

The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

David Horton

ABSTRACT. In March 2022, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (Ending Forced Arbitration Act). The Act voids predispute arbitration clauses in cases involving sexual-misconduct allegations. The legislation—which earned bipartisan support—was a stunning victory for the #MeToo movement and critics of forced arbitration.

However, this Essay explores a design choice that limits the impact of the new law. Previously, Congress had restricted forced arbitration through standalone statutes that applied to all arbitration provisions within the scope of its legislative power. Conversely, federal lawmakers inserted the Ending Forced Arbitration Act within the Federal Arbitration Act (FAA). Thus, the Ending Forced Arbitration Act only governs if the FAA governs. But the FAA is subject to several exceptions. In turn, when a case falls through the cracks of federal arbitration law, state law applies. States generally have a reputation for being hostile to arbitration. But this Essay demonstrates that, counterintuitively, many states require arbitration where federal law now does not. Accordingly, the Essay outlines what Congress, state lawmakers, and courts can do to prevent allegations of sexual misconduct from being sent to private dispute resolution.

INTRODUCTION

On March 3, 2022, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (Ending Forced Arbitration Act).¹ The Act is the first major amendment in the one-hundred-year history of the

1. See Phil Mattingly & Maegan Vazquez, *Biden Signs Bill Overhauling Workplace Sexual Misconduct into Law*, CNN (Mar. 3, 2022, 6:32 PM), <https://www.cnn.com/2022/03/03/politics/biden-sexual-misconduct-bill-signing/index.html> [<https://perma.cc/GK69-38KW>].

Federal Arbitration Act (FAA).² It voids predispute arbitration clauses in cases involving sexual-misconduct claims.³ Although forced arbitration has long been polarizing, the measure drew bipartisan support. Thus, commentators cited it as “a milestone in the #MeToo movement”⁴ and a ringing victory for critics of forced arbitration.⁵

This Essay critiques one aspect of the new law. Although Congress has rarely restricted forced arbitration, it has always done so by passing standalone statutes. Indeed, scattered throughout the United States Code are rules that exempt certain whistleblower claims from arbitration and invalidate predispute arbitration clauses in residential mortgages, motor-vehicle franchise contracts, agreements for the sale of livestock and poultry, and loans to active-duty military personnel.⁶ These arbitration bans are subject specific, but they are also comprehensive: within their realms, they extend to all arbitration provisions that fall within the scope of Congress’s legislative authority. Conversely, lawmakers chose to plant the Ending Forced Arbitration Act *within* the FAA. Accordingly, the Ending Forced Arbitration Act only applies if the FAA applies. But the FAA contains several exceptions, and if a case falls into one of these fissures in federal arbitration law, it must be decided under state law. In sharp contrast to the conventional wisdom, many states require arbitration in contexts that the FAA does not.

These gaps in the Ending Forced Arbitration Act are notable for three reasons. First, they undercut Congress’s goal of “improv[ing] access to justice for survivors of sexual assault and harassment.”⁷ The FAA’s exceptions are relatively narrow, but there is little doubt that they will apply to some allegations of sexual

-
2. See Michael J. Yelnosky, *Fully Federalizing the Federal Arbitration Act*, 90 OR. L. REV. 729, 745 (2012) (noting that “[t]he FAA was enacted in 1925, and it has never been meaningfully amended”).
 3. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (codified as amended in scattered sections of 9 U.S.C.).
 4. *Congress Ends Mandatory Arbitration of Sexual Harassment and Sexual Assault Claims*, NAT’L L. REV. (Feb. 18, 2022), <https://www.natlawreview.com/article/congress-ends-mandatory-arbitration-sexual-harassment-and-sexual-assault-claims> [<https://perma.cc/6VTK-QH6P>].
 5. See Amy B. Wang, *Senate Passes Bill to End Forced Arbitration in Sexual Assault, Harassment Cases*, WASH. POST (Feb. 10, 2022, 2:59 PM), <https://www.washingtonpost.com/politics/2022/02/10/senate-sexual-assault-forced-arbitration> [<https://perma.cc/745P-DRMR>]; Eric Lutz, “One of the Biggest Workplace Reforms in History”: Passage of Bipartisan Bill is Major Victory for the MeToo Movement, VANITY FAIR (Feb. 10, 2022), <https://www.vanityfair.com/news/2022/02/one-of-the-biggest-workplace-reforms-in-history-passage-of-bipartisan-bill-is-major-victory-for-the-metoo-movement> [<https://perma.cc/TX6D-FMQF>].
 6. See Andrew McWhorter, *A Congressional Edifice: Reexamining the Statutory Landscape of Mandatory Arbitration*, 52 COLUM. J.L. & SOC. PROBS. 521, 534 (2019).
 7. H.R. REP. NO. 117-234, at 18 (2022).

wrongdoing. Thus, lawmakers have failed to exempt these claims from arbitration.

