Journal of Dispute Resolution

Volume 2024 | Issue 1 Article 14

2024

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MANDATORY ARBITRATION AND LGBTQ+ HOSTILE WORKPLACE PROTECTIONS: A REVIEW OF THE ENDING FORCED ARBITRATION ACT, ITS IMPACT, AND IMPLICATIONS

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I. INTRODUCTION

In 2022, the 117th Congress amended the Federal Arbitration Act (FAA) in response to widespread public pressure to change the culture of American employment. After years of pervasive sexual harassment across industries, supported by the growth of mandatory, adhesive arbitral agreements in employment contracts, Congress adopted the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("Ending Forced Arbitration Act") which rendered unenforceable pre-dispute arbitral agreements for claims of sexual harassment or sexual assault.[1]

The text of the Act is simple: pre-dispute arbitration agreements and pre-dispute joint action waivers are no longer valid or enforceable with respect to a case relating to sexual assault or sexual harassment.[2] While this action was much-needed and broadly welcomed, the language of the statute failed to define the key operative term 'sexual harassment,' instead deferring to definitions found in "[f]ederal, [t]ribal, or [s]tate law."[3] Sexual harassment is actionable under federal law under the anti-discrimination provisions of Title VII, which the Court has long held appropriate. There is no federal statute defining the offense; rather, it has been defined by the Equal Employment Opportunity Commission (EEOC) and promulgated into the Code of Federal Regulations.[4] Over the course of the past four decades since the Court affirmed that sexual harassment is in fact discrimination, the distinction between sexual harassment and sex-based discrimination has not been outcome-determinative in adverse employment actions as both are prohibited behavior under Title VII, and both could be subjected to mandatory arbitration.[5]

However, now the distinction between sexual harassment and sex-based discrimination will mean the difference in how pre-dispute arbitral agreements will be enforced, which will likely also weigh heavily on the outcome of employment disputes. This Article discusses the implications for the LGBTQ+ community as a result of Congressional action to remove sexual harassment and sexual assault from arbitrability under the FAA, and how Congress's decision to defer to the existing federal definition and the definitions provided by the states has the potential to lead to disparate results for the LGBTQ+ community depending on the state in which the individual resides and works. This Article begins with a discussion of arbitration generally and how arbitration of employment agreements developed through the

1. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, § 3, 136 Stat. 28 (2022) [hereinafter "Ending Forced Arbitration Act"].

2. *Id.*

3. *Id.*

4. Katherine M. Franke, *What's Wrong with Sexual Harassment*, 49 STAN. L. REV. 691, 703 (1997).

5. *See* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986); *see also infra* Section III.A.1 (discussing the distinction between sexual harassment as a form of sex-based discrimination and sex-based discrimination).

jurisprudence of the Court.[6] This discussion will explore the Court's determination that employment agreements and statutory rights are arbitrable under the FAA and how the "liberal federal policy favoring arbitration agreements" has shaped employment law and the rights of workers over the last 40 years.[7]

This Article then proceeds to explore how the offense of "sexual harassment" is defined under federal law for purposes of both Title VII as well as arbitrability following Congress's recent actions.[8] This discussion continues with application of the EEOC's definition of 'sexual harassment' in light of the Court's decision in *Bostock v. Clayton County, Georgia*,[9] and the applicability of that decision as to whether hostile work environment claims from LGBTQ+ persons would qualify as 'sexual harassment,' which directly implicates the arbitrability of such claims.[10] The analysis then turns to the application of state law definitions of 'sexual harassment' and how the laws of the states of Minnesota, Texas, and Florida would likely result in disparate treatment of LGBTQ+ employees under the Ending Forced Arbitration Act's preclusion of arbitrability.[11]

This Article then concludes with a discussion of ways in which LGBTQ+ employment protections could be expanded, through adoption of a similar statute removing any discriminatory actions from the ambit of arbitration.[12] Alternatively, protections could be expanded through judicial interpretations which could include sexual orientation and gender identity-based hostile work environment and discrimination claims under the umbrella of 'sexual harassment' as defined by the EEOC.[13]

II. ARBITRATION AND EMPLOYMENT CONTRACTS

As the centennial of the FAA approaches, the American legal system has expanded the remedy to include virtually every type of dispute from corporate contracting to billing irregularities with one's cable provider.[14] The FAA was driven by the desire of the legal community to make arbitration a viable means of alternative dispute resolution.[15] At the time of the FAA's adoption, the use of arbitration to resolve contractual disputes was meaningless as there was little-to-no judicial enforcement of arbitral awards through the courts.[16] Because of this, and to "reverse the longstanding judicial hostility to arbitration agreements," Congress, at the urging of the American business community, adopted the FAA in 1925 to provide a national organizational framework for use of arbitration and to allow arbitral awards to be enforced by the nation's courts.[17]

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6. *See infra* Section II.
7. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).
8. *See infra* Section III.A.1.
9. 140 S. Ct. 1731 (2020).
10. *See infra* Section III.A.2.
11. *See infra* Section III.B.
12. *See infra* Section IV.A.
13. *See infra* Section IV.B.
14. Craig Smith & Eric V. Moyé, *Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts*, 44 TEX. TECH L. REV. 281, 282 (2012); *see also* HENRY ALLEN BLAIR, A SHORT & HAPPY GUIDE TO ARBITRATION 1 (2019).
15. Smith & Moyé, *supra* note 14, at 287.
16. *Id.*
17. *Id.* (citing E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 289 (2002)); BLAIR, *supra* note 14, at 12–13.

At the time of the FAA's adoption, neither Congress nor the Act's proponents intended arbitration to be used in the context of employment contracts, primarily because the FAA was to be used as a dispute resolution mechanism between parties with relatively equal bargaining power as part of arms-length transactions.[18] Despite Congressional intent, the siren song of arbitration has enamored the federal judiciary such that that there is virtually no subject beyond its reach, unless specifically excluded by congressional action.[19] Since the early 1980s, the Supreme Court has consistently held that the FAA provides a "congressional declaration of a liberal federal policy favoring arbitration agreements."[20] This liberalism extends far beyond the original corporation-to-corporation relationship envisioned by the FAA's drafters in 1925 where parties were knowingly entering into arbitral agreements with the advice of counsel to the Court's endorsement of contracts of adhesion which result in the surrender of Constitutional rights.[21] The disparity of bargaining power present in such contacts of adhesion — particularly in the context of a potential-employer – job-seeker relationship — "is particularly acute when an entire industry demands arbitration" and employment contracts containing arbitral clauses "translates into the loss of trial by jury in the single most pervasive area of commercial dispute imaginable—employer-employee relations."[22]

A. Arbitration in the Employment Context

In 1991, the Supreme Court determined that pre-dispute arbitral clauses included as part of an employment contract are valid and "would preclude employees or former employees from suing in court on . . . statutory discrimination claims."[23] The Court's determination that these agreements are valid under the FAA would progressively change how employees could hold employers responsible.[24] At the time *Gilmer v. Interstate/Johnson Lane* was decided, use of mandatory arbitration agreements in employment was relatively uncommon but grew quickly once the practice was legitimized by the Court.[25] In 1992, researchers estimated 2.1 percent of non-union workplaces employed mandatory arbitration in dispute resolution. By 2003, that number expanded to nearly a quarter of the American workforce.[26]

In *Gilmer*, the Court extended the determination that "statutory claims may be the subject of an arbitration agreement" to individual employment contracts just as

18. Smith & Moyé, *supra* note 14, at 287 (citing Craft v. Campbell Soup Co., 177 F.3d 1083, 1090 (9th Cir. 1999), *abrogated by* Cir. City Stores, Inc. v. Adams, 532 U.S. 105 (2001)) ("[the FAA] was 'never intended . . . to apply to employment contracts of any sort'"); Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, ECON. POL'Y INST. 7 (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/ [https://perma.cc/6QXG-46BH].

