impact of invalidating the agreement is felt narrowly with respect to the sexual harassment or assault claim. Conversely, under the Broad View, the impact of invalidation of an arbitration agreement is felt with respect to the entire

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<sup>72</sup> Under some liberal joinder rules, such as FED. R. CIV. P. 18 and similar state counterparts, it is possible for a lawsuit to include a bundle of unrelated claims.

<sup>73</sup> The Amendment recognizes an invalidation power “at the election” of a victim, 9 U.S.C. § 402(a), and thus, at least with respect to the sexual harassment or sexual assault claims, the victim can decide to pursue such claims in arbitration pursuant to a predispute arbitration clause. If a court adopts the Broad View and holds that all four claims in the above hypothetical could remain in court, could the victim decide that one of the claims, other than the sexual harassment or assault claims, go to arbitration pursuant to a predispute arbitration clause? For example, even though a court under the Broad View would allow all four claims to remain in court, could the victim decide that the wage claim be arbitrated while the other three claims be litigated in court? It is not clear how the election power may operate in connection with the Broad View.



“case,”<sup>74</sup> even with respect to unrelated claims asserted within the case. Textually, the Broad View focuses on the phrase “with respect to a *case*” in § 402(a). An arbitration clause is completely invalid, with respect to an entire filed “case,” as long as the case includes a sexual assault or harassment claim. Congress could have drafted the Amendment in a more limited manner to invalidate an arbitration agreement with respect to a *claim*, but instead, Congress chose to use the broader term “case” in the text of the Amendment. Literally, the four-count hypothetical case mentioned above “relates to” or has a connection with or concerns a sexual harassment dispute since the case includes a sexual harassment claim.

Under the Broad View, the “relates to” language defines the subset of cases to which the Amendment applies. Within this framework, the object of invalidation is the arbitration agreement as it applies to an entire “case,” but with a qualifier that the case must “relate to” a claim of sexual assault or harassment. A lawsuit or case “relates to” sexual assault or sexual harassment if it includes or involves a claim for sexual assault or sexual harassment.<sup>75</sup> Under the Broad View, the Amendment creates an invalidation power that operates with respect to an entire filed “case,” including all the claims asserted within that case, and the “relates to” language in § 402(a) looks back to and modifies the word “case” so that only cases containing or including sexual harassment or sexual assault claims are subject to this invalidation power.

### 3. Nexus View

The Nexus View falls between the Broad and Narrow Views and involves a more moderate approach to interpreting the Amendment. Under the Nexus View, the Amendment applies to sexual assault or sexual harassment claims, as well as any other claim with a close factual nexus to such claims.

Textual support for the Nexus View focuses on the Amendment’s use of the terms, “case” (as opposed to the narrower term “claim”) and “relates to,” a phrase suggesting the scope of the Amendment applies to any claims with a relationship or nexus to a sexual assault or harassment claim. The “relates to” language expands the scope of the Amendment beyond a narrowly construed, singular claim for sexual harassment or sexual assault. Congress could have drafted the Amendment narrowly to invalidate arbitration agreements solely with respect to sexual harassment or assault claims. Instead, the Amendment applies more broadly to a “case” that “relates to” the sexual assault or

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<sup>74</sup> The Amendment does not invalidate the entire universe of arbitration agreements in the abstract, such as when an Agreement is drafted and signed, but instead, the Amendment only comes into play when there is a filed case. Under the Broad View, one can envision the Amendment operating like an on-off switch that comes into play only when a “case” is “filed” containing a sexual harassment or sexual assault claim.

<sup>75</sup> A counterargument is that the “relates to” language should not be interpreted so expansively or loosely to mean all claims in a multi-count lawsuit as long as there is one count for sexual harassment or assault. There are at least two other ways to interpret the “relates to” language. Under the Narrow View, the “relates to” language plays a different role and narrowly channels or focuses the impact of the invalidation power so that this power operates only with respect to a narrow claim or dispute. The Nexus View interprets the “relates to” language differently to require a connection or relationship among the claims, such as claims that share a factual connection. While “relates to” embodies the concept of a factual connection under the Nexus View, this same phrase “relates to” is construed to mean “includes” or “involves” under the Broad view. That is, a case relates to a sexual harassment claim under the Broad View if the case merely includes or involves a claim for sexual harassment.

harassment claim. Thus, if a wage claim involves allegations that the employer failed to increase wages or reduced wages in retaliation for a sexual harassment claim, such a wage claim is not subject to a predispute arbitration agreement under the Nexus View.

The word “case” supports the Nexus View. “Case” has a special meaning under the United States Constitution and covers a group of claims that “derive from a common nucleus of operative fact” such that the parties would ordinarily expect such claims would be heard in one forum.<sup>76</sup> This constitutional concept of a “case” is also embodied in 28 U.S.C. § 1367, a federal statute governing the supplemental subject matter jurisdiction of federal courts.<sup>77</sup> A court adopting the Nexus View of the Amendment may use standards developed by courts to interpret § 1367. Although there are different formulations of this test regarding supplemental jurisdiction, a federal court would generally conclude that two claims are sufficiently related if the claims arise from a common nucleus of operative fact, or if the facts underlying the claims overlap.<sup>78</sup>

Congress may have intended the word “case” to be interpreted as a term of art with an already-established meaning. This term “case” already has a developed meaning from court decisions interpreting § 1367 and covers a bundle of related claims. Some of the concerns or policies supporting the jurisdictional test for federal courts, such as economy, efficiency, fairness, and meeting parties’ expectations, also exist in the context of the Amendment. For example, efficiency and fairness justify the non-arbitrability of a sexual assault claim and any related claims involving a factual connection to the sexual assault claim.

If a court applying the Amendment engaged in an analysis similar to § 1367, whereby claims are related if there is a factual overlap or if the claims arise from a common nucleus of operative fact, such an assessment would also advance the Amendment’s broader goals. For example, the Amendment aims to help ensure the public becomes aware of the misconduct underlying sexual assault or sexual harassment claims. If the facts underlying a sexual assault or sexual harassment claim overlap with the facts underlying a different claim, it seems reasonable to allow all such claims to fall under the scope of the Amendment. All these related facts would be heard openly in court, and the public and

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<sup>76</sup> *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966).

<sup>77</sup> 28 U.S.C. § 1367(a) (“[T]he district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.”).

<sup>78</sup> *McCoy v. Iberdrola Renewables, Inc.*, 760 F.3d 674, 683 (7th Cir. 2014) (“Claims form part of the same case or controversy when they ‘derive from a common nucleus of operative fact.’ To satisfy this requirement, ‘[a] loose factual connection between the claims is generally sufficient.’”) (citations omitted); *Brettschneider v. City of N.Y.*, No. 15-CV-4574-CBA-SJB, 2020 WL 5984340, at \*12 (E.D.N.Y. Aug. 25, 2020) (whether two claims are sufficiently related for purpose of supplemental subject matter jurisdiction depends on whether (i) the facts underlying the claims substantially overlap, (ii) the claims arise from the same transaction, or (iii) the claims arise from a common nucleus of operative fact); *Thomas v. EONY LLC*, No. 13-CV-8512 JPO, 2015 WL 1809085, at \*5 (S.D.N.Y. Apr. 21, 2015) (in determining whether claims come from a common nucleus of operative fact for purpose of 28 U.S.C. § 1367, “the court should look to whether the evidence likely to be used in the specific case in addressing the federal claim is likely to substantially overlap [with] that used to address the state-law claims.”). Some courts have explained that a “loose factual connection” among claims can satisfy the meaning of “case” under Article III of the Constitution. *Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 213 (2d Cir. 2004) (citation omitted). Other courts have held that claims form a singular case if they involve a “logical relationship . . . such that judicial economy and fairness dictate that all issues be resolved in one lawsuit.” *Cousens v. Am. Honda Fin. Corp.*, No. 06-CV-2080 W (LSP), 2007 WL 9776765, at \*1 (S.D. Cal. Feb. 5, 2007) (citation omitted).

government representatives could become aware of the related facts or conduct and take additional action.

The Nexus View is a better fit with the policies of the Amendment. Another goal of the Amendment is to give survivors of sexual harassment or sexual assault broad procedural protections typically available in court. If a court hears a sexual harassment claim but sends a related claim involving the same facts to arbitration, the arbitration proceeding may undermine the procedural protections afforded by the Amendment.<sup>79</sup> Two different proceedings—one in arbitration, with limited procedural protections, and one in litigation, with its broader procedural protections—would occur involving the same underlying facts, and it is likely that the arbitration proceeding would finish first. The preclusive effect of the arbitrator’s decision may negatively impact the survivor’s ability to pursue the sexual harassment or assault claims pending in court. For example, a survivor may have difficulty establishing that inappropriate touching occurred in arbitration because of the limited discovery available. In response, a finding in arbitration that no such contact occurred could preclude a converse finding in litigation for a case based on common facts. Interpreting the Amendment to cover both sexual harassment or assault claims as well as related claims, as long as they overlap in facts or derive from a common nucleus of operative fact, helps advance the Amendment’s goals by ensuring the survivor retains the broad procedural protections available in court for all such related claims. Furthermore, splitting related claims by hearing a sexual harassment claim in court, while related claims go to arbitration, would double the work for counsel and can retraumatize survivors by making them recount their testimony for two different proceedings. In sum, the Nexus View aligns with protecting survivors and the policies underpinning the Amendment.

The established body of case law interpreting § 1367 is instructive and immediately available for courts to assess whether the Amendment covers certain claims related to sexual assault or sexual harassment. In using the word “case” in the Amendment, Congress could have intended to borrow these standards from the field of federal subject matter jurisdiction to provide guidance when applying the Amendment. Under the Nexus View and borrowing from this body of law defining the word “case,” an arbitration agreement is not valid or enforceable with respect to a sexual assault or harassment claim, or any other related claim. Related claims derive from a common nucleus of operative fact or have a loose factual connection or logical relationship to the sexual assault or harassment claim.

Definitions found in § 401 of the Amendment similarly support the Nexus View. The Amendment defines “sexual harassment dispute” as “a dispute *relating to* conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.”<sup>80</sup> Thus, the very definition of sexual harassment includes any dispute that relates to such conduct. The Amendment could have focused narrowly on the conduct constituting sexual harassment or assault, but instead it more broadly covers all disputes relating to such misconduct. The Amendment also defines “sexual assault dispute” as “a dispute *involving* a nonconsensual sexual act or sexual contact.”<sup>81</sup> The term “involving” in the definition of a sexual assault dispute appears to convey the same meaning as “relates to” in the definition of a sexual harassment dispute. For example, suppose one survivor suffers a reduction in pay as retaliation for complaining about sexual harassment from a manager, and a different

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<sup>79</sup> Preclusion concerns are explored in more detail in Part III.C.2 of this Article.