Second, this problem inverts the conventional federalism dynamic of arbitration law. For decades, the FAA has been notorious for mercilessly preempting state rules that seek to shield consumers, franchisees, and employees from compulsory arbitration. With the Ending Forced Arbitration Act, for once, federal law is hospitable to plaintiffs, and state principles favor businesses. Therefore, the gaps in the FAA, rather than its preemptory effect, now pose a problem for victims of sexual misconduct.

Third, the fact that the FAA and the Ending Forced Arbitration Act are joined at the hip creates an unnecessary headache for progressives. Public-interest organizations routinely file impact litigation seeking to enlarge the FAA's exceptions. But now, every stride forward in this landscape will require taking half a step back. For most plaintiffs, each inch that the FAA recedes is a victory. But for individuals with sexual-assault or harassment complaints, the opposite is true: as the FAA shrinks, the odds that such plaintiffs will be forced to arbitrate *increase*.

Finally, the Essay suggests several possible solutions. It argues that the most effective remedy would be for Congress to decouple the Ending Forced Arbitration Act from the FAA. Liberating the new statute from the FAA's limits would transform it into a blanket prohibition against forced arbitration in cases that raise claims of sexual wrongdoing. Alternatively, states could fill the apertures in federal law by passing their own versions of the Ending Forced Arbitration Act, or judges can find that forced arbitration clauses violate public policy when applied to allegations of sexual wrongdoing.

The Essay contains three Parts. Part I offers a primer on the Ending Forced Arbitration Act. It explains why mandatory arbitration of sexual-assault and harassment claims has been one of the most divisive aspects of the "arbitration war."⁸ It then surveys how the Ending Forced Arbitration Act tries to stop firms from sending these allegations into the opaque box of private dispute resolution. Part II establishes that the FAA's limits can neutralize the Ending Forced Arbitration Act by triggering proarbitration state laws. Part III discusses how Congress, state lawmakers, and judges can fix this defect.

8. Editorial, *The Arbitration War*, N.Y. TIMES (Nov. 26, 2010), <https://www.nytimes.com/2010/11/27/opinion/27sat1.html> [<https://perma.cc/YCJ6-T3JR>].

I. THE ENDING FORCED ARBITRATION ACT

The Ending Forced Arbitration Act is “one of the most significant changes to employment law in years.”⁹ This Part situates the new law against the backdrop of the forced-arbitration controversy.

The seeds of the arbitration revolution were sown in 1925 when Congress passed the FAA. Previously, courts had invented special rules—known as the ouster and revocability doctrines—to refuse to enforce agreements to arbitrate a future controversy.¹⁰ The FAA abolished these antiarbitration doctrines. Section 2, the statute’s nucleus, makes certain arbitration agreements presumptively enforceable:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . or an agreement in writing to submit to arbitration an existing controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.¹¹

By making arbitration clauses vulnerable to traditional contract principles—but not unique antiarbitration rules—the FAA places them “upon the same footing as other contract[]” provisions.¹²

For decades, the FAA’s impact was muted. For one, the statute was seen as a procedural rule for federal courts that neither applied in state courts nor preempted state law.¹³ Also, section 1 of the FAA seemed to exclude employment contracts. That provision declares that the FAA does not apply to “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”¹⁴ How would this language exempt all employment contracts? In 1925, most employment agreements did not fall under

9. Leigh Ann Caldwell, *Senate Passes Bill Ending Forced Arbitration in Sexual Misconduct Cases*, NBC NEWS (Feb. 10, 2022, 11:59 AM), <https://www.nbcnews.com/politics/congress/senate-passes-bill-ending-forced-arbitration-sexual-misconduct-cases-rcna15657> [<https://perma.cc/PCA5-5ZZG>].

10. See, e.g., *Kill v. Hollister* (1746) 95 Eng. Rep. 532, 532 (KB); *Vynior’s Case* (1609) 77 Eng. Rep. 597, 599 (KB).

11. 9 U.S.C. § 2 (2018).

12. H.R. REP. NO. 68-96, at 1 (1924).

13. The FAA’s legislative history declares that it “relate[s] to the procedure in the [f]ederal courts” and “is no infringement upon the right of each [s]tate.” *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 37 (1924).

14. 9 U.S.C. § 1 (2018).

Congress's Commerce Clause power and thus were not subject to section 2 of the FAA in the first place.¹⁵ The only exceptions were in the shipping and transportation industries, where sailors and train conductors moved between states on the job and thus fell within Congress's Commerce Clause authority.¹⁶ Arguably, because section 1 excluded these very workers – the only ones to whom the FAA might apply – lawmakers meant to ensure that *no* employees were subject to the statute.¹⁷ For these reasons, until the 1970s, arbitration was “largely a tool for resolving commercial disputes between businesspeople.”¹⁸

Matters changed dramatically during the tort-reform movement of the 1980s. As concern mounted about the “litigation explosion,”¹⁹ the Supreme Court abruptly declared that the FAA embodies “a liberal federal policy favoring arbitration agreements.”²⁰ In *Southland Corp. v. Keating*, the Court held that the FAA applies in state court and preempts state law.²¹ Then, in *Circuit City Stores*,