19. *See* Smith & Moyé, *supra* note 14, at 286–92.

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

21. Smith & Moyé, *supra* note 14, at 296–97.

22. *Id.*

23. Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559 (2001) (discussing Gilmer v. Interstate/Johnson Lane Corp. 500 U.S. 20 (1991)).

24. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration: Access to the courts is now barred for more than 60 million American workers*, ECON. POL'Y INST. 3, https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/ (Apr. 6, 2018).

25. *Id.* at 3-4.

26. *Id.*

it had done in the commercial context.[27] Referring to the Court's previous holdings in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[28] and *Shearson/American Express, Inc. v. McMahon*,[29] which addressed the arbitrability of "claims arising under the anti-trust act, the securities act, and the Racketeer Influenced and Corrupt Organizations Act," the *Gilmer* Court found arbitration of individualized claims under the Age Discrimination in Employment Act (ADEA) arbitrable.[30] This holding was consistent with the "liberal federal policy favoring arbitration,"[31] and provided that "so long as the prospective litigant effectively may vindicate [their] cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent functions."[32]

With this decision in *Gilmer*, the Court rejected the proposition that arbitration of statutory claims are inconsistent with the statutory framework of these individualized causes of action and the argument that arbitration procedures are "inherently inadequate to protect statutory rights."[33] Rather than address the issue globally, the Court looked solely to the rules of arbitration applicable in *Gilmer* and determined them sufficient to "adequately safeguard [the plaintiff's] substantive rights."[34] The question of arbitrability of statutory claims was not solely directed by *Gilmer*, but was underscored through adoption of the Civil Rights Act of 1991, which "explicitly condoned alternative means of dispute resolution, including arbitration to resolve disputes arising under Title VII."[35]

In the years immediately following *Gilmer*, courts extended the immediate holding of the case relative to the AEDA to also include statutory claims arising under laws prohibiting discrimination based on "race, sex, religion, and national origin, as well as claims arising under ERISA and the federal Employee Polygraph Protection Act."[36] However, the applicability of the *Gilmer* ruling to any statutory claims arising as a result of employment, and the additional layer of analysis required specifically for Title VII claims following adoption of the Civil Rights Act of 1991, was subject to determination by the lower courts on a case-by-case basis.[37] Ultimately, this led to the Ninth Circuit's determination that Section 1 of the FAA excluded all employment contracts from the FAA.[38] This determination split the Ninth Circuit from the other eleven Circuits, and provided the Court an avenue to declare definitively that employment contracts are arbitrable under the FAA.[39]

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27. Katherine V.W. Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U.L. REV. 1017, 1031 (1996).
28. 473 U.S. 614 (1985).
29. 482 U.S. 220 (1987).
30. Stone, *supra* note 27.
31. *Id.* at 1030–31 (quoting Gilmer v. Interstate/Johnson Lane Corp. 500 U.S. 20, 25 (1991)).
32. *Id.* (quoting *Gilmer*, 500 U.S. at 26).
33. *Id.*
34. The Court detailed the arbitral procedures applicable to the case at hand and determined that disclosure requirements for potential arbitrators, challenges to panel members for cause, discovery (including document production and depositions), and the requirement that awards be reduced to writing were sufficient to ensure procedural due process. *Id.*
35. Alyssa Schaefer, *Sexual Harassment in the Shadow of Mandatory Arbitration*, 34 WIS. J.L., GENDER & SOC'Y 237, 249 (2020).
36. Stone, *supra* note 27, at 1034.
37. *Id.*; Schaefer, *supra* note 35.
38. Estreicher, *supra* note 23, at 559–60.
39. *Id.*

Since 1991 courts have consistently held as arbitrable Title VII claims, despite challenges by opponents to mandatory arbitration and the EEOC itself.[40] While the question has never been presented directly to the Supreme Court, rulings in favor of arbitrability of these claims have been issued by every circuit in which the question has been raised.[41] Throughout these challenges, opponents to mandatory arbitrability of Title VII claims have used Congressional committee records and other legislative history of the Civil Rights Act of 1991 to demonstrate that the legislative intent of the Act's language was not to render such claims subject to mandatory arbitration; however, in rejecting this position courts have consistently found the plain language of the Act sufficiently clear to render Title VII claims arbitrable.[42]

The Court's approval of mandatory arbitration in employment contracts was further refined in 2001 in *Circuit City Stores, Inc. v. Adams*, which concluded the FAA demonstrates a "congressional intention to exclude only employment contracts of 'transportation workers'" from arbitration, thereby opening the door for inclusion of arbitral clauses in employment contracts in virtually all other fields.[43] Justice Stevens's dissent in *Gilmer* and Adams in *Circuit City* argued that the FAA's exclusion of "any other class of workers engaged in foreign or interstate commerce" should be read to exclude *all* employment contracts from the supremacy of the FAA.[44] Applying the canon of *ejusdem generis*, the Court could not extend the specific references to seamen and railroad employees to a broader application of the statute.[45]

Notably in *Circuit City*, the argument was not directly about the validity of mandatory arbitration in the employment context, but rather the supremacy of the FAA in governing such arbitral clauses.[46] If the FAA were found to be the supreme guiding force over arbitration of employment agreements, this would effectively preempt suits in court to enforce statutory claims even when arising from state law-governed contracts of employment.[47] The Court, maintaining consistency with their position that Congress intended a liberal application of the FAA, found a "federal presumption of arbitrability" for questions arising from non-transportation employment contracts and refused the argument which postulated that the "[s]tatutory silence on the question of arbitrability in federal statutes, coupled with the general policy of these statutes on prospective waivers by employees would lead to the conclusion that claims under these statutes cannot be the subject of an enforceable pre[-]dispute arbitration agreement."[48]

Ultimately the *Circuit City* Court concluded that the benefits of arbitration, at least in its perception, do not "somehow disappear when transferred into the employment context" and that "there are real benefits to enforcement of arbitration

40. Schaefer, *supra* note 35.
41. *Id.* at n.98.
42. *Id.*
43. *Id.*; Cir. City Stores, Inc. v. Adams, 532 U.S. 105 (2001). While the text of the Federal Arbitration Act excludes "contracts of employment of seamen, railroad employees, *or any other class of workers engaged in foreign or interstate commerce*," (emphasis added) the Court has applied this language to exclude only those classes of worker engaged in the physical movement of goods in commerce. 9 U.S.C. § 1; Estreicher *supra* note 23, at 559–60.
44. Stone, *supra* note 27, at 1032–33; Estreicher, *supra* note 23, at 560–61.
45. Estreicher, *supra* note 23.
46. *Id.* at 560–61.
47. *Id.*
48. *Id.* at 561.

provisions."[49] On the question of to whom those benefits would accrue, the Court was less clear. From the context of Justice Kennedy's majority opinion, the benefit of enforcement of arbitration provisions appears to be to the "efficacy of alternative dispute resolution procedures adopted by the Nation's employers" and by extension to the employers themselves, with little regard for the employees subject to the procedure through adhesive contracting.[50] Ultimately, the Court determined that to rule otherwise would undermine the FAA and "breed[] litigation from a statute that seeks to avoid it."[51]

Arbitration in the context of employment disputes is not necessarily a bad thing—arbitration offers a dispute resolution framework which can be less expensive and less time-consuming than recourse to the judicial process.[52] However, with the benefits of arbitration come limitations on procedure which may be crucial to establishing patterns of wrongdoing within companies.[53] Rules of private arbitral agreements often contain provisions which limit discovery in ways that prevent a claimant from accessing records of how other, similarly-situated employees have been treated in the past or how such disputes were resolved.[54] Some arbitral agreements contain procedural protections, but many "shorten statutes of limitations, alter the burdens of proof, limit the amount of time a party has to present his or her case, or otherwise impose constrictive procedural rules."[55]