<sup>80</sup> 9 U.S.C. § 401 (emphasis added).

<sup>81</sup> *Id.*

survivor suffers a reduction in pay as retaliation for complaining about sexual assault from a manager. One could reason that the reduction in pay for either person both “relates to” and “involves” sexual harassment and assault. Although using slightly different phrases, the definitions of a sexual harassment dispute and a sexual assault dispute appear to cover related claims within the scope of the Amendment. Moreover, the term “dispute” in the Amendment is arguably broader than a single, narrow claim or count in a lawsuit, and the term “dispute” may suggest a bundle of related claims.

Applying the Nexus View to the previous hypothetical involving four separate counts, a court would find that count one, the sexual harassment claim, is not subject to arbitration at the election of the survivor. However, a court would have to assess whether counts two, three, or four arise from a common nucleus of operative facts as the sexual harassment claim. Imagine the hypothetical four-count lawsuit involves allegations of intersectional harassment based on a worker’s gender and race.<sup>82</sup> For example, what if a manager engages in behavior with overlapping motives such that the harassment is both sexual and racial in nature? Under the Nexus View and borrowing from the body of law interpreting “case” for the purpose of § 1367, a court can find the claim of racial harassment as closely intertwined with the same facts as the claim of sexual harassment. Thus, under the Amendment, these claims are not subject to a predispute arbitration agreement.<sup>83</sup> Consider also the hypothetical state law wage claim. The wage claim may have factual connections with and relate to the claim for sexual harassment. For example, if the employer refuses to pay the employee proper overtime wages as retaliation for the employee’s refusal of sexual advances, a court could hold the Amendment’s scope covers the wage claim because it relates to the sexual harassment claim.<sup>84</sup> However, if the wage claim had no connection to the sexual harassment claim, the Amendment would not cover the wage claim.<sup>85</sup> As demonstrated by these examples, the analysis for the Nexus View is fact-specific. As explained below, the Nexus View represents the best interpretation of the Amendment.

### *C. Courts Should Adopt the Nexus View*

Although the Nexus View is not without problems, such as the possible costs and delays for a court to analyze and apply the Nexus View to a given situation, the Nexus

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<sup>82</sup> See generally Bowman Williams, *supra* note 63.

<sup>83</sup> Cf. *Gard v. Teletronics Pacing Sys., Inc.*, 859 F. Supp. 1349, 1353 (D. Colo. 1994) (applying 28 U.S.C. § 1367 and finding that age discrimination claim was related to sexual harassment claim because an important conversation between plaintiff and chief operating officer of the company was central to proving both claims).

<sup>84</sup> Cf. *Malphurs v. Cooling Towers Sys. Inc.*, 709 F. App’x. 935, 939 (11th Cir. 2017) (applying 28 U.S.C. § 1367 and concluding that sexual harassment claim and overtime wage claim were related because business owner forced employee to work overtime so that she would be alone with him in order to facilitate harassment, and she would not receive overtime payments unless she complied with owner’s sexual demands).

<sup>85</sup> Cf. *Shibetti v. Z Rest., Diner & Lounge, Inc.*, 478 F. Supp. 3d 403 (E.D.N.Y. 2020) (applying 28 U.S.C. § 1367 and concluding that sexual harassment claim and wage claim were not related); *Thomas v. EONY LLC*, No. 13-CV-8512 JPO, 2015 WL 1809085, at \*6 (S.D.N.Y. Apr. 21, 2015) (applying 28 U.S.C. § 1367 and concluding that sexual harassment claim and wage claim were not related because they involve a “significantly different sets of facts”).

View represents the best interpretation of the Amendment in light of the Amendment's legislative history, policy, and text.

### 1. Legislative History Supports the Nexus View

The legislative history of the Amendment contains remarks that, viewed in isolation, arguably lend support to each of the three different views regarding the proper scope of the Amendment.<sup>86</sup> However, the legislative history most directly supports the Nexus View.<sup>87</sup>

There are a few stray remarks in the legislative history that support the Narrow View. For example, Congresswoman Cheri Bustos, the original sponsor of the bill in the House of Representatives, spoke in favor of the bill and described the scope of the bill in very narrow terms: "This bill would simply void forced arbitration provisions as they apply to sexual assault and harassment *claims*."<sup>88</sup> Similarly, the House Report accompanying the bill describes the impact of § 402 as invalidating arbitration agreements with respect to sexual harassment or assault "disputes," as opposed to the arguably broader term "case."<sup>89</sup> Senator Chuck Grassley described the Senate version of the bill as "address[ing] an important issue: preventing employers from sweeping sexual assault or sexual harassment *claims* under the rug by enforcing mandatory arbitration agreements."<sup>90</sup> Additionally, Senator Joni Ernst suggested the Narrow View is correct: "Harassment and assault allegations are very serious and should stand *on their own*. The language of this bill should be *narrowly* interpreted."<sup>91</sup> Although these statements appear to support the Narrow View, they were not made in the context of discussing a hypothetical multi-count complaint with several different claims; these stray statements appear to be quick, rough summaries of the proposed legislation, without addressing the finer point of how to handle multiple claims. As a result, these isolated statements do not resolve the debate about the scope of the Amendment.

There are some statements from the legislative history suggesting the Broad View of the Amendment is correct. Senator Dianne Feinstein described the Amendment in broad terms as invalidating an arbitration agreement whenever a "case involves sexual assault or harassment."<sup>92</sup> A case may "involve" such a claim as long as the case includes such a claim. Furthermore, Senator Joni Ernst, whose other comments seemed to support a narrow view, gave an interesting example that demonstrates Broad View support:

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<sup>86</sup> Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (recognizing that examining legislative history can become an exercise in "looking over a crowd and picking out your friends") (citation omitted).

<sup>87</sup> The use of legislative history in interpreting a statute is not without controversy, but the legislative history can provide at least some guidance in construing the ambiguous language of the Amendment. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848–61 (1992).

<sup>88</sup> 168 CONG. REC. H353 (daily ed. Feb. 2, 2022) (statement of Rep. Cheri Bustos) (emphasis added).

<sup>89</sup> H.R. REP. NO. 117-234, at 19 (2022).

<sup>90</sup> Press Release, Chuck Grassley, Senator, Ranking Member, Senate Judiciary Committee, Grassley Statement in Support of Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (Nov. 4, 2021), <https://www.judiciary.senate.gov/grassley-statement-in-support-of-ending-forced-arbitration-of-sexual-assault-and-sexual-harassment-act> [hereinafter Grassley Press Release] (emphasis added).

<sup>91</sup> 168 CONG. REC. S625 (daily ed. Feb. 10, 2022) (statement of Sen. Joni Ernst) (emphasis added). *But see infra* notes 102–105 and accompanying text, where it becomes clear that Senator Ernst supports the Nexus View.

<sup>92</sup> 168 CONG. REC. S642 (daily ed. Feb. 10, 2022) (statement of Sen. Dianne Feinstein).

If an employment agreement contains a predispute arbitration clause and a sexual assault or harassment claim is brought forward in conjunction with another employment claim and the assault or harassment claim is later dismissed, a court should remand the other claim back to the arbitration system under this bill.<sup>93</sup>

Senator Ernst’s example provides for the arbitration of the non-assault or non-harassment claim *only after* the sexual assault or harassment claim is dismissed by the court. This particular example from Senator Ernst suggests as long as a viable claim of sexual harassment or assault remains in court, all the other claims in the lawsuit are initially exempt from arbitration. However, as explained below, other comments from Senator Ernst and comments from other members of Congress express a preference for the Nexus View.

When members of Congress expressly addressed the hypothetical of a multi-count complaint containing one claim for sexual assault or harassment, their statements in the legislative history tended to support the Nexus View as the correct interpretation of the Amendment’s scope.<sup>94</sup> Comparatively, remarks supporting the Broad or Narrow View do not refer to multi-count complaints. For example, Senator Kirsten Gillibrand, the sponsor of the bill in the Senate, adopted the Nexus View with the following remark: “[T]his bill allows any conduct alleging a violation of those laws, *and any claims related to such conduct*, to move forward together in one case.”<sup>95</sup> Similarly, Senator Lindsey Graham specifically addressed multiple-count issues in discussing the bill:

We do not intend to take *unrelated* claims out of the contract . . . . If lawyers try to game the system, they are acting in bad faith. They could be subject to disciplinary proceedings by courts. What we are not going to do is take *unrelated* claims out of the arbitration contract. So if you have got an hour-and-wage dispute with the employer, you make a sexual harassment, sexual assault claim, the hour-and-wage dispute stays under arbitration unless it is *related*. That is the goal. I hope people won’t game the system . . . .<sup>96</sup>

In his remarks, Senator Graham adopted the Nexus View. According to Senator Graham, if there is a wage claim asserted together with a sexual harassment claim, the wage claim may stay in court as long as it is related to the harassment claim. Such relatedness may exist, for example, if the failure to pay wages is in retaliation for the survivor’s complaining about the harassment.

Senator Kirsten Gillibrand also confirmed the Amendment embodies the Nexus View:

The bill plainly reads, which is very relevant to Senator ERNST’s concerns, that only disputes that relate to sexual assault or harassment conduct can escape the forced arbitration clauses. “That relate to” is in the text . . . . But it is—and this is important to Senator GRAHAM and I—it is essential that

<sup>93</sup> 168 CONG. REC. S625 (daily ed. Feb. 10, 2022) (statement of Sen. Joni Ernst).

<sup>94</sup> See *infra* notes 95–111.

<sup>95</sup> 168 CONG. REC. S642 (daily ed. Feb. 10, 2022) (statement of Sen. Kirsten Gillibrand) (emphasis added).

<sup>96</sup> 168 CONG. REC. S625 (daily ed. Feb. 10, 2022) (statement of Sen. Lindsey Graham) (emphasis added).

all the claims related to the sexual assault or harassment can be adjudicated at one time for the specific purpose that Senator ERNST is well aware of. We don't want to have to make a sexual assault or harassment victim relive that experience in multiple jurisdictions. So we want to be able to deal with all the harassment-and assault-related claims in one goal . . . To ensure that a victim is able to realize the rights and protections intended to be restored to her by this legislation, all of the related claims will proceed together.<sup>97</sup>

Senator Gillibrand finds support for the Nexus View in the text of the Amendment. In focusing on “relate to,” she may have been referring to language in § 402(a).<sup>98</sup> Supporting the Nexus View, she also quotes the definitions of sexual harassment and sexual assault from § 401:

The language of the bill specifically states that “the term ‘sexual harassment dispute’ means a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law,” and “the term ‘sexual assault dispute’ means a dispute involving a nonconsensual sexual act or sexual conduct.”<sup>99</sup>

Senator Gillibrand adopted the Nexus View based on the text of the Amendment and her concern that splitting related claims would make survivors relive their experience of sexual assault or harassment twice, in court and in arbitration.