-
15. In fact, just seven years before Congress passed the FAA, the Court held that Congress lacked the power under the Commerce Clause to pass a law that that was designed to “standardize the ages at which children may be employed in mining and manufacturing within the [s]tates.” *Hammer v. Dagenhart*, 247 U.S. 251, 272, *overruled by* *United States v. Darby*, 312 U.S. 100 (1941). Likewise, in *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), the Court squarely held that an employment contract was not “a transaction involving commerce” within the meaning of § 2 of the Act,” *id.* at 200.
 16. See, e.g., *Howard v. Ill. Cent. R. Co.*, 207 U.S. 463, 496 (1908) (acknowledging “that the power of Congress may be exercised as to the relation of master and servant in matters of interstate commerce”).
 17. See *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1087 (9th Cir. 1998); Archibald Cox, *Grievance Arbitration in the Federal Courts*, 67 HARV. L. REV. 591, 598 (1954) (observing that when Congress passed the FAA, “the phrase ‘any other class of workers engaged in interstate or foreign commerce’ might well have been considered broad enough to reach every contract of employment subject to federal regulation”). The FAA’s legislative history strongly supports this interpretation. When the statute was introduced to Congress in 1923, it did not contain section 1’s exclusion, and labor advocates complained that it might apply in employment disputes. See *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 9 (1923). In a Senate Judiciary Subcommittee hearing, W.H.H. Piatt, the Chairman of the American Bar Association Committee on Commerce, Trade, and Commercial Law, sought to defuse this objection by declaring that “[i]t is not intended that this shall be an act referring to labor disputes[] at all.” *Id.* Secretary of Commerce Herbert Hoover then proposed that Congress add the section 1 exclusion to assuage the “objection . . . to the inclusion of workers’ contracts in the law’s scheme.” *Id.* at 14.
 18. Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1428-29 (2008).
 19. See David S. Schwartz, *Judicial Capacity, Causation, and History: Next Steps for the Judicial Capacity Model*, 2020 WIS. L. REV. 195, 212.
 20. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).
 21. See 465 U.S. 1, 16 (1984).

Inc. v. Adams, the Court read section 1's exception narrowly.²² Instead of honoring Congress's likely wish to carve out all employment contracts from the FAA, the Court held that section 1 merely excludes "seamen," "railroad employees," and other "transportation workers" who are engaged in interstate commerce.²³ The Court reached this conclusion, in part, by citing the "FAA's proarbitration purposes."²⁴

Forced arbitration clauses spread throughout the economy, sparking debate.²⁵ Businesses and some scholars applauded this development on the grounds that arbitration is faster, cheaper, and more accessible than litigation.²⁶ But plaintiffs' lawyers and most academics writing about alternative dispute resolution saw things differently. In their eyes, the lockstep use of arbitration provisions was nothing less than an attempt to "systematically reduce[] the legal liability of corporate defendants."²⁷

For about forty years, nothing managed to trim the FAA's sails. In a string of opinions, the Court held that the statute precluded state lawmakers, as well as judges applying state law, from trying to shield individuals from lopsided arbitration clauses. According to the Court, the FAA preempted California statutes that voided arbitration clauses in franchise²⁸ and wage disputes,²⁹ the California Supreme Court's opinion that deemed most class arbitration waivers to be unconscionable,³⁰ a California appellate court's interpretation of an arbitration agreement as unenforceable,³¹ Kentucky's restriction on the ability of agents acting under a power of attorney to contract away a principal's right to access the

22. 532 U.S. 105, 114-19 (2001).

23. *Id.* at 109.

24. *Id.* at 123. The Court also cited the fact that "the words 'any other class of workers engaged in . . . commerce' constitute a residual phrase, following, in the same sentence, explicit reference to 'seamen' and 'railroad employees.'" *Id.* at 114. Accordingly, the Court applied the canon of *ejusdem generis* to conclude that "[w]here general words follow specific words . . . the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Id.* at 114-15.

25. See, e.g., David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 623 (2010).

26. See Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001); Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 HARV. NEGOT. L. REV. 29, 107 (2017).

27. David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 37.

28. *Southland Corp. v. Keating*, 465 U.S. 1, 11, 17 (1984).

29. *Perry v. Thomas*, 482 U.S. 483, 491 (1987).

30. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

31. *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 49 (2015).

courts,³² Montana’s requirement that drafters give notice on the first page of a contract that the contract included an arbitration provision,³³ and West Virginia’s attempt to exempt wrongful-death lawsuits from the FAA.³⁴ As a result, the Justices “nullified any wisdom that state legislatures or courts might bring to bear on the increasing prevalence of arbitration clauses in contracts.”³⁵

Likewise, arbitration abolitionists failed to make much headway in Washington. To be sure, arbitration opponents won several small victories in the 2000s, when Congress passed a patchwork of antiarbitration rules. For instance, the Motor Vehicle Franchise Contract Arbitration Fairness Act (Fairness Act) and the Food, Conservation, and Energy Act allow certain parties to retract their assent to a predispute arbitration clause.³⁶ In addition, the Military Lending Act (