The central question in *Circuit City* was whether the FAA or state laws would govern arbitral agreements within employment contracts.[56] While not directly at issue in the case, the larger concept was that if the FAA did not govern employment contract based arbitration and it was governed solely by state law, then causes of action arising from employment and implicating federal laws could be excluded from arbitrability because federal employment laws, "by their terms, contemplate law suits as the exclusive enforcement mechanism and, as a general matter, preclude prospective waivers of rights contained therein."[57]

B. Expansion of Mandatory Arbitration in Employment

As the Court progressively cemented its support of arbitration in employment settings, the use of these agreements grew rapidly.[58] In a 2018 report by the Economic Policy Institute (EPI), researchers found that over half of responding employers required employees to consent to "a mandatory 'agreement or provision for arbitration of legal disputes within the company.'"[59] While many of these companies required employees to consent to such agreements at the time of hiring, "in some instances businesses adopt[ed] arbitration procedures simply by announcing

49. *Id.*
50. *Id.* at 561 (quoting Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001)).
51. *Circuit City*, 532 U.S. at 123.
52. Stone & Colvin, *supra* note 18.
53. *Id.*
54. *Id.*
55. *Id.*
56. Estreicher, *supra* note 23, at 560.
57. Specifically, the statutes in question which would preclude prospective waivers of rights are Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. *Id.* at 560–61.
58. Colvin, *supra* note 24, at 5.
59. *Id.*

that these procedures have been incorporated into the organization's employment policies" though such announcements appeared to be a small percentage of the total number of organizations implementing arbitration requirements.[60]

In studying the timing of arbitration requirements, approximately 40 percent of respondent companies implemented their policies between 2012 and 2017.[61] Researchers looked specifically at program implementation during this time frame due to the Supreme Court's ruling in *AT&T Mobility, LLC v. Concepcion*,[62] which held "class action waivers in [] mandatory arbitration agreements broadly enforceable."[63] The EPI survey of businesses evaluated companies of all sizes (based on number of employees), across the country and across numerous industries.[64] The result was that, generally, larger companies have a higher likelihood of mandatory arbitration than smaller companies (49.8% of companies with fewer than one hundred employees versus 67.7% of companies with five thousand or more).[65] Further, outside of the construction industry, approximately 50 to 60 percent of jobs across all sectors require mandatory arbitration of work-related disputes.[66] When the EPI study was compiled in 2018, more than 60 million American workers were subject to mandatory arbitration regimes as a requirement of employment.[67]

C. Corporate Shift to Mandatory Arbitration and Hidden Victimization

As discussed *supra*, there are benefits to employing arbitration as the alternative dispute resolution mechanism of choice for employers, including faster resolution of disputes, less (or at least predictable) expenses, and a defined, streamlined, adjudicatory process.[68] The benefits do not end there; perhaps the most compelling reason for mandating arbitration as a condition of employment is to ensure control over both the dispute resolution process in terms of establishing rules for the proceedings, and guaranteeing secrecy of both the dispute and its resolution.[69]

In the years since *Gilmer* and *Circuit City*, there has been a steady shift towards requiring new and existing employees to sign pre-dispute arbitral agreements as a condition of gaining or retaining employment.[70] These arbitration agreements have been implemented across the spectrum of employment, from small to large employers and in virtually all industries.[71] To reiterate: arbitration in itself is not a detriment to workers' rights, but the provisions of arbitration and the somewhat hidden nature of the proceedings and results can be.[72]

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60. *Id.*
61. *Id.*
62. 563 U.S. 333 (2011).
63. Colvin, *supra* note 24, at 5.
64. *See generally id.*
65. *Id.* at 6.
66. *Id.* at 8.
67. *Id.* at 5.
68. *See supra* Section II.A.
69. Stone & Colvin, *supra* note 18.
70. *Closing the Courthouse Doors: The Injustice of Forced Arbitration Agreements, Hearing on H.R. 4445 Before the H. Subcomm. on Health, Education, Labor, & Pensions of H. Comm. On Education and Labor*, 117th Cong. 8–9 (2021) (testimony of Alexander Colvin, Kenneth F. Kahn 1969 Dean, School of Industrial and Labor Relations, Cornell University) [hereinafter "Testimony of Colvin"].
71. *Id.*
72. *Id.*

By keeping employment disputes out of the courts and within the confines of private arbitration, employers are able to mandate nondisclosure agreements as part of the arbitral rules included in pre-dispute contracts.[73] Through prohibiting discussion about these disputes and their resolutions, other employees, the public, regulators, or, more importantly, shareholders are shielded from information which could have negative implications for the company.[74] Compounding this secrecy, the Court's decision in *Concepcion*[75] provided that rights to class-action and collective claims can be waived through arbitral agreements, further isolating claimants.[76] This requires every dispute to be adjudicated individually, prohibits discovery from any one case from being used in other cases, and renders as practically impossible the ability of any one claimant to demonstrate patterns of behavior or harassment which may help establish their claim.[77]

The result is that allegations—and admissions, when they occur—of wrongdoing are now hidden from the public and from similarly situated employees who may not have the ability to stand up for their own rights.[78] Adhesive arbitral agreements have allowed employers to not only hide patterns of harassment, but also allow them to establish the rules of dispute resolution which, whether intentionally or as a positive externality, permit them to control the outcome.[79]

Procedural due process is required for arbitration to withstand appellate review, and employer-devised rules of engagement will provide for the basics of a 'neutral' decision-maker, notice, and the right to present one's case, but aside from that baseline requirement the rules largely favor employers.[80] Research shows that not only are there structural advantages toward corporations, but those advantages are compounded by a repeat player advantage that comes from the volume of cases subject to arbitration, which combine to disadvantage victims raising claims against their employers.[81]

The structural advantages of adhesive arbitration are clear—the party offering the adhesive contract structures the rules and procedures, resulting in a "heads I win, tails you lose" dispute resolution arrangement.[82] Beyond allowing employers to place their thumbs on the scales of justice, statistical research shows that there is a real and demonstrable advantage for employers.[83] This is not as simple as the belief that arbitrators will favor employers in the interest of future employment; rather, the situation is more complex than observers may believe.[84] The repeat player advantage manifests itself in a number of ways based on empirical research demonstrating that advantage can be gained simply through ongoing engagement with the process.[85]

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73. *See id.*
74. *See id.*
75. AT&T Mobility, LLC v. Concepcion, 563 U.S. 333 (2011).
76. Testimony of Colvin, *supra* note 70.
77. *Id.*
78. Kaci Dupree, Note, *#MeToo, Due Process, and Mandatory Arbitration: The Perfect Storm for Functional State Level Arbitration Reform*, 11 ARB. L. REV. 188, 194 (2019).
79. *Id.*
80. *Id.*; Testimony of Colvin, *supra* note 70.
81. Testimony of Colvin, *supra* note 70.
82. *Id.*
83. *Id.*
84. *See id.*
85. *Id.*

Advantages to employers can range from having greater resources and more detailed knowledge of their own internal grievance procedures and filtering of complaints to simply learning how individual arbitrators evaluate cases through experience and presenting their argument to match that arbitrator's judicial approach.[86] Regardless of how an advantage is obtained, the effect is real; with respect to large employers, "employers tend to win more often and have lower damages awarded against them the more cases they ha[ve] before the same arbitrator."[87]

The result is that victims in workplace disputes are victimized a second time through a denial of access to justice.[88] The combination of forced arbitration, the Court's sanctioning of class action waivers as part of arbitral agreements, and structural advantage have created a "kind of legal loophole that . . . companies could use . . . to cover up illegal behavior."[89] Through the #MeToo movement, the hidden danger of sexual abuse that was not subject to public scrutiny has been brought to light.[90] This movement began to pressure public companies, such as Google, Microsoft, and others to voluntarily remove sexual assault and sexual harassment from their corporate pre-dispute arbitral agreements in order to ensure protection of victims against the secrecy that defines the arbitration process.[91]