Representative Jerrold Nadler also made statements supporting the Nexus View. Representative Nadler noted the definitions found in the Amendment make it “clear that anything related to sexual harassment or assault as currently defined by law is covered by this bill.”<sup>100</sup>

<sup>97</sup> 168 CONG. REC. S627 (daily ed. Feb. 10, 2022) (statement of Sen. Kirsten Gillibrand).

<sup>98</sup> 9 U.S.C. § 402(a) (“[N]o predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and *relates to* the sexual assault dispute or the sexual harassment dispute.”) (emphasis added). In mentioning the phrase “relate to,” she may have been referring to, additionally or in the alternative, language appearing in the definition of sexual harassment found in 9 U.S.C. § 401.

<sup>99</sup> 168 CONG. REC. S627 (daily ed. Feb. 10, 2022) (statement of Sen. Kirsten Gillibrand).

<sup>100</sup> 168 CONG. REC. H992 (daily ed. Feb. 10, 2022) (statement of Rep. Jerrold Nadler). The original version of the bill had a different definition of sexual harassment dispute, although this original definition contains the phrase “relating to”:

The term ‘sexual harassment dispute’ means a dispute *relating to* the any of the following conduct directed at an individual or a group of individuals:

- (A) Unwelcome sexual advances.
- (B) Unwanted physical contact that is sexual in nature, including assault.
- (C) Unwanted sexual attention, including unwanted sexual comments and propositions for sexual activity.
- (D) Conditioning professional, educational, consumer, health care or long-term care benefits on sexual activity.
- (E) Retaliation for rejecting unwanted sexual attention.

H.R. 4445, 117th Cong., § 401(4) (2021) (emphasis added).

The definition ultimately adopted states the following: “The term ‘sexual harassment dispute’ means a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or

Although Senator Joni Ernst made statements that appear to support the Narrow View or Broad View,<sup>101</sup> she specifically spoke in favor of the Nexus View. On February 9, 2022, Senator Ernst met with Senators Chuck Schumer and Lindsey Graham to discuss the bill and agreed to clarify the intent of the bill.<sup>102</sup> On February 10, 2022, Senator Ernst said the following on the floor of the Senate about their meeting:

During our meeting, my colleagues agreed with me that this bill should not be the catalyst for destroying predispute arbitration agreements in all employment matters. Specifically, we agreed that harassment or assault claims should not be joined to an employment claim *without a key nexus*. . . . [The language of the bill] should not be used as a mechanism to move employment claims that are *unrelated* to these important issues [of sexual harassment and assault] out of the current system. These clarifications are needed.<sup>103</sup>

Senator Ernst spoke of the perceived need for “clarifications”<sup>104</sup> of legislative intent, implicitly admitting that the Amendment is subject to different interpretations because its current text is not clear. Senator Ernst explained, “[m]y hope is that the legislative intent of this bill reflects the conversation with my colleagues discussed here today,” and she warned that if litigants tried to game the system to avoid arbitration, Senators Schumer and Graham pledged to work with her “on a bipartisan bill to further codify the intent and language of this bill.”<sup>105</sup>

Representative Bobby Scott also recognized this confusion regarding the scope of the Amendment, which he described as “one of the most problematic issues” with the Amendment.<sup>106</sup> He gave the example of a harassment survivor who also may “experience other negative employment actions related to the sexual harassment such as a demotion, unfavorable job transfer, reduction in pay, or other retaliatory conduct.”<sup>107</sup> Representative Scott said:

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State law.” 9 U.S.C. § 401. This change from the original definition helped clarify that the Amendment was not altering substantive laws regarding harassment. 168 CONG. REC. H992 (daily ed. Feb. 10, 2022) (statement of Rep. Ken Buck); *id.* (statement of Rep. Jerrold Nadler). Congressman Nadler stressed that the change in definition also helped support the Nexus View and ensured that related claims would be covered by the Amendment. *Id.*

<sup>101</sup> See sources cited *supra* notes 91, 93 and accompanying text.

<sup>102</sup> 168 CONG. REC. S625 (daily ed. Feb. 10, 2022) (statement of Sen. Joni Ernst); 168 CONG. REC. S628 (daily ed. Feb. 10, 2022) (statement of Sen. Chuck Schumer); 168 CONG. REC. S620 (daily ed. Feb. 10, 2022) (statement of Sen. Chuck Schumer).

<sup>103</sup> 168 CONG. REC. S625 (daily ed. Feb. 10, 2022) (statement of Sen. Joni Ernst).

<sup>104</sup> *Id.* In light of Senator Ernst’s clarifications, her hypothetical involving the multi-count complaint where the sexual harassment or assault claims are dismissed, see *supra* note 94 and accompanying text, should be interpreted as a hypothetical where all the claims asserted are related under the Nexus View. In other words, all the claims in the lawsuit in Senator Ernst’s hypothetical would initially proceed in court since they are related, but if the sexual assault or harassment claim is dismissed first, Senator Ernst believes that the other claims should be immediately sent to arbitration.

<sup>105</sup> *Id.* Interestingly, before the original FAA was enacted, there was a similar sentiment that the FAA should be passed immediately, and the FAA could be subsequently amended after its enactment if the text of the statute became problematic. 1924 *Hearings*, *supra* note 20, at 20, 21 (letters from Herbert Hoover).

<sup>106</sup> 168 CONG. REC. H991 (daily ed. Feb. 7, 2022) (statement of Rep. Bobby Scott).

<sup>107</sup> *Id.*



[t]he language in [the bill] fails to specifically state whether there is coverage of these cases, i.e., whether . . . negative employment action cases related to the sexual harassment would go to court as one case or whether these cases would have to be bifurcated such that the sexual harassment case would go to court, but the . . . related case would be forced into arbitration.<sup>108</sup>

After recognizing this ambiguity in the Amendment’s text, Representative Scott expressed his support of the Nexus View.<sup>109</sup> He believed the scope of the Amendment should cover related claims because bifurcating and sending the related claims into arbitration causes “unnecessary expense and an administrative burden” on the parties.<sup>110</sup> However, he admitted, “regrettably the bill, as drafted, does not foreclose that possibility” of the Narrow View, whereby related claims would be bifurcated and sent to arbitration.<sup>111</sup>

Thus, members of Congress acknowledged the Amendment’s ambiguity, and an earlier bill clearly adopting the Nexus View demonstrates Congress could have easily corrected this ambiguity. However, Congress considered and rejected this clearer language.<sup>112</sup> In April 2021, Representative Debbie Lesko introduced a bill, known as “Carrie’s Law,” which provided “a predispute arbitration agreement shall have no force or effect with respect to a sexual assault claim.”<sup>113</sup> In a section titled “Related Claims,” the bill further stated the arbitration agreement has no effect for any other related claim “asserted by a sexual assault victim that is based upon that sexual assault.”<sup>114</sup> The bill went on to explain courts would enforce the arbitration agreement with respect to related claims in the event the sexual assault claims were later dismissed with prejudice.<sup>115</sup> Based on this rejected bill, Congress knew to address the issue of related claims in the text of any bill. However, Congress chose not to use similar language in adopting the Amendment. Some may construe this rejected bill as suggesting that Congress intended to reject the Nexus View.

Although a few remarks in the legislative history are suggestive of the Broad or Narrow Views, legislators did not make these remarks in the context of addressing the particular situation of a multi-count complaint with related claims. Public statements by members of Congress about multi-count complaints demonstrate support for the Nexus View. Unfortunately, the Amendment contains ambiguities, which members of Congress

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Drafting history can be a useful tool of statutory construction. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987) (“Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language.”) (quoting *Nachman Corp v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 392–93 (1980) (Stewart, J., dissenting)); *F.A.A. v. Cooper*, 566 U.S. 284, 305 (2012) (Sotomayor, J., dissenting) (referring to “drafting history” as part of the “traditional tools of statutory construction”); *but see Hamdan v. Rumsfeld*, 548 U.S. 557, 668 (2006) (Scalia, J., dissenting) (“[D]rafting history is no more legitimate or reliable an indicator of the objective meaning of a statute than any other form of legislative history.”).

<sup>113</sup> H.R. 2906, 117th Cong. (2021).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

recognized. An earlier bill adopting the Nexus View raises a question of whether Congress intended to circumvent that resolution. Courts will be left to sort out the correct interpretation of the Amendment, but as explained below, the text and policy behind the Amendment suggest the Nexus View is the best interpretation.

## 2. The Text and Policy of the Amendment Support the Nexus View

Textually, the Nexus View represents the best interpretation. The Amendment declares that predispute arbitration agreements are not enforceable or valid for a certain type of “case.”<sup>116</sup> Immediately following the word “case” is the following subordinate, adjectival clause: “which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.”<sup>117</sup> This clause modifies the word “case” in two ways.<sup>118</sup> First, the Amendment operates only if there is a “case which is filed under Federal, Tribal, or State law.”<sup>119</sup> Second, the case must be one that “relates to” a sexual assault dispute or sexual harassment dispute.<sup>120</sup> The Amendment embodies a power of invalidation insofar as, or to the degree that, a case “relates to” sexual assault or harassment disputes.<sup>121</sup> All other claims in a lawsuit that arise from the same common facts as a sexual assault or sexual harassment claim arguably form part of the same case and “relate to” such claims. Thus, the scope of the Amendment or its invalidation power should cover any count or claim that overlaps factually with a claim for sexual assault or harassment. This Nexus View approach takes into account each word in the Amendment, and each word is interpreted in a reasonable manner.

The Broad View suffers from drawbacks and is inconsistent with the text and policy of the Amendment. Under the Broad View, claims with no connection to sexual assault or sexual harassment would be exempt from arbitration, as long as such claims were asserted in a lawsuit that included a count for sexual harassment or assault. Textually, Congress did not draft the Amendment broadly to cover such unrelated claims or an entire case that merely includes one count or claim of sexual harassment or assault.<sup>122</sup> The Broad View ignores the limitation created by the phrase “relates to;” an unrelated claim should not fall under the scope of the Amendment. Also, parties may attempt to game the system with the Broad View. Suppose a party has a valid wage claim or breach of contract claim that has nothing to do with sexual harassment or assault, and further suppose that an arbitration agreement covers such a claim. Normally, the party would have to arbitrate such a wage claim or contract claim. Through the Broad View, if the party with the contract claim alleges an unrelated sexual harassment incident, the obligation to arbitrate the unrelated wage claim suddenly vanishes. Such a broad exemption from arbitration for every type of

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<sup>116</sup> 9 U.S.C. § 402(a).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> If Congress wanted to adopt the Broad View, Congress could have used language such as the following: “No predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and contains a sexual assault claim or a sexual harassment claim.” The Broad View fails to give proper weight to the restrictive phrase “relates to,” and the Broad View also ignores the special meaning of the word “case,” which covers a bundle of related claims.

claim, even claims unrelated to sexual assault or harassment, conflicts with the purpose or policy of the Amendment. There is no need to provide increased transparency, a public forum, and greater procedural protections for such a contract claim that has nothing to do with sexual assault or harassment.

The Narrow View is equally problematic. Congress did not narrowly draft the text of the Amendment to focus solely on a sexual harassment or assault claim.<sup>123</sup> The Narrow View ignores the terms “case” and “relates to” in the Amendment and would require arbitration of claims that factually overlap with a sexual harassment or assault claim. Different policies supporting the Nexus View, such as transparency, efficiency, and protecting the survivor from recounting their experience in multiple forums, counsel against adopting the Narrow View.<sup>124</sup> Under the Narrow View, claims that are factually related to the harassment or assault would be sent to arbitration, so there could be less transparency regarding the facts underlying the harassment or assault. Full transparency is important for such claims because transparency would help create punitive and deterrent effects by informing the public of the perpetrator’s conduct. Additionally, establishing these related facts in two different forums is inefficient and causes survivors to relive their trauma in two separate proceedings.

The Narrow View also raises policy concerns regarding preclusion. Under the Narrow View, related claims would go to arbitration while the sexual assault or harassment claims remain in court. With the speed of arbitration, the related claims would likely be resolved before the court proceeding ends. Recall that related claims will likely share a common nucleus of operative fact with the sexual assault or harassment claims. Thus, the arbitrator may have already determined certain key facts relevant to the assault or harassment claims pending in court. It is possible such factual determinations would be binding on the court. Courts have allowed issue preclusion, whereby courts treat issues as automatically established based on findings from earlier proceedings, to include earlier arbitration proceedings.<sup>125</sup> The precise contours of issue preclusion in the context of arbitration are subject to discretion,<sup>126</sup> but the possibility of issue preclusion arising from a prior arbitration proceeding exists if courts adopt the Narrow View.

If issue preclusion occurs in this setting under the Narrow View, whereby a court hearing a sexual harassment or assault claim is bound by relevant factual findings from the prior arbitration of related claims, then use of issue preclusion undermines the goals of the Amendment. The Amendment aims to give survivors access to the procedural protections available in court to prove and establish their claims, such as broad discovery rights and

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<sup>123</sup> If Congress wanted to adopt the Narrow View, Congress could have used language such as the following: “No predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a sexual assault claim or a sexual harassment claim.”

<sup>124</sup> See *supra* Part II.

<sup>125</sup> See, e.g., *Manganella v. Evanston Ins. Co.*, 700 F.3d 585, 591 (1st Cir. 2012) (affirming lower court’s finding of issue preclusion based on prior arbitral award); *Crowley Mar. Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 931 F.3d 1112, 1128 (11th Cir. 2019) (applying issue preclusion to prior arbitral award).

<sup>126</sup> Courts generally have discretion in applying issue preclusion based on prior arbitral awards because there may be some difficulties in applying these principles, particularly due to the differences between arbitration and litigation. See, e.g., *Manganella*, 700 F.3d at 591 (recognizing that issue preclusion may not be appropriate where the arbitrator did not issue a reasoned opinion so that it is difficult to assess what the arbitrator determined); *Jacobs v. CBS Broad., Inc.*, 291 F.3d 1173, 1179 (9th Cir. 2002) (arbitral proceeding was not entitled to preclusive effect because of lack of procedural safeguards, such as the ability to cross-examine witnesses).

appellate rights not available in arbitration.<sup>127</sup> Such procedural rights are theoretically available for sexual harassment or assault claims pending in court. However, under the Narrow View, where related claims are heard and resolved through a speedy arbitration proceeding, survivors may lose such procedural benefits if critical, relevant factual findings are established through arbitration with limited discovery and other procedural rights. Also, if the Narrow View controlled, survivors would have to present their testimony or evidence regarding related claims in the confidential setting of arbitration. Thus, society would lose transparency and public accountability benefits from the Amendment. The Amendment aimed to allow the presentation of critical testimony and evidence openly in courts. If critical factual findings determined in arbitration take automatic effect for the court proceeding through issue preclusion, such testimony and evidence may not be presented in open court at all. Under the Nexus View, however, all related claims (and all their related factual findings) would be heard in court, thereby avoiding issue preclusion.

In terms of application, the Broad and Narrow Views are easier for a court to administer because either all claims in a lawsuit remain in court (under the Broad View) or only the sexual assault or harassment claims remain in court (under the Narrow View). To apply the Nexus View, a court would assess whether claims are sufficiently related, which involves more time and resources than the alternatives.<sup>128</sup> However, federal courts are already accustomed to a similar relatedness analysis when applying the supplemental jurisdiction statute, which requires courts to consider whether claims are factually related.<sup>129</sup> Similarly, both state and federal courts administer joinder rules that rely to some extent on whether two claims are factually related.<sup>130</sup> Although the Nexus View may require an extra step, a court's administration of the Nexus View is not overly burdensome since courts are already accustomed to similar analyses.

The Nexus View represents the best and most literal interpretation of the Amendment. The legislative history and policies behind the Amendment also weigh in favor of adopting the Nexus View. As explained above, when members of Congress discussed multi-count complaints, they tended to favor the Nexus View.<sup>131</sup> Additionally, different policies, such as transparency, efficiency, and protecting the survivor from having to recount and relive their trauma in multiple forums, support advocating for the Nexus View.

#### IV. BEYOND ITS AMBIGUOUS SCOPE: ADDITIONAL PROBLEMS WITH THE AMENDMENT

As discussed above, the scope of the Amendment is ambiguous and is subject to at least three interpretations. This Article argues the Nexus View, consistent with the

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<sup>127</sup> For a discussion of some limitations with arbitration and why arbitration is not appropriate for sexual harassment or assault claims, *see supra* notes 47–56 and accompanying text.

<sup>128</sup> But such an assessment may not be required in all cases. It seems that if the relatedness of claims is obvious and uncontested, a court may not have to require briefing or argument from the parties or engage in a detailed analysis.

<sup>129</sup> *See, e.g., supra* notes 76–78.

<sup>130</sup> *See, e.g., State Farm Fire & Cas. Co. v. Super. Ct.*, 53 Cal. Rptr. 2d 229, 241 (Cal. App. 2d Dist. 1996), *abrogated by Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527 (Cal. 1999) (assessing whether claims were factually related to determine if they were properly joined in a lawsuit); N.Y. C.P.L.R. 1002 (MCKINNEY 1963); FED. R. CIV. P. 20.

<sup>131</sup> *See supra* notes 95–111 and accompanying text.

legislative intent, policy goals, and plain text, represents the best approach. However, the Amendment also gives rise to other issues. First, there are some interpretative problems for special situations involving timing, settlements, and the dismissal of the sexual assault or harassment claims. Second, the Amendment does not address how drafting parties should implement the Amendment. Third, it is not clear how the Amendment applies in the labor context in connection with collective bargaining agreements or in situations where the FAA does not apply. Finally, the Amendment, as applied to state law claims in state court proceedings, may be unconstitutional.

#### A. *Predispute or Postdispute?*

There are a few special situations that give rise to interpretative questions about how the Amendment operates. For example, suppose a worker is subject to an incident of sexual harassment or assault on June 1st, or over an extended period of time. Next, suppose the human resources department or a manager learns about the incident and gets involved to address the harassment or assault. Perhaps, the human resources department fires the perpetrator and asks the survivor, who may not be represented by counsel, to sign paperwork containing an arbitration clause.<sup>132</sup> What happens when an arbitration clause is implemented after a sexual harassment or assault occurs?

The Amendment is drafted to cover and invalidate *predispute* arbitration agreements.<sup>133</sup> However, the example above describes forming an arbitration agreement *after* the incident occurred. If a court construes the agreement as a postdispute arbitration agreement, the Amendment has no effect on the validity or enforceability of the arbitration agreement.<sup>134</sup> Such a result would be contrary to the spirit of the Amendment.

As a variation on the above hypothetical, imagine a survivor of sexual harassment or assault complains about the incident and then enters into a postdispute settlement agreement with an arbitration clause. What happens if there is a subsequent dispute about the settlement terms? Perhaps one party allegedly breaks a strict confidentiality clause in the settlement agreement by speaking out or releasing information about the sexual harassment or assault. Alternatively, perhaps a party defaults by not making payments required by a settlement agreement. Would the Amendment apply and invalidate the arbitration clause found in the settlement agreement? The arbitration clause is both a pre-dispute agreement with respect to the breach of the settlement terms and a postdispute agreement with respect to the sexual assault or harassment. On one hand, a court may say such an arbitration agreement is invalid under the Amendment because the Amendment

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<sup>132</sup> Perhaps the workplace never had an arbitration agreement in place before the incident. Or perhaps there was a prior arbitration agreement, but the worker is asked to sign a new arbitration agreement that is updated and designed to supersede all prior agreements. In this hypothetical where the human resources department is getting involved after an incident, the postdispute arbitration agreement could be a standalone agreement, or maybe part of another agreement, such as a settlement agreement of any claims against the company arising from the incident, an agreement to provide counseling services regarding the incident, or an agreement to maintain confidentiality about the incident.

<sup>133</sup> 9 U.S.C. § 402.