D. Movement Toward Reform and Accountability

While public pressure began shifting the tide of adhesive arbitration regarding sexual assault and sexual harassment, this push for voluntary change could only succeed with respect to large, public corporations that would not want to be accused of silencing victims.[92] Observing the trend of using mandatory arbitration to silence victims of harassment and assault and obstruct larger workplace reforms, several states sought to limit the use of arbitration to resolve sexual harassment claims through state law.[93] Although the Supreme Court has long held that the FAA preempts any state-level modifications to arbitral agreements, states, based on Congress's inaction on the topic, sought to protect their workers regardless of possible preemption.[94]

States may regulate arbitral agreements through measures which regulate validity of contracts generally, but they may not direct laws of contract in such a way that the practical effect is to limit arbitrability.[95] Defying this limitation, states began to take action. States, including Maryland, Illinois, and New York began enacting statutory reforms to arbitration contracts.[96]

86. *Id.*
87. Testimony of Colvin, *supra* note 70.
88. *Id.*; Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, 54 HARV. CR-CL L. REV. 155, 201 (2019).
89. Sternlight, *supra* note 88, at 203.
90. *Id.*
91. *Id.* at 203–04.
92. *Id.*; Dupree, *supra* note 78, at 198–99.
93. Samuel D. Lack, *Forced into Employment Arbitration? Sexual Harassment Victims are Saying #MeToo and Beginning to Fight Back—But They Need Congressional Help*, HARV. NEGOT. L. REV. BLOG (2020) (https://journals.law.harvard.edu/hnlr/2020/08/forced-into-employment-arbitration-sexual-harassment-victims-are-saying-metoo-and-beginning-to-fight-back-but-they-need-congressional-help/) [https://perma.cc/FVK4-Y6AB].
94. Dupree, *supra* note 78, at 200.
95. *See generally* Southland Corp. v. Keating, 465 U.S. 1 (1984).
96. Lack, *supra* note 93.

In 2018, Maryland invalidated "any agreement or contract provision that prevents sexual harassment or retaliation victims from asserting a right in a court of law."[97] Maryland's statutory language is devised in such a way that conceptually respects the Court's prohibition on "state legislative attempts to undercut the enforceability of arbitration agreements"[98] while simultaneously placing arbitral agreements clearly in its sights.[99] Making this abundantly clear, Maryland also declared employee policies mandating arbitration of sexual harassment claims unenforceable under state law.[100]

The Illinois Legislature adopted the Workplace Transparency Act in 2019, which implemented language similar to Maryland's but included workplace discrimination within the scope of their contract limitations.[101] Perhaps more importantly, Illinois took aim at one of the primary benefits realized by employers in arbitration: the guarantee of secrecy.[102] Within this Act, the state provided that any contracts entered into after January 1, 2020 could not include non-disclosure agreements relative to "making truthful statements or disclosures regarding unlawful employment practices" or any language which would "have the effect of discouraging the employee from reporting" such acts.[103]

New York's approach was to simply declare "pre-dispute agreements to arbitrate sexual harassment claims illegal and unenforceable."[104] Through this 2018 amendment to the state's Human Rights Law, the state forcefully prohibited compelled arbitration of sexual harassment claims against employers and "render[ed] such clauses null and void as a matter of law."[105]In deference to the Court's jurisprudence regarding the FAA, the statutory language did include the disclaimer "except where inconsistent with federal law."[106] The year following the act's adoption, the Federal District Court for the Southern District of New York found the state's nullification of mandatory arbitration, even in this limited context, inconsistent with the Court's approach to the supremacy of the FAA.[107]

E. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

Following the #MeToo movement, and in response to the perceived "pervasive culture of harassment" that mandatory arbitration perpetuates, Congress adopted the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of

97. *Id.*
98. *Keating*, 465 U.S. at 16.
99. Lack, *supra* note 93.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. Dupree, *supra* note 78, at 200.
105. Lack, *supra* note 93.
106. Dupree, *supra* note 78, at 200 (quoting N.Y. C.P.L.R. Art. 75 § 7515(b)(i) (2018)).
107. New York's approach to limiting mandatory arbitration of sexual harassment claims in the employment context were almost immediately challenged in *Latif v. Morgan Stanley & Co. LLC* (Latif v. Morgan Stanley & Co. LLC, 2019 U.S. Dist. LEXIS 107020 (S.D.N.Y. June 26, 2019)), which resulted in the district court's determination that the FAA's liberal policy favoring arbitration and the Court's guidance in *Conception* prohibited New York's singling-out of arbitral contracts for specific limitations on enforceability. *Id.*; Lack, *supra* note 93.

2021."[108] Proponents of the Act cite a study by the EEOC which found that "between 50-75% of women have faced some form of . . . harassment in the work place" and despite this prevailing culture of harassment, only 6-13% of victims report the conduct – the number filing a formal complaint is far less.[109]

To be clear, the statistics cited are *estimates* of occurrences of harassment and reporting. There is no way to determine the exact numbers, in part due to the secrecy of arbitral proceedings—which is precisely why advocates of reform sought to remove assault and harassment claims from the scope of mandatory arbitration.[110] As noted, motivation for compelling employment arbitration is the ability to maintain secrecy in the proceedings and the resolution, in fact "the only entities with any knowledge that a case has been filed in forced arbitration are the private arbitration providers – which have a clear interest in keeping the information shielded from public view and perpetuating the system of forced arbitration from which they profit."[111]

This is perhaps a cynical view, but the sentiment reflects public perception of mandatory arbitration, which was the driving force behind Congress acting to amend the FAA.[112] The language of the Act goes beyond merely removing these claims from mandatory arbitration under the FAA and placing them back into the public judicial process, it also includes "prohibitions against confidentiality in connection with settlements of sexual assault or sexual harassment claims."[113]

Recognizing that the confidential nature of arbitration could provide a shield against negative publicity, companies across the United States began implementing mandatory arbitration agreements as part of their standard terms of employment.[114] While it would be purely speculative to state that employers specifically pursued arbitral dispute resolution for the purpose of hiding illegal activities rather than merely simplifying personnel processes and limiting legal exposure, the result of this shift to mandatory arbitration has certainly benefitted the former in addition to the latter.[115]

III. DEFINING "SEXUAL HARASSMENT" AND ITS APPLICATION TO LGBTQ+ DISCRIMINATION

In the Ending Forced Arbitration Act, Congress acted to accomplish precisely what the title of the legislation indicates.[116] Following years of public and activist pressures to remove sexual assault and sexual harassment claims from the auspices

108. *Silenced: How Forced Arbitration Keeps Victims of Sexual Violence and Sexual Harassment in the Shadows: Hearing on H.R. 4445 Before the H. Comm. On the Judiciary*, 117th Cong. 64–65 (2021) (testimony of Myriam Gilles, Professor of Law, Benjamin N. Cardozo School of Law) [hereinafter "Testimony of Gilles"]; Ending Forced Arbitration Act.

109. Testimony of Gilles, *supra* note 108, at 68–69.

110. *Id.* at 69.

111. *Id.*

112. Imre S. Szalai, *#MeToo's Landmark, Yet Flawed, Impact on Dispute Resolution: The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*, 18 NW. J.L. & SOC. POL'Y. 1, 2–4 (2023).

113. *Id.* at 3.

114. Testimony of Gilles, *supra* note 108, at 69; Stone, *supra* note 27, at 1036–37.

115. Stone, *supra* note 27, at 1036–37; Lack, *supra* note 93.; *see generally* Smith & Moyé, *supra* note 14, at 292–93.

116. Ending Forced Arbitration Act.

of pre-dispute arbitration agreements, Congress acted to amend § 402 of the FAA.[117] This amendment provides that "no pre[-]dispute arbitration agreement or pre[-]dispute 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."[118] The purpose of this analysis is not to question the necessity or benefit of this legislation, but rather to explore the disparate effect of the legislation on arbitrability of sexual harassment claims due to the statute's deference to state and tribal law definitions of the term "sexual harassment" in addition to the definition provided under federal law.