<sup>134</sup> A postdispute arbitration agreement may be invalid and unenforceable based on contractual defenses under § 2 of the FAA. *See, e.g.,* Hensiek v. Bd. of Dirs. of Casino Queen Holding Co., 514 F. Supp. 3d 1045 (S.D. Ill. 2021) (arbitration clause not valid because modification of prior agreement requires consideration, and consideration for modification was lacking). However, the Amendment by its terms does not apply to postdispute arbitration agreements.

declares predispute arbitration agreements as invalid for cases relating to sexual harassment or assault. This hypothetical still relates to sexual harassment (such as whether the confidentiality terms of the settlement agreement allow for a party to speak about a sexual harassment). From one angle, the arbitration agreement is predispute since the parties made the agreement before the dispute about the alleged breach of these confidentiality terms, which in turn relate to the underlying harassment.<sup>135</sup> On the other hand, the Amendment arguably does not apply because the dispute may be construed as relating solely to a breach of contract (the settlement agreement) and confidentiality obligations or payment obligations, not sexual harassment. Courts have yet to resolve how the Amendment applies to these settlement or timing issues.<sup>136</sup> But there is some precedent from an analogous situation suggesting that the dispute over a breach of a settlement term is merely a breach of contract, and not a dispute related to the underlying claim which was settled.<sup>137</sup>

### *B. Dismissal of the Anchor Claim*

Under the Nexus View, the preferred approach advocated by this Article, a sexual harassment or sexual assault claim operates like a hook or anchor for the related claims to foreclose application of an arbitration clause. For example, imagine that a court, applying the Nexus View, hears a sexual harassment claim along with related claims, such as a racial discrimination claim and wage claim that factually overlap with the sexual harassment claim. In the event that the sexual harassment claim is the first claim to be dismissed in court, perhaps because the claim is settled, dismissed for failure to state a claim, or dismissed on partial summary judgment, it is unclear what would happen to the remaining related claims.<sup>138</sup>

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<sup>135</sup> The Amendment defines predispute arbitration agreement as “any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement.” 9 U.S.C. § 401. Note that this particular definition does not mention sexual harassment or assault; in other words, it is not clear that the dispute for the purpose of determining whether an agreement is predispute or postdispute must refer to a sexual assault or harassment. There could be a dispute about confidentiality terms, and the dispute arises after the formation of the agreement, even if the assault or harassment occurred prior to the agreement. Such post-agreement dispute can still relate back to earlier, pre-agreement assault or harassment. Thus, one can argue that literally, there is a predispute arbitration agreement, and under the Amendment, it is invalid with respect to a case related to an earlier sexual harassment or assault.

<sup>136</sup> A similar problem may arise if a victim leaves a job and signs a severance agreement. Maybe the victim no longer feels comfortable at the job and signs a severance agreement before leaving, without complaining about the sexual harassment or assault. If the severance agreement contains a broad arbitration provision, there could be uncertainty regarding the application of the Amendment. If the victim decides to later sue for the sexual harassment or assault, it seems that the arbitration agreement would be considered a postdispute agreement and be fully enforceable without running afoul of the Amendment. But if the victim is suing for a subsequent breach of the severance agreement, and if the breach somehow relates to the sexual harassment or assault, one could argue that the Amendment invalidates this agreement. The agreement may be considered a predispute agreement if the breach of the severance terms happened after the agreement was formed. However, if a court characterizes the dispute as related to the severance terms and not the earlier sexual harassment or assault, the Amendment would not apply.

<sup>137</sup> *Cf. Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994) (“Enforcement of the settlement agreement, however, whether through award of damages or decree of specific performance, is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction.”).

<sup>138</sup> The particular problem of what to do with the other claims if the sexual harassment or assault claim is dismissed arises under both the Nexus and Broad Views.

The legislative history is sparse and conflicting on this point. Senator Joni Ernst, on the matter, said if “the assault or harassment claim is later dismissed, a court should remand the other claim back to the arbitration system under this bill.”<sup>139</sup> Senator Richard Durbin took the opposite view, explaining that all claims related to a sexual assault or harassment claim would remain in court, and “the bill does not require dismissal of some claims in the case if other claims are not ultimately proven.”<sup>140</sup>

The text of the Amendment does not clarify this situation. In one view, the Amendment sets forth a certain invalidation power, and the Amendment neither reverses the invalidation power once exercised nor resurrects arbitration agreements once deemed invalid and unenforceable. Thus, one could argue that courts should always retain related claims even when the anchor claim of sexual assault or harassment is dismissed. Alternatively, one can argue that if the anchor claim is dismissed, the Amendment may lose its force because there no longer exists a “case which is filed” and related to an anchor claim.<sup>141</sup> If the anchor claims are dismissed, one could argue a court should always send related claims immediately to arbitration. The rejected bill known as Carrie’s Law, a precursor to the Amendment, explicitly addressed this dismissal problem by directing courts to send related claims to arbitration if they dismissed the sexual harassment or assault claim with prejudice.<sup>142</sup> Thus, Congress knew how to address this specific problem, but failed to do so in the Amendment.

The Amendment does not provide clear guidelines for when the anchor claim is dismissed. If the anchor claim of sexual assault or harassment is dismissed with prejudice before other claims, at least three possible outcomes with respect to related claims exist: (a) automatically send the related claims to arbitration; (b) automatically retain the related claims in court; or (c) give the court discretion whether to retain the related claims or send the related claims to arbitration. The author prefers retaining the related claims in court.

Automatically sending the remaining claims to arbitration if the assault or harassment claim is dismissed is problematic. For example, suppose the anchor claim of assault is dismissed on summary judgment after extensive discovery, such as multiple depositions, has been completed. The extensive discovery that has already occurred probably would not have been allowed in arbitration, and it is not clear whether such extensive discovery can be used in arbitration. Such prior litigation would seem to undercut the benefits of simplified arbitration proceedings. Furthermore, if an anchor claim of assault or harassment is dismissed after summary judgment, or late in the litigation process, the judge is already familiar with the matter to continue hearing the related claims, whereas an arbitrator would have to start from the beginning. Keeping related claims together in open court, with broad procedural protections and transparency, is consistent with the Amendment’s goals. Recall that under the Nexus View, related claims tend to involve the same facts as the sexual harassment or assault claims, such as whether an inappropriate touching occurred or whether inappropriate statements were made. Forcing arbitration for these sensitive, related matters would undermine the transparency and broader protections arising from the Amendment. Thus, policy considerations support retaining related claims

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<sup>139</sup> 168 CONG. REC. S625 (daily ed. Feb. 10, 2022) (statement of Sen. Joni Ernst).

<sup>140</sup> 168 CONG. REC. S626 (daily ed. Feb. 10, 2022) (statement of Sen. Richard Durbin).

<sup>141</sup> 9 U.S.C. § 402.

<sup>142</sup> H.R. 2906, 117th Cong. (2021).

in court, and courts are justified in continuing to hear related claims, even if anchor claims are dismissed.

Suppose the anchor claim is dismissed because a court finds it is undisputed that the acts underlying the harassment or assault did not occur. In this scenario, the policies behind the Amendment, such as protecting survivors with broad procedural protections in court and avoiding their having to relive the incident in two different proceedings, are diminished. Nevertheless, a court may still find that efficiency and economy justify the court's retention of related claims since the court is familiar with the situation. As a practical matter, proceeding with litigation over arbitration may not make much of a difference in the outcome of the case; however, the related claims based on the same factual scenario are likely to fail if they are based on the same underlying alleged acts.

Suppose the anchor claim is settled while formal discovery is in process. Perhaps one party has nearly completed discovery, having taken a few depositions, and engaged in extensive document requests, while the other party still has significant discovery to accomplish. Sending related claims to arbitration with such discovery asymmetry may unfairly benefit one party because the other party may not be able to continue with discovery since discovery tends to be more limited in arbitration. Keeping related claims in court would avoid this imbalance.

A blanket rule keeping all related claims in court, regardless of what happens to the anchor sexual harassment or assault claim, would be easy to administer. However, if courts are uncomfortable with such a rule, a compromise could give courts discretion to keep the related claims or send them to arbitration once an anchor is dismissed. Similar discretion exists in federal court in connection with supplemental subject matter jurisdiction under 28 U.S.C. § 1367(c)(3). Under this provision, a federal court has discretion to keep or dismiss state law claims when the main claim over which the federal court has original jurisdiction is dismissed. As demonstrated by § 1367(c)(3), Congress knows how to draft provisions to give judges discretion to dismiss or retain related claims when the main anchor claim has been dismissed, but such language regarding discretion does not appear in the Amendment.<sup>143</sup> Giving a court discretion to keep the related claims or send them to arbitration allows the court to account for different scenarios, such as whether significant discovery has taken place for one party or whether the anchor claim is dismissed for lack of factual support. Unfortunately, the text of the Amendment neither directly addresses this situation nor provides for such discretion.

In sum, the Amendment does not clearly provide guidance for when the anchor claim is dismissed or settled before other claims in a suit. One view, preferred by the author, is that a court must retain the related claims because the Amendment does not provide for the resuscitation of an arbitration agreement already declared invalid and unenforceable. Thus, keeping related claims in court would best advance the policies underpinning the Amendment. Another view is that a court must dismiss the related claims because the Amendment only operates to prevent arbitration if there is an ongoing case related to a sexual harassment or assault claim, and no such case exists if a court declares that the

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<sup>143</sup> Perhaps, Congress was hesitant to provide discretion or factors to consider when exercising discretion because Congress would, in effect, be regulating state court judges in administering proceedings, and as explained below, *see supra* Part IV.E., there are constitutional concerns with how the Amendment may operate in state court.



sexual harassment or assault claims are not valid. With better drafting, Congress could have addressed and solved this problem. However, courts are instead left to their own devices.

### *C. How Should Parties Implement the Amendment?*

Arbitration agreements that predate the Amendment may be broad in scope and cover all potential disputes between two parties. However, it is unclear whether parties need to modify their existing arbitration agreements to comply with the Amendment and explicitly recognize the exceptions created by the Amendment. The Amendment does not address implementation procedures. Ideally, parties will modify their arbitration agreements to expressly address new exceptions established by the Amendment. One solution is to include a carefully drafted carve-out from the arbitration clause, establishing the scope of the arbitration clause to cover all potential disputes between parties, except sexual harassment and sexual assault disputes as set forth in the Amendment. Especially in consumer or employment settings where there is likely to be an imbalance of power, a fair arbitration clause would notify parties of their right to pursue sexual harassment or sexual assault claims in court.

While the Amendment focuses on and restricts predispute arbitration agreements, nothing in the Amendment directly addresses other forms of dispute resolution. If a company is revising its arbitration agreement for its workers or consumers to address the Amendment, the company may consider incorporating other forms of dispute resolution for sexual harassment or assault claims. For example, an agreement may establish a multi-step process to deal with allegations of sexual harassment or assault, such as requirements to report the incident, requirements to have informal discussions with someone at the company responsible for overseeing such incidents, and, or mediation. The Amendment aims to protect the right to sue in court so that a case may be “filed.”<sup>144</sup> Contractual preconditions, such as a requirement to report incidents to a supervisor or engage in informal mediations or negotiations, may interfere with or undermine the purpose of the Amendment in providing a public, transparent forum with robust procedural protections. For example, suppose a company policy contractually requires survivors of sexual harassment or assault to report the incident to one person in charge at the company before filing a lawsuit, and these contractual requirements also impose strict confidentiality provisions while the company is investigating or engaging in informal negotiations regarding the incident. It is possible for a court to dismiss a case filed in court if the survivor does not comply with such contractual preconditions,<sup>145</sup> or a court may find that such preconditions undermine the purpose or objectives of the Amendment and are thus invalid.<sup>146</sup>

Another consideration in drafting a new arbitration agreement to comply with the Amendment is whether the arbitration agreement should attempt to address the different views of the Amendment discussed above. Suppose courts in a particular jurisdiction adopt the Narrow View and send related claims to arbitration. A drafting party, if it so desires,

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<sup>144</sup> 9 U.S.C. § 402.

<sup>145</sup> *See, e.g.,* Hathaway v. Zoot Enters., Inc., 498 P.3d 204, 208 (Mont. 2021) (dismissing worker’s wrongful discharge claim for failure to exhaust company’s internal grievance procedures); Berkowitz v. Pres. & Fellows of Harv. Coll., 789 N.E.2d 575, 586 (Mass. App. Ct. 2003) (dismissing professor’s complaint for failure to comply with university’s internal grievance procedures).

<sup>146</sup> *Cf.* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (FAA preempts state laws that stand as obstacles to the FAA’s purposes or objectives).

may try to contract around the Narrow View, in effect implementing the Nexus View through the arbitration agreement. For example, an arbitration agreement may provide that if a court declares the arbitration agreement as invalid and unenforceable for a sexual harassment or assault dispute, any related claims are not subject to arbitration.<sup>147</sup> Parties could also attempt to contractually address what should occur if the anchor claims of sexual harassment or assault are dismissed first.

It is problematic for companies to avoid the Amendment in their arbitration agreements. The Amendment operates to protect workers and consumers who are survivors of sexual harassment and assault. If companies retain their old, broadly drafted arbitration agreements and fail to modify such preexisting agreements to include an explicit exception implementing the Amendment, a consumer or worker who experiences a sexual harassment or assault may not be aware they have the right to go to court. As a practical matter, employers or companies generally draft arbitration agreements and present them to workers or consumers on a take-it-or-leave-it basis. To best fulfill the goals of the Amendment, drafting parties should have an obligation to redraft their old arbitration clauses and notify workers and consumers that sexual harassment and assault claims—and related claims—are no longer covered by the arbitration clause. Suppose an attorney or company executive reasons as follows: “I know this broad arbitration clause cannot automatically apply to sexual harassment or assault claims because of the Amendment, but I don’t want to tell our workers or consumers about this new exception. I want our workers or consumers to believe they can’t sue the company for anything, including such harassment or assault claims. Let the worker or consumer become aware of the Amendment and raise the Amendment if the situation arises. I will draft this arbitration agreement to give the impression that the consumer or worker must arbitrate all claims, including sexual harassment or assault claims.” Attorneys who draft such arbitration agreements may act in bad faith and unethically.<sup>148</sup> Moreover, if an employer or company knowingly attempts to implement a misleading or false arbitration agreement,<sup>149</sup> such an agreement may be invalid on the grounds of fraud, which is a generally applicable contract defense under § 2 of the FAA.<sup>150</sup> Furthermore, an employer who knowingly drafts a misleading or false arbitration agreement giving the impression that sexual harassment claims are not subject to litigation may be in violation of civil rights laws. One can argue such an employer is

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<sup>147</sup> Contracting around the different views may not always be possible. For example, if a jurisdiction follows the Nexus View, an arbitration clause cannot contradict the Amendment and in effect implement the Narrow View requiring related claims to be arbitrated. But the Amendment would appear to operate as a minimum floor, and thus if a jurisdiction follows the Nexus View, an arbitration clause may provide victims greater protections than the Nexus View and incorporate the Broad View by stating there is no longer any obligation to arbitrate any claim asserted in a party’s case if it includes a sexual harassment or assault claim. With the Amendment operating as a minimum floor of protections, it seems that an arbitration agreement cannot provide lesser protections than the Amendment, as construed by a particular court.

<sup>148</sup> See, e.g., Imre S. Szalai, *The Failure of Legal Ethics to Address the Abuses of Forced Arbitration*, 24 HARV. NEGOT. L. REV. 127, 163 (2018).

<sup>149</sup> For example, a company may be engaging in fraud or unfair business practices if it drafts an agreement purporting to require arbitration of sexual harassment or assault claims, even though the company knows that such claims cannot be forced into arbitration.

<sup>150</sup> Under *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), arbitrators generally resolve allegations of fraud that are directed to the broader agreement. However, in this example, the allegation of fraud pertains directly to the arbitration clause. Such fraud allegations would be resolved by a court and would possibly invalidate the arbitration clause under the savings clause of 9 U.S.C. § 2.

interfering with or “engaging in a pattern or practice of resistance to the full enjoyment” of rights secured by Title VII.<sup>151</sup>

The Amendment gives rise to several concerns regarding drafting or modifying arbitration agreements, but unfortunately, the Amendment does not provide any guidance regarding these drafting issues. Ideally, companies should redraft arbitration agreements to incorporate the new exceptions created by the Amendment and notify weaker parties of their rights, rendering agreements that fail to incorporate the Amendment vulnerable to attack.

#### *D. Does the Amendment Apply in the Labor Setting? No One Knows.*

The Amendment invalidates predispute arbitration agreements for sexual harassment and assault claims and also likely applies to related claims under the Nexus View. Collective bargaining agreements between a union and employer may broadly require arbitration of all claims raised by workers. However, it is uncertain how the Amendment would apply to this situation and whether sexual harassment or assault claims could proceed in court.

From a textual review of the Amendment (without considering the rest of the FAA), § 402(a) of the Amendment invalidates an arbitration clause in a collective bargaining agreement with respect to sexual harassment or assault claims. The text of the Amendment applies broadly and has no explicit exception regarding union or non-union settings. In fact, the Senate version of the bill originally addressed arbitration provisions in a collective bargaining agreement,<sup>152</sup> but Congress later deleted this provision.<sup>153</sup> Congress, therefore, made an active choice to exclude language addressing collective bargaining agreements.

While the language of the Amendment appears expansive enough to cover collective bargaining agreements, there is some confusion regarding the applicability of the FAA—the main federal law governing arbitration agreements in general—in the labor setting. When first enacted in 1925, Congress did not intend the FAA to apply to the labor or

<sup>151</sup> 42 U.S.C.A. § 2000e-6; *cf.* *EEOC v. Doherty Enters., Inc.*, 126 F. Supp. 3d 1305 (S.D. Fla. 2015) (denying employer’s motion to dismiss where EEOC alleged that employer’s use of arbitration agreement was a pattern or practice that interfered with the enjoyment of civil rights because the arbitration agreement was overly broad and deterred workers from filing charges with the EEOC by giving the false impression that such charges could not be filed).

<sup>152</sup> S. 2342, 117th Cong. § 402(c) (as introduced in the Senate, July 14, 2021) (“Exception For Collective Bargaining Agreements.—Nothing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations, except that no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.”).

<sup>153</sup> 168 CONG. REC. S625 (daily ed. Feb. 10, 2022) (statement of Sen. Joni Ernst) (“Earlier this Congress, I was glad to see progress in the Senate Judiciary Committee as they moved forward on this bill. The committee took action that I supported. They removed the provision on collective bargaining agreements.”). Senator Chuck Grassley said the following about the earlier draft:

The bill, as originally drafted, included an exemption for union negotiated employment agreements. In other words, if you’re a union member and you’re sexually assaulted, your right to go to court may be negotiated away by the union. I’m pleased that the bill sponsors listened to our concerns about how the exemption weakened the legislation. The managers’ amendment strikes that provision. Now 2342 applies to *all* victims of sexual assault and harassment. I’d like to thank the Chairman and Senator Graham for their efforts on this bill.

Grassley Press Release, *supra* note 90 (emphasis in original).

employment setting at all.<sup>154</sup> However, today's courts express some uncertainty as to whether the FAA generally applies to arbitration clauses in collective bargaining agreements.<sup>155</sup> If the FAA does indeed apply to collective bargaining agreements, then the Amendment would also govern such agreements. Notwithstanding the FAA's applicability, the Amendment could still govern collective bargaining agreements.

To see why the Amendment may still govern collective bargaining agreements even if the FAA does not apply in such a setting, it is important to understand the relationship between the FAA and the Amendment. The domestic FAA is generally considered to be Chapter 1 of Title 9 of the United States Code.<sup>156</sup> Section 2 of Chapter 1 provides that arbitration agreements are generally binding "save upon such grounds as exist at law or in equity for the revocation of any contract *or as otherwise provided in chapter 4.*"<sup>157</sup> Thus, the FAA expressly incorporates the Amendment, and the Amendment builds on the FAA. The Amendment applies to situations covered by Chapter 1, which is generally viewed as the domestic FAA. However, if one starts an analysis by first looking to Chapter 4, Chapter 4 is drafted broadly, without any limits regarding collective bargaining agreements,<sup>158</sup> and declares arbitration agreements as invalid in certain situations, even if the scope of Chapter 1 does not expressly cover the agreement. Put another way, Chapter 4 operates in at least two different manners: (a) as an add-on or special exception to Chapter 1, by virtue of the express incorporation from the saving clause in 9 U.S.C. § 2; and (b) as a stand-alone restriction broadly governing arbitration agreements in any setting,<sup>159</sup> even if the scope of Chapter 1 does not cover those agreements. Treating Chapter 4 as a stand-alone restriction separate from Chapter 1 of the FAA suggests that the Amendment applies to an arbitration clause in a collective bargaining agreement when a sexual harassment or assault claim is at stake, regardless of whether the FAA applies to collective bargaining agreements.

A similar problem exists in rare situations where the FAA does not control. For example, transportation workers are exempt from Chapter 1 of the FAA and thus cannot be compelled to arbitrate under the FAA,<sup>160</sup> but state arbitration law may still make the arbitration agreements of transportation workers fully enforceable.<sup>161</sup> If Chapter 4 or the Amendment is construed broadly as having a life of its own, separate from the FAA or Chapter 1, then it may be possible to apply the Amendment to unusual situations where the FAA does not apply, such as where a transportation worker may be subject to a binding arbitration agreement pursuant to state arbitration law. Ultimately, like many other issues

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<sup>154</sup> SZALAI, *supra* note 13, at 191–92.