A. "Sexual Harassment" Under Federal Law

Title VII of the Civil Rights Act of 1964 outlines unlawful employment practices, which have been administratively refined through the federal regulatory process over the last sixty years.[119] As with many statutes, Title VII provides a framework of employment practices which devise as prohibited numerous acts relative to employment based solely on invidious discrimination based on the "individual's race, color, religion, sex, or national origin."[120]

The EEOC has further refined this statutory language through the administrative rulemaking process to provide a definition of "sexual harassment,' which defines the offense as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[121]

Title VII provides a prohibition on discrimination in the workplace, it does not prohibit "harassment" directly.[122] Rather that has been left to the EEOC to define sexual harassment as a subset of prohibited discriminatory behavior, a determination which has since been confirmed by the Supreme Court.[123] In making this determination the Court in *Meritor Savings Bank, FSB v. Vinson*[124] reasoned that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[125]

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117. *Id.*
118. *Id.* at § 402.
119. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2; 29 C.F.R. § 1604.11.
120. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).
121. 29 C.F.R. § 1604.11(a).
122. Franke, *supra* note 4, at 692.
123. *Id.*
124. 477 U.S. 57 (1986).
125. Franke, *supra* note 4, at 692 (quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)).

The determination under *Meritor* confirming the EEOC's interpretation that harassment is a form of discrimination is crucial to the present discussion. Since *Meritor*, the Court has refined what can be considered sexual harassment actionable under Title VII without providing clear direction as to *why* harassment is a form of discrimination.[126] The *Meritor* Court "recognized that hostile environment sexual harassment was cognizable under Title VII," and even alluded to reasoning for this determination through their citation to a lower court ruling which provided that such harassment is equivalent to racial harassment which would be actionably under Title VII as an unreasonable barrier to employment.[127] To a large degree, the specific 'why' of the Court's jurisprudence has been irrelevant to the discussion of sexual harassment in the workplace; regardless of the Court's reasoning for the determination, since 1986 harassment has been defined as a form of discrimination actionable under Title VII.[128]

Since *Meritor* in 1986 and through review of subsequent jurisprudence, scholars have raised three principle justifications for the determination: (1) the harassment would not have occurred but for the plaintiff's sex, (2) the conduct violates Title VII simply because it is sexual in nature, and (3) the nature of the conduct subordinates women to men, which is what Title VII aimed to address.[129] Viewing sexual harassment through the lens of Title VII's purpose, the clearest path from antidiscrimination to anti-sexual harassment is viewing harassment as a group injury, that is where the offense harms all members of a protected group.[130] While this may provide a relatively direct nexus between Title VII and *Meritor*, the 'group injury' theory does not survive closer examination.[131] While sex-based discrimination would fulfill this concept—that is, "where individuals are treated differently, and worse, than others simply because of their . . . sex"—sexual harassment is generally more individualized than systemic.[132] While harassment does, in fact, generally occur because of the victim's sex, it is not their sex that motivates the offense.[133] Rather, it is motivated by the intentions of the harasser, meaning that the harasser would not pursue every member of a sex, but only those to whom they intend to harass, and this is what causes the distinction between sexual harassment and sexual discrimination.[134]

The Court's lack of clarity is particularly notable in the Court's 1998 decision in *Oncale v. Sundowner Offshore Services, Inc.*,[135] clarifying that *Meritor* applies

126. Franke posits two possible explanations for the Court's lack of articulation: (1) that the Court was ill-prepared in 1986 to accept a theory which "conflated male sexuality with the subordination of women," or (2) that the Court simply regarded the conduct in question as a "per se violation of Title VII" and found that it was "sex discrimination plain and simple." *Id.*

127. L. Camille Hébert, *Sexual Harassment as Discrimination "Because of . . . Sex": Have We Come Full Circle?*, 27 OHIO N.U.L. REV. 439, 446 (2001). The Court cited to Henson v. Dundee, 682 F.2d 897 (11th Cir. 1982) in *Meritor*, indicating that a "hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality." *Henson*, 682 F.2d at 902.

128. Franke, *supra* note 4, at 692.

129. *Id.* at 692–93.

130. Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 349 (1990).

131. *Id.*

132. *Id.* at 349–50.

133. *Id.*

134. *Id.*

135. 523 U.S. 75 (1998).

to same-sex sexual harassment.[136] Here, the Court further clouded the distinction between sexual harassment and sex-based discrimination.[137] In *Oncale*, the Court uses the term 'harassment' nearly synonymously with hostility in the workplace based on animus toward certain characteristics, such as gender or non-conformity with gender stereotypes.[138] Writing for the Court, Justice Scalia, clarified "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex,"[139] which served to underscore the notion that Title VII's purpose is to "forbid . . . behavior so objectively offensive as to alter the 'conditions' of the victim's employment."[140]

The reason that the distinction between sexual harassment and sex-based discrimination is important in the present context is that the Ending Forced Arbitration Act defers to the federal definition of 'sexual harassment.'[141] Since the definition of 'sexual harassment' is administratively derived and has developed as a category of judicially prohibited conduct, there is an open question as to how the courts will apply this language with respect to LGBTQ+ individuals in workplace arbitration disputes.

1. Application of Title VII to LGBTQ+ Persons as Interpreted in Bostock

During the 2019-2020 term, the Supreme Court held in *Bostock v. Clayton County, Georgia*[142] that Title VII, as written and applied by the EEOC, protects LGBTQ+ persons from discrimination in the workplace based on "homosexuality or transgender status."[143] Writing for the Court, Justice Gorsuch provided that "[i]t makes no difference if other factors besides the plaintiff's sex contributed to the decision or that the employer treated women as a group the same when compared to men as a group. A statutory violation occurs if an employer *intentionally relies in part on an individual employee's sex*" when making personnel decisions.[144] For the LGBTQ+ community, the outcome of this case vindicated years of efforts to ensure employment protection.[145]

Upon entering office, roughly six-months following the Court's ruling in *Bostock*, President Biden issued Executive Order 13,988, entitled "Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation."[146] This Order called for all agencies across the federal government to "review all existing orders, regulations, guidance documents, policies, programs, or other agency actions" relative to implementing the Court's *Bostock* decision.[147] Clarifying the intent of the Order and providing a strong statement of support for

136. *Id.* at 80.
137. Hébert, *supra* note 127, at 448–49.
138. *Id.*; *see* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
139. *Oncale*, 523 U.S. at 80.
140. *Id.* at 81.
141. Ending Forced Arbitration Act.
142. 140 S. Ct. 1731 (2020).
143. *Id.* at 1734.
144. *Id.* (emphasis added).
145. Aryn Fields, *Human Rights Campaign President Celebrates One-Year Anniversary of Supreme Court Bostock Decision*, HUM. RTS. CAMPAIGN (June 15, 2021), https://www.hrc.org/press-releases/human-rights-campaign-president-celebrates-one-year-anniversary-of-supreme-court-bostock-decision [https://perma.cc/7UG4-QPVJ].
146. Exec. Order No. 13,988, 3 C.F.R. § 419 (2022).
147. *Id.*

the LGBTQ+ community, the President declared it to be "the policy of [his] Administration to prevent and combat discrimination on the purpose of gender identity or sexual orientation, and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation."[148]

In revising guidance pursuant to *Bostock* and Executive Order 13,988, the EEOC has promulgated expansive guidance on employment practices regulated through Title VII as they relate to discrimination against LGBTQ+ employees.[149] Clarifying the implications of *Bostock* to Title VII protections, the EEOC now authoritatively asserts that "[t]he law forbids sexual orientation and gender identity discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment."[150] Expanding upon this, the EEOC has further provided that workplace harassment which creates a hostile work environment for LGBTQ+ persons is prohibited under Title VII as applied by the Court.[151]

The EEOC does not specifically address the question of whether such harassment is prohibited under the agency's definition of "sexual harassment" or whether it is simply classified as discriminatory behavior.[152] As to whether the treatment is actionable under the EEOC the distinction is largely irrelevant, but this distinction is key as to whether hostile work environment or discrimination claims arising under Title VII may be subject to mandatory arbitration under pre-employment or predispute agreements.