<sup>155</sup> *Int'l All. of Theatrical Stage Emp. v. InSync Show Prods., Inc.*, 801 F.3d 1033, 1039 (9th Cir. 2015) (recognizing that it is undecided whether the FAA applies in the labor setting); *Int'l Brotherhood of Elec. Workers, Loc. #111 v. Pub. Serv. Co. of Colo.*, 773 F.3d 1100, 1105–07 (10th Cir. 2014) (FAA applicable to arbitration clauses in collective bargaining agreements); *Wiregrass Metal Trades Council AFL-CIO v. Shaw Env't & Infrastructure, Inc.*, 837 F.3d 1083, 1087 n.1 (11th Cir. 2016) ("There is some ambiguity in our case law about whether the FAA applies to labor arbitration awards arising out of collective bargaining agreements.").

<sup>156</sup> 9 U.S.C. §§ 1–16.

<sup>157</sup> *Id.* § 2 (emphasis added).

<sup>158</sup> *Id.* §§ 401, 402.

<sup>159</sup> Chapter 4 does not appear to limit the Amendment to interstate commerce or maritime situations like Chapter 1 does. *See* 9 U.S.C. §§ 1, 2.

<sup>160</sup> *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019) (discussing the transportation worker exemption to the FAA).

<sup>161</sup> *Byars v. Dart Transit Co.*, 414 F. Supp. 3d 1082, 1087–88 (M.D. Tenn. 2019).

under the Amendment, courts must sort out whether the Amendment applies to collective bargaining agreements or agreements not covered by the FAA.

*E. The Amendment May be Unconstitutional as Applied in Certain Settings*

Although the goals of the Amendment are certainly laudable, the Amendment raises serious federalism concerns, and applying the Amendment to state law claims in state court is likely unconstitutional. Notwithstanding the Amendment for the moment, it is important to acknowledge that the application of the FAA in state courts is generally controversial and subject to debate. There are reasonable arguments that Congress never intended the FAA to govern in state courts, and the Supreme Court, in its 1984 decision of *Southland Corp. v. Keating*, erroneously and unconstitutionally treated the FAA as applicable in state courts.<sup>162</sup>

As explained by Justice Thomas in a powerful dissent, arbitration laws were traditionally understood as procedural in nature.<sup>163</sup> After all, no one arbitrates for the sake of arbitration; arbitration is not an end in itself. Instead, arbitration provides a mechanism for the resolution of an underlying dispute. As such, we should understand arbitration laws as procedural laws, which was the understanding at the time of the FAA's enactment.<sup>164</sup> In several cases, the Court has properly treated arbitration as purely procedural in nature. For example, the Court held that by agreeing to arbitrate, "a party does not forgo the substantive rights afforded by [a statute]; it only submits to their resolution in an arbitral, rather than a judicial, forum."<sup>165</sup> As explained by Justice Thomas, "[i]t would have been extraordinary for Congress to attempt to prescribe procedural rules for *state* courts."<sup>166</sup> Unfortunately and erroneously, the Court in *Southland* characterized the FAA as substantive law binding on state courts.<sup>167</sup>

Considering the unified, comprehensive nature of the FAA, its procedural nature, and the text of the FAA with its references to federal courts, it is clear that the FAA was

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<sup>162</sup> *Southland Corp. v. Keating*, 465 U.S. 1 (1984). For a thorough exploration of why the FAA does not apply in state court, see MACNEIL, *supra* note 17; see also H.R. REP. NO. 96, 68th Cong. 1 (1924) ("The bill declares simply that such agreements for arbitration shall be enforced and provides a procedure in the Federal courts for their enforcement."); 1924 *Hearings*, *supra* note 20, at 40 ("There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement. The statute cannot have that effect."); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5, 54 (2004) ("In *Southland*, the Court made an error of constitutional proportions that is in significant respects comparable to the error of *Swift v. Tyson*, which the Court famously corrected in *Erie* [almost one hundred years later].").

<sup>163</sup> *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 286–88 (1995) (Thomas, J., dissenting).

<sup>164</sup> *Id.* at 286–87 ("As then-Judge Cardozo explained: 'Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow.'") (citation omitted); H.R. REP. NO. 96, 68th Cong. 1 (1924) ("Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought, and not one of substantive law to be determined by the law of the forum in which the contract is made.").

<sup>165</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); see also *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002) ("[an arbitration] agreement only determines the choice of forum") (emphasis added).

<sup>166</sup> *Allied-Bruce Terminix*, 513 U.S. at 287–88 (Thomas, J., dissenting) (emphasis in original).

<sup>167</sup> *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

designed to apply solely in federal courts.<sup>168</sup> The FAA should not bind state courts, and instead, state courts should follow state arbitration laws, which may differ from the FAA. Application of the FAA to govern in state courts should be viewed as unconstitutional. Similarly, application of the Amendment to state courts would involve an unconstitutional intrusion on state sovereignty since the Amendment purports to regulate procedures or the enforcement of arbitration agreements in state courts.

The Constitution does not give Congress power to regulate state court procedures.<sup>169</sup> Congress cannot “regulate or control [state courts’] modes of procedure,” a concept that is one of the “general principles which have come to be accepted as settled constitutional law.”<sup>170</sup> When dealing with the enforcement of *federal* substantive laws in state court, “[t]he general rule, ‘bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.’”<sup>171</sup> Here, the Amendment is not limited in its applicability to arbitration of federal substantive rights; the Amendment defines sexual assault and sexual harassment disputes to include such misconduct under *state* law.<sup>172</sup> Congress, in effect, is telling state courts how they must procedurally handle state law tort claims that are traditionally within the sovereign Tenth Amendment police powers of a state.<sup>173</sup> Imagine the constitutional concerns parties would raise if Congress attempted to create nationally uniform procedural rules, such as a uniform pleading standard or uniform discovery rights, to govern every state court or local court system with respect to state law tort claims, such as a personal injury negligence claim, a defamation claim, or a battery claim. Such a federal attempt to control state court procedures for the enforcement of state-created, substantive tort rights would be breathtaking in scope and raise serious federalism concerns.<sup>174</sup> Application of the Amendment to state courts in connection with state tort claims is equally problematic.

The source for purported federal power to control how states enforce state-created substantive rights is not clear. Congress may attempt to rely on its Commerce Clause

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<sup>168</sup> MACNEIL, *supra* note 17. Several Justices have argued for the overruling of *Southland*. *Allied-Bruce Terminix*, 513 U.S. at 285 (Scalia, J., dissenting) (applying the FAA to state courts is unconstitutional and doing so creates an ongoing, “permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes”); *Southland Corp.*, 465 U.S. at 23 (O’Connor, J., dissenting) (“Congress intended to require federal, not state, courts to respect arbitration agreements.”).

<sup>169</sup> See Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947 (2001). The Supreme Court recently granted certiorari in a case raising similar issues on whether Congress can regulate discovery procedures in state courts in connection with the enforcement of federal substantive rights. *Pivotal Software, Inc. v. Super. Ct. of Ca.*, 141 S. Ct. 2884 (2021). However, *Pivotal Software* was removed from the oral argument calendar and briefing was stayed because the parties had reached a settlement in principle. See Letter from Morrison Foerster, Couns. of Respondents, to Scott S. Harris, Clerk of the Sup. Ct., Re: *Pivotal Software, Inc. v. Super. Ct. of Ca.*, No. 20-1541 (May 26, 2022).

<sup>170</sup> *Ex parte Gounis*, 263 S.W. 988, 990 (Mo. 1924).

<sup>171</sup> *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (citations omitted).

<sup>172</sup> 9 U.S.C. § 401.

<sup>173</sup> *Halgren v. City of Naperville*, 577 F. Supp. 3d 700, 721 (N.D. Ill. 2021) (States “traditionally have had great latitude under their [Tenth Amendment] police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.”).

<sup>174</sup> *Hardware Dealers’ Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931) (how “rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control”); *In re Tarble*, 80 U.S. 397, 407–08 (1871) (“How [the federal government’s and state governments’] respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers . . . are matters subject to their own control, and in the regulation of which neither can interfere with the other.”).

powers, but the text of the Amendment is not necessarily linked to and does not mention interstate commerce.<sup>175</sup> Moreover, attempting to rely on Commerce Clause powers is problematic in this situation because not only is the activity or behavior at issue (protection of bodily integrity from assault) traditionally within the police powers of a state,<sup>176</sup> but assault is also not economic activity to begin with. In 2000, the Supreme Court held in *United States v. Morrison* that a part of the Violence Against Women Act, which created a cause of action for gender-based violence, was unconstitutional.<sup>177</sup> The Court in *Morrison* reasoned that assault is not an economic activity subject to regulation by Congress under the Commerce Clause.<sup>178</sup> *Morrison* is consistent with the notion that assaults are traditionally with the sovereign police powers of a state to regulate. If Congress cannot directly regulate or create substantive standards regarding assault under the Commerce Clause since an assault is not economic activity, then resolving disputes or claims about assault, or regulating the enforcement of rights to be free from assault, seems to be one step further removed from the assault. If an assault is not economic activity, then resolving a claim about an assault should not be considered economic activity either.

One difference between assaults purportedly covered by the Amendment and assaults purportedly covered by the unconstitutional provisions that were the subject of *Morrison* is that assaults under the Amendment would occur in connection with a consumer or employment relationship. For example, suppose a customer purchases a washer from Home Depot, and the transaction is covered by a broad arbitration agreement covering all disputes between the customer and Home Depot and any of its workers. If the Home Depot delivery person sexually assaults the customer while making the delivery, the Amendment would render the arbitration clause unenforceable with respect to the customer's state law tort claim of sexual assault. It is not clear whether the commercial setting or interstate commerce involved with the delivery of the washer would justify federal regulation of the state law assault claim in this hypothetical. If the delivery person makes a date with the customer to occur later the same evening or a few days later, and the assault occurs later that evening or several days after the delivery, assault seems separate from the economic activity involving the sale of the washer. If an assault is generally not considered economic activity, according to the *Morrison* case, the assault would not suddenly transform into economic activity because the assault occurs during or after a delivery or commercial transaction. Perhaps the connection between an assault and a commercial transaction may distinguish the Amendment from the unconstitutional situation involved in *Morrison* because the impact on commerce is clearer if the assault occurs in connection with a commercial transaction. However, the reasoning of the *Morrison* Court cautions against a broad interpretation of the Commerce Clause that blurs the distinction between national and local authority and allows Congress to regulate any tortious act traditionally with a

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<sup>175</sup> As discussed above in connection with collective bargaining agreements, the Amendment may be conceptualized as standing alone and separate from the FAA. See *supra* Part IV.D.