Reviewing the EEOC's guidance on the topics of "sexual harassment," sex-based discrimination," and "sexual orientation and gender identity discrimination" there is a clear divide in what the agency considers "sexual harassment" which is what courts would look to in determining the arbitrability of a claim under the FAA, as amended. [153]

2. Arbitrability of Discrimination and Hostile Work Environment Claims

As discussed *supra*, the statutory language of the Ending Forced Arbitration Act provides, in relevant part: "no pre[-]dispute arbitration agreement or pre[-]dispute 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."[154] The operative words of the statute limit the Act's applicability solely to sexual harassment and sexual assault claims arising under applicable law, rendering critical the EEOC's determination of whether

148. Notably, in this Order, the President directed all agencies to go beyond the Court's direct holding regarding Title VII and to implement the Court's reasoning as applied to any and all non-discrimination statutes "so long as the laws do not contain sufficient indications to the contrary." *Id.*

149. *Sexual Orientation and Gender Identity (SOGI) Discrimination*, U.S. EEOC, https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination (last visited Feb. 4, 2024) [hereinafter "*SOGI Discrimination*"] [https://perma.cc/9B59-BSCT].

150. *Id.*

151. *Id.*

152. *Id.*; *Sexual Harassment*, U.S. EEOC, https://www.eeoc.gov/sexual-harassment (last visited Feb. 4, 2024) [hereinafter "*Sexual Harassment*"] [https://perma.cc/5B7M-2KKT].

153. *SOGI Discrimination*, *supra* note 149; *Sexual Harassment*, *supra* note 152; *Sex-Based Discrimination*, U.S. EEOC, https://www.eeoc.gov/sex-based-discrimination (last visited Feb. 4, 2023) [hereinafter "*Sex-Based Discrimination*"] [https://perma.cc/5QW8-AHRF].

154. Ending Forced Arbitration Act.

discriminatory behavior toward LGBTQ+ persons is or is not 'sexual harassment' subject to mandatory arbitration under the FAA.

EEOC guidance separates sexual harassment from sex-based and sexual orientation and gender identity discrimination information and prohibitions, which lends to the position that the EEOC does not consider sex-based or sexual orientation discrimination to be harassment for purposes of federal law, and by extension for purposes of inarbitrability.[155] The EEOC's guidance on the subject of sexual harassment generally requires "unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature" to fall under the definition of sexual harassment, but the application is broader than direct solicitation of sexual contact.[156] 'Harassment,' pursuant to the EEOC, can also include "offensive remarks about a person's sex," "when it is so frequent or severe that it creates a hostile work environment or when it results in an adverse employment decision."[157]

Focusing on the latter attributes of 'harassment,' and the EEOC's substantially similar guidance on "Sex-Based Discrimination"—which explicitly includes the *Bostock*-inclusive elements relative to sexual orientation and gender identity—the presumption by the courts in application of these administrative regulations would be that they are intended to be, and therefore should be separate categories of offenses actionable under Title VII.[158] Notable in these highly similar categories of behavior, the EEOC notes in both that "it is illegal to harass a woman by making offensive comments about women in general."[159] However, the EEOC differentiates sexual orientation and gender identity discrimination using the Court's language from *Bostock*: "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."[160]

Rather than simply incorporate the Court's holding into existing categories of offenses, the EEOC appears to have created a new offense as a result of their *Bostock* updates: "Sexual Orientation and Gender Identity (SOGI) Discrimination."[161] The intention behind this decision is somewhat left to speculation, since the Court was clear that discrimination—or, conceptually, harassment—based on sexual orientation is discrimination based on sex, as prohibited by the plain language of Title VII.[162] It is possible that the disparity in treatment of LGBTQ+ persons is merely an oversight caused by the executive and legislative branches amending separate laws without fully following what the other is doing. However, it is equally possible that the EEOC did not want to translate *Bostock* into the narrowly written (and affirmed) definition of sexual harassment, since even after nearly 30 years, the Court's exact reasoning for upholding the agency's interpretation of Title VII in *Meritor* remains undetermined.[163] Regardless of the reasoning, the result of this analysis is the same: claims for sex-based and sexual orientation-based

155. *SOGI Discrimination*, *supra* note 149; *Sexual Harassment*, *supra* note 152; *Sex-Based Discrimination*, *supra* note 153.
156. *Sexual Harassment*, *supra* note 152.
157. *Id.*
158. *Id.*; *Sex-Based Discrimination*, *supra* note 153.
159. *Sexual Harassment*, *supra* note 152.
160. *SOGI Discrimination*, *supra* note 149 (quoting Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731, 1734 (2020)).
161. *Id.*
162. *Bostock*, 140 S. Ct. at 1734.
163. *See* Franke, *supra* note 4, at 692.

discrimination are subject to mandatory arbitration as the exceptions implemented in 2022 would be inapplicable.

B. Disparities in Arbitrability under State Law

As discussed above, the Ending Forced Arbitration Act amends the FAA to remove from arbitrability pre-dispute agreements which would mandate arbitration for claims involving sexual assault or sexual harassment under "Federal, Tribal, or State laws."[164] With the exception of sexually-solicitous behavior or other limited forms of harassment provided in the EEOC's definition of sexual harassment, any claims for sexual orientation or gender identity discrimination under Title VII would be subject to arbitration under the FAA.[165]

However, depending on an individual state's definition of "sexual harassment," the FAA may be rendered inapplicable by operation of law. To evaluate how this would impact the LGBTQ+ community broadly, the laws of Minnesota, Texas, and Florida are presented as examples of statutory and judicial constructions of 'sexual harassment' which demonstrate the disparate nature of allowing state law to determine the arbitrability of claims under the Ending Forced Arbitration Act. While all laws surveyed for this analysis closely follow the EEOC standard language, there are variations in terminology and statutory construction which result in disparities in what constitutes 'sexual harassment' in different states.

1. Minnesota

The State of Minnesota specifically defines the term 'sexual harassment' to include "verbal . . . communication of a sexual nature" when "that conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment."[166] Based on a plain reading of the Minnesota statute, creation of a hostile work environment based on "communication of a sexual nature" would constitute sexual harassment. Unfortunately, the statute does not provide a definition of what is considered to be "communication of a sexual nature" in order to truly analyze whether the Minnesota Legislature intended this to apply solely to sexually solicitous or lewd conduct, or whether a broader interpretation of the term was considered.

Minnesota's Department of Human Rights, charged with enforcement of the state's employment discrimination laws, provides that employers cannot discriminate based on sexual orientation or gender identity and clearly states that employers cannot "create or allow a hostile working environment to exist."[167] However, this clarification solely provides that such actions constitute employment discrimination, and not 'sexual harassment' as defined.[168] Similar to the distinction at the federal level, sexual harassment is a form of discrimination based on sex as provided

164. Ending Forced Arbitration Act.
165. *See supra* Section III.A.2.
166. MINN. STAT. § 363A.03 (Subd. 43) (2022).
167. *Employment Discrimination*, MINN. DEP'T OF HUM. RTS., https://mn.gov/mdhr/yourrights/what-is-protected/employment/ (last visited Feb. 4, 2024) [https://perma.cc/LU7J-TK9N].
168. *Id.*

in the Minnesota Human Rights statute.[169] Unlike the EEOC's language defining the offense, the statutory language adopted by Minnesota may be broad enough to incorporate sexual orientation-based harassment, without solicitous conduct under the umbrella of the state's definition, removing such hostile workplace claims from mandatory arbitrability.[170]

2. Texas

Texas law is highly similar to Minnesota's, in that the statutory definition of 'sexual harassment' includes "verbal or physical conduct of a sexual nature" as prohibited conduct.[171] Such verbal conduct would be considered harassment if it "has the purpose or effect of unreasonably interfering with an individual's work performance" or "create[es] an intimidating, hostile, or offensive working environment."[172] The Texas Labor Code has a similar shortcoming to that of Minnesota's statute: failure to define what constitutes conduct of a 'sexual nature.'[173] In reviewing these statutes, it appears that legislatures and implementing agencies are reluctant to provide firm definitions of conduct which would be sexual in nature to avoid being overly prescriptive. By offering a prescriptive definition of such conduct, the resulting analysis of reported harassment, based on the facts and context of a given situation, may be scored against a rubric, likely creating more unfavorable outcomes for victims.

The Texas Workforce Commission, the state agency responsible for oversight and enforcement of the state's Labor Code, provides little guidance on what constitutes sexual harassment under Texas law.[174] However, what is provided indicates that the state's definition of harassment is intended to refer to directly solicitous behavior, and not verbal harassment due to one's sexual orientation.[175] The Commission provides that "[s]exual harassment can be unwelcome advances, requests for sexual favors, or physical touching of a sexual nature" which "unreasonably interfere with your work performance or create an intimidating, hostile or offensive work environment, *then that may be sexual harassment*."[176] The Commission's need to qualify that even unwelcome physical contact *may* constitute sexual harassment is indicative of their narrowly applied definition of the offense. Based on the statutory language and the Commission's guidance, it is unlikely that hostile work environment claims without solicitous conduct would be classified as 'sexual harassment' under the laws of Texas, and that such claims would remain subject to arbitration under the FAA through pre-dispute arbitral agreements.

169. MINN. STAT. § 363A.03 (Subd. 13) (2022).
170. *Id.* § 363A.03 (Subd. 43).
171. TEX. LAB. CODE ANN. § 21.141 (West 2022).
172. *Id.*
173. *Id.*
174. *Sex Discrimination*, TEX. WORKFORCE COMM'N, https://www.twc.texas.gov/jobseekers/sex-discrimination (last visited Feb. 4, 2024) [https://perma.cc/CU8V-S3KK].
175. *Id.*
176. *Id.* (emphasis added).

3. Florida

The Florida Civil Rights Act is the state's statutory instrument prohibiting employment discrimination in line with Title VII.[177] While the statute clearly proscribes prohibitions on sex discrimination, there is no statutory definition of the term 'sexual harassment.'[178] Further, the executive branch of state government has not chosen to fill the legislative gap in this area through promulgation of administrative regulations defining the term, rather it has been left to the courts to define and identify when harassing behavior is actionable under Florida law.[179]

Florida's courts have generally defined two types of sexual harassment: quid pro quo and hostile environment.[180] Focusing solely on hostile environment claims, the courts have provided five elements required to establish whether "sexual harassment is sufficiently severe or pervasive to support a hostile-work environment claim."[181] The plaintiff in such a hostile work environment claim is required to prove:

> (1) that the employee belongs to a protected group; (2) that the employee was subjected to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) that the harassment was based on the sex of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) a basis for holding the employer liable.[182]

Evaluating the criteria as a whole, it is highly unlikely that the Florida courts would extend the definition hostile work environment sexual harassment to cover LGBTQ+ individuals. This assessment is based on elements one and two that the courts have established: membership in a protected class and the nature of unwelcome behavior. First, while the Supreme Court has, in recent years, extended protection of federal laws to apply to LGBTQ+ persons, the Court has not, in any instance, found LGBTQ+ persons to be part of a protected class.[183] Rather, the Court, as in *Bostock*, has focused on applying generally applicable protections to LGBTQ+ persons, clarifying that discrimination based on sexual orientation is discrimination based on sex.[184] The result of this application is that a hostile workplace claim would fail on this first element.

Secondly, the focus of the Florida courts on the nature of the unwelcome behavior of the harasser places focus on solicitous sexual acts rather than verbal incidents.[185] Certainly same-sex solicitations would be actionable, just as an opposite-

177. 9 FLA. JURIS. 2D CIVIL RIGHTS § 22 (2023).
178. *Id.*
179. *Id.*; *see* Branch-McKenzie v. Broward Cnty. Sch. Bd., 254 So. 3d 1007 (Fla. Dist. Ct. App. 2018); Blizzard v. Appliance Direct, Inc., 16 So. 3d 922 (Fla. Dist. Ct. App. 2009); Speedway SuperAmerica, LLC v. Dupont, 933 So. 2d 75 (Fla. Dist. Ct. App. 2006).
180. 9 FLA. JURIS. 2D CIVIL RIGHTS § 22 (2023).
181. *Id.*
182. *Id*.
183. *See generally* Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731 (2020); Obergefell v. Hodges, 576 U.S. 644 (2015).
184. *See Bostock*, 140 S. Ct. at 1734.
185. 9 FLA. JURIS. 2D CIVIL RIGHTS § 22 (2023).

sex solicitation would be, but solicitation is required nonetheless.[186] This would place verbally abusive behavior based solely on an employee's sexual orientation or gender identity outside of the state's definition of 'sexual harassment' and into the more broadly applicable sex-based discrimination protections of Title VII.

As a result, under applicable Florida law, there is no shield for hostile work environment claims based on LGBTQ+ status from mandatory arbitration under the FAA.[187] Certainly, abusive and discriminatory workplace behavior are prohibited under Title VII and actionable through the EEOC, but claims arising in situations where there are pre-dispute arbitral agreements would be subject to arbitration rather than a judicial remedy, as they exist outside of the exemptions provided in the Ending Forced Arbitration Act.[188]

IV. EXPANDING LGBTQ+ EMPLOYMENT PROTECTION BY NARROWING THE SCOPE OF THE FAA

The Ending Forced Arbitration Act was a much-needed solution to adhesive arbitration implemented by employers which has had the effect of shielding sexual assault and harassment from public view for years. In the years between the beginning of the #MeToo movement and adoption of this Act in 2022, numerous high-profile individuals spoke out to highlight the danger of requiring these issues to be resolved in the privacy of arbitration.[189] Responding to allegations of long-term sexual harassment at FOX News, Gretchen Carlson tweeted "EVERY organization should end forced arbitration because keeping victims silent is how sexual predators can get away with it for years (or decades)."[190] Similarly, addressing sexist and abusive practices in Hollywood, Reese Witherspoon called for an end to "forced arbitration agreements for sexual harassment cases" to make a safer work environment for everyone.[191]

Employing the same ferocity with which advocates attacked adhesive arbitration of sexual harassment claims in employment, the next fight should move to removal of *all* discriminatory behaviors form the confines of the arbitration process, including sex-based discrimination even if such behavior does not rise to the definition of 'sexual harassment.' Consider the history of arbitration generally—this was intended to be a dispute resolution mechanism for equal partners to an arms-length transaction, not one which establishes the "right of stronger parties in regulated transactions to compel arbitration as a condition of doing business."[192]

A. Reigning in the Scope of the FAA

Putting aside whether the Court was correct in *Mitsubishi Motors*[193] and its progeny in allowing one-sided transactions to be the subject of mandatory

186. *Id.*
187. *See generally* Ending Forced Arbitration Act.
188. *See generally id.*
189. Sternlight, *supra* note 88, at 203.
190. *Id.*
191. *Id.*
192. David S. Schwartz, *If You Love Arbitration, Set It Free: How "Mandatory" Undermines "Arbitration*,*"* 8 NEV. L.J. 400, 401 (2007).
193. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985).

arbitration, it is clear is that as the Court extended its "liberal federal policy favoring arbitration agreements" they have drifted further from requiring *both* parties to an arbitral agreement to truly consent.[194] The Court has made it clear in subsequent decisions that this policy will not be judicially revisited and that any restraint on arbitration under the FAA must come from Congress itself.[195]