<sup>176</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (recognizing that since "the police power is controlled by 50 different States instead of one national sovereign," "smaller governments closer to the governed" generally exercise police powers and regulate "the facets of governing that touch on citizens' daily lives"); *United States v. Lopez*, 514 U.S. 549, 567 (1995) (cautioning that courts must not "pile inference upon inference" in such a manner as to "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States").

<sup>177</sup> *United States v. Morrison*, 529 U.S. 598, 627 (2000).

<sup>178</sup> *Id.* at 613 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.").

State's police power as long as "the nationwide, aggregated impact" of such acts "has substantial effects on employment, production, transit, or consumption."<sup>179</sup> State tort law risks becoming federalized under such an expansive application of the Commerce Clause.<sup>180</sup>

Expansive application of the FAA and the Amendment to state courts would harm federalism values and innovative attempts to regulate dispute resolution. For example, imagine the people of a state, acting through their representatives, could decide how to enforce state law harassment and assault claims. If states were free from the *Southland* ruling and could broadly regulate arbitration, states could direct their courts to enforce arbitration agreements with respect to such claims, but states could add certain caveats or conditions. For example, states could declare that arbitration of assault or harassment claims would only be allowed if certain procedural protections are in place, such as requiring published opinions, public hearings, the licensing of arbitrators, or broad discovery. In other words, states would be free to ban arbitration for assault claims, broadly allow arbitration for such claims, or allow for arbitration of such claims with certain procedural protections. If state sovereignty were respected, states would have flexibility to address the enforcement of their own state law claims enacted pursuant to their police powers. However, the FAA, as currently interpreted by the Supreme Court<sup>181</sup> and the Amendment, overrides state sovereignty to experiment and control dispute resolution. Instead of permitting federal law to override the sovereignty of states in an unconstitutional manner, each state, as "laboratories for experimentation,"<sup>182</sup> should have the freedom to experiment with enforcing its own state-created rights.<sup>183</sup> The exercise of such sovereignty helps promote the values of federalism and spur innovation among the states to regulate dispute resolution in different, creative ways.<sup>184</sup>

Application of the Amendment to the states, particularly for state law claims, raises constitutional problems. Another angle to consider these problems is that one can assert state law assault claims without reference to a contractual or commercial relationship. The elements of a sexual assault tort claim would differ from state to state, but they likely involve whether a sexual contact occurred without the survivor's consent and whether the

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<sup>179</sup> *Id.* at 615.

<sup>180</sup> *Id.* at 615, 618 (Commerce Clause should not be interpreted broadly to "completely obliterate the Constitution's distinction between national and local authority," and there is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims").

<sup>181</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 17 (1984) (FAA applied in state courts).

<sup>182</sup> *United States v. Lopez*, 514 U.S. 549, 581 (Kennedy, J., concurring) (citation omitted).

<sup>183</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (recognizing that since "the police power is controlled by 50 different States instead of one national sovereign," "smaller governments closer to the governed" generally exercise police powers and regulate "the facets of governing that touch on citizens' daily lives").

<sup>184</sup> PETER B. RUTLEDGE, *ARBITRATION AND THE CONSTITUTION* 121 (2013) (sacrificing the uniformity value of broad FAA preemption that would promote federalism values in connection with dispute resolution and the enforcement of rights); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989) ("The FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.").



defendant acted with an intent to cause such contact.<sup>185</sup> Such a right to be free from sexual harm is not dependent on a contract or commercial relationship. However, the FAA's coverage is limited to written provisions in a contract "to settle by arbitration a controversy thereafter arising out of such contract."<sup>186</sup> The plain language of the FAA demonstrates that Congress never intended the statute to cover arbitration of such tort claims that can be asserted without reference to a contract, and the Supreme Court has erred by applying the FAA to statutory claims or tort claims that do not depend on a contract.<sup>187</sup> The FAA was originally designed for contractual disputes in connection with the shipment of goods across state lines, such as disputes about the quality of the goods or whether the goods were damaged or arrived on time, not statutory or tort claims unrelated to commercial transactions.<sup>188</sup>

The current Amendment raises constitutional questions when applied to state courts, particularly with respect to state law tort claims. The Supreme Court's erroneous expansion of the FAA since the 1980s to cover non-contractual claims, such as tort claims or statutory claims, helped give rise to the need for the Amendment,<sup>189</sup> without such an erroneous expansion by the Court, sexual assault or harassment claims would not likely fall under the coverage of the FAA. A much cleaner solution, instead of passing an Amendment that is arguably unconstitutional and intrusive on state sovereignty, is to hold the FAA simply does not cover state tort claims or statutory harassment claims where the right to sue is not based on a contract. By properly interpreting the FAA in a limited manner fitting with its text, there would be no need for the Amendment.

## CONCLUSION

At first glance, it is easy to think of arbitration and the FAA as facilitating the resolution of a dispute between two parties. However, the Amendment provides a different perspective regarding the FAA and raises deeper questions about the proper role of arbitration in society. Broadly, the FAA establishes or defines a relationship between the government and its people. Arbitration law, by defining what is or is not arbitrable, creates something akin to a zone of privacy for the resolution of certain disputes, whereby parties can resolve these disputes on their own without much government interference or oversight. When arbitration law declares a matter, such as sexual assault or sexual harassment, as non-arbitrable, the government declares such matters outside the zone of privacy, and the government becomes available to play a larger, more active role in the life of its people through the court system. With the Amendment, Congress gives a greater

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<sup>185</sup> See, e.g., CAL. CIV. CODE § 1708.5(a)(1) (West 2003) (to be liable, a person must "[a]ct[] with the intent to cause a harmful or offensive contact with an intimate part of another, and a sexually offensive contact with that person directly or indirectly results"); *Reavis v. Slominski*, 551 N.W.2d 528, 536 (Neb. 1996) ("In order to succeed on her theory of recovery regarding sexual assault, Reavis was required to prove that Slominski had sexual contact with her without her consent and that he acted with intent to inflict physical injury or contact upon her which resulted in physical injury proximately causing some damage.").

<sup>186</sup> 9 U.S.C. § 2 (2011).

<sup>187</sup> *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017) (applying the FAA to wrongful death tort claims).

<sup>188</sup> See *supra* note 20 and accompanying text.

<sup>189</sup> See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (applying the FAA to statutory civil rights claims); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (applying the FAA to statutory antitrust claims).

public voice to survivors in our society and shifts more power to the judiciary to resolve these important claims, instead of allowing corporate parties to control the process of dispute resolution.

The Amendment prompts a deeper question as to whether other claims should be exempt from the scope of arbitration law. Considering the justifications for the Amendment, one can argue that other forms of harassment and discrimination should also be exempt from arbitration. Further, Congress may determine that any laws designed to protect vulnerable workers or consumers should be subject to more robust, public enforcement in the courts.<sup>190</sup> Thus, one could argue that any claims raising public interest concerns, such as claims related to the sale of dangerous goods that cause serious bodily harm, should not be subject to predispute arbitration agreements. For example, at one time, Amazon.com (Amazon) had a broad arbitration clause for consumers as part of its terms of use.<sup>191</sup> Amazon allegedly sold harmful or illegal products to consumers, such as counterfeit, deadly infant car seats and other products, but any such claims related to these sales were covered by Amazon's broad arbitration clause.<sup>192</sup> Although Amazon voluntarily dropped its arbitration clause, other companies still use arbitration agreements in an attempt to shield claims of similar incidents from the more robust scrutiny that occurs through public court proceedings.<sup>193</sup> The Amendment, although narrow in scope, opens the door to more public discourse about what other types of claims or rights should be reserved for the courts.

The constitutional concerns surrounding the Amendment's application to states also raise a deeper question about the regulation of dispute resolution and about who should have the power to engage in such regulation. Arbitrations may take place without the need for court proceedings, and arbitration law should respect party autonomy as much as possible. However, to help maintain a minimal degree of fairness and in case the arbitration process breaks down, some involvement of courts is desirable to facilitate the process. If states had greater freedom to experiment with arbitration law, states could facilitate arbitration in different ways and apply greater creativity in dispute resolution. For example, one state could experiment with licensing arbitrators for workplace disputes, and the arbitration law of another state could say that state courts cannot compel arbitration unless the arbitration has certain procedural protections or is administered by an arbitrator with certain qualifications. However, in light of the Supreme Court's expansion of the FAA to cover state courts, the FAA is likely to preempt such state laws and experimentation.

The Amendment, although falling short of its goals and poorly drafted, is still a landmark statute arising from the #MeToo movement and a step in the right direction regarding arbitration reform. The Amendment partially restores the original intent of the FAA, which was never supposed to apply to tort claims or workplace claims. The FAA is almost 100 years old, and the sparse text of the statute cannot support how the FAA is

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<sup>190</sup> See *supra* Part II.

<sup>191</sup> Michael Corkery, *Amazon Ends Use of Arbitration for Customer Disputes*, N.Y. TIMES (Sept. 28, 2021), <https://www.nytimes.com/2021/07/22/business/amazon-arbitration-customer-disputes.html>.

<sup>192</sup> Blake Ellis & Melanie Hicken, *Dozens of Amazon's Own Products Have Been Reported as Dangerous—Melting, Exploding or Even Bursting into Flames. Many are Still on the Market*, CNN (Sept. 10, 2020, 7:55 AM), <https://cnn.it/3cFUWvC>; *Anderson v. Amazon.com, Inc.*, 478 F. Supp. 3d 683 (M.D. Tenn. 2020) (compelling arbitration of claims involving sale of allegedly defective seatbelt extenders for children).

<sup>193</sup> *Anderson v. Amazon.com, Inc.*, 490 F. Supp. 3d 1265, 1268–70 (M.D. Tenn. 2020) (Walmart and eBay successfully relied on arbitration clause to send consumers' claims to arbitration).

broadly interpreted or used today. Reforms for improving the fair use of arbitration in different settings are much needed. As a result of the debates surrounding the Amendment and media coverage of the Amendment, members of Congress and the public are probably more aware of arbitration. With the approaching centennial anniversary of the FAA and increased public awareness of arbitration, the time is ripe for a more thorough reassessment of the FAA; hopefully, more amendments and refinements of arbitration law are on the horizon.