The Court further emphasized its commitment to arbitration in *Gilmer*,[196] declaring statutory rights subject to arbitration when there is a valid arbitral agreement to resolve such claims in that forum.[197] Statutory rights are not lost based on the forum in which they are resolved, and the Court agreed in this instance that the arbitral forum was appropriate for the adjudication of those rights and that there was no Congressional intent to place those rights solely in the hands of the judiciary.[198] Since that time, the Court has expanded its view that, subject to the express exceptions of the FAA (or other statutory language to the contrary), there is virtually no limit to arbitration's ability to justly resolve claims.[199]

However, in doing this, the Court has essentially abdicated the judiciary's power to review cases under the "public policy exception" to arbitration which previously existed.[200] Under this exception, courts had previously held that "statutory causes of action reflecting 'important public policies' could not be sent into mandatory arbitration under the FAA."[201] The purpose of this exception was clear—pre-dispute agreements, and the arbitral forum generally, were not the appropriate mechanism for protection of statutory rights.[202] This view of arbitration has now been reaffirmed by Congress to a limited degree in the Ending Forced Arbitration Act, as they have now rejected the use of pre-dispute arbitral agreements for resolution of two particular sorts of claims.[203]

Congress next needs to explore expanding the bar on pre-dispute arbitral agreements beyond the sexual harassment and sexual assault carve-out they have created. Just as arbitration is ill-equipped to protect the rights of harassment and assault victims, the mechanism can also shield structural discriminatory practices from public scrutiny and prevent harmed employees from building viable, independent cases against an employer.[204]

Arbitration, as a private dispute resolution mechanism, is not required to apply governing law to the resolution of an employment dispute.[205] In terms of a claim of employment discrimination raised by an LGBTQ+ employee, an arbitral forum would not be required to apply the Court's holding in *Bostock* that sexual orientation or gender identity discrimination is sex-based discrimination as prohibited by Title VII.[206] Rather, under the terms of arbitration, an employer could provide in the rules of arbitration, for example, that only the employer's definition of 'sex-based

194. Schwartz, *supra* note 192, at 400–01.
195. *Id.*
196. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
197. *Id.*
198. *Id.* at 26.
199. Schwartz, *supra* note 192, at 404–06.
200. *Id.* at 406.
201. *Id.*
202. *Id.*
203. Ending Forced Arbitration Act.
204. *Id.*; *see* Devon M. Loerch, *The Man Behind the Curtain: How Mandatory Arbitration Impedes the Advancement of LGBTQ+ Rights*, 2020 J. DISP. RESOL. 151 (2020).
205. Loerch, *supra* note 204, at 167.
206. *Id.*; Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731, 1734 (2020).

discrimination' may be considered. By limiting the scope of the FAA to remove discriminatory actions under Title VII from the jurisdiction of adhesive arbitration, Congress would be expanding protection beyond the LGBTQ+ community, and in the words of Reese Witherspoon, making a safer work environment for everyone.

B. Diminishing Kompetenz-Kompetenz and Enhancing Judicial Review

The Ending Forced Arbitration Act created one additional provision in the FAA beyond rendering pre-dispute arbitral agreements for specified claims unenforceable—it placed the determination of the statute's applicability solely within the jurisdiction of the courts and not arbitrators.[207] The statute provides that the validity and enforceability of an agreement "shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determination to an arbitrator."[208]

This language has the effect of reversing the Court's holding in *First Options of Chicago Inc. v. Kaplan*[209] with respect to claims for sexual harassment and sexual assault. In *Kaplan,* the Court provided that, subject to agreement of the parties—including in a pre-dispute arbitral agreement—an arbitrator is vested with the authority to determine the arbitrability of a claim.[210] While *Kaplan* delegation, or the principle otherwise appreciated as *kompetenz-kompetenz*, provides an arbitrator with the capacity to determine arbitrability of a dispute, this depends on the parties concurring on the arbitrator possessing this authority.[211] In the case of adhesive arbitration, such as in employment agreements, the arbitral agreement is written by the party in the superior position, which grants that party sole power to establish the authority of the arbitrator.[212] Looking at the documented structural bias and repeat player advantage discussed *supra*, it is reasonable to presume the statistical advantage employers gain in arbitration would likely translate to disputes regarding arbitrability itself. [213]

Presuming the structural bias and repeat player advantages do, in fact, translate to arbitrability under *Kaplan* delegation, Congress was forward-thinking in ensuring that the question of arbitrability in sexual harassment and sexual assault claims is removed from the arbitral forum and placed with the courts.[214] In placing the final authority over arbitrability in these claims with the courts, Congress has ensured that employment law as written, and applied through the courts, will be applied to disputes arising under the provisions of the Ending Forced Arbitration Act.[215] For the LGBTQ+ community, this may be a positive result.

Since the late 1980s, the Supreme Court has routinely supported the employment rights of LGBTQ+ persons, beginning with the decision in *Price Waterhouse*

207. Ending Forced Arbitration Act.
208. *Id.*
209. 514 U.S. 938 (1995).
210. *Id.*; *see also* William W. Park, *The Arbitrability Dicta in* First Options v. Kaplan*: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?*, 12 ARB. INT'L 137 (1996).
211. Park, *supra* note 210, at 144.
212. *Id.*; Testimony of Colvin, *supra* note 70.
213. *See supra* Section II.C.
214. Testimony of Colvin, *supra* note 70, at 15–16; Ending Forced Arbitration Act.
215. Ending Forced Arbitration Act.

v. Hopkins,[216] which provided that employment decisions based on conformance to traditional gender norms constitutes a violation of Title VII's non-discrimination provisions.[217] Since that time—and most recently in *Bostock*—the Court has provided that discrimination based on sexual orientation, gender identity, or gender conformance is sex-based discrimination.[218] While this is not dispositive of a result for whether the Court may ultimately find sexual orientation and gender identity based hostile work environment claims to be actionable as 'sexual harassment,' it provides more hope for the LGBTQ+ community than leaving the final decisions on this question to employer-selected arbitrators.

V. CONCLUSION

The Ending Forced Arbitration Act was a significant step forward in terms of worker protections. Arbitration is an incredibly useful tool for dispute resolution outside of the traditional court system, but the application of this tool over the past several decades has placed workers at a disadvantage when trying to combat systemic issues in the workplace and cultures of harassment that were perpetuated through mismanagement. The progressive result of the Court's "liberal federal policy favoring arbitration agreements"[219] have made adhesive arbitral agreements regarding employment and the adjudication of statutory rights part-and-parcel of the American workplace. In a vacuum, arbitration would likely be an ideal solution for resolving employment-based disputes, arbitration is generally less expensive and more expeditious than litigation, which benefits both parties; however, research has shown that mandatory arbitration of employment issues has structural and repeat player biases which place employees at a disadvantage when in a dispute with their employers.[220]

One could argue that under freedom to contract, if a party agrees to a situation which places them at a disadvantage, that was their right; however, this is not truly the case in employment arbitration.[221] When concession to an employer-drafted arbitral agreement is made a condition of new or continued employment, many workers are unable to reject the offer in front of them in favor of better terms.[222] This removes the mutual assent element from arbitral agreements and places the integrity of arbitration into question.[223]

Removing sexual harassment and sexual assault from the purview of pre-dispute, employer-mandated arbitration and reserving these issues to the courts is a strong first step in protecting the rights of American workers as adhesive arbitration continues to grow. However, this first step is not enough; Congress must act to ensure protection of all workers from sex-based and other discriminatory practices that remain subject to pre-dispute arbitral agreements. If Congress fails to act, the disparate impact will cause unequal justice under law based on the state in which one resides, which is not an adequate solution to a national problem.

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216. 490 U.S. 228 (1989).
217. Loerch, *supra* note 204, at 159.
218. Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731 (2020).
219. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).
220. Testimony of Colvin, *supra* note 70, at 16.
221. *Id.*
222. *Id.* at 12.
223. Schwartz, *supra* note 192, at 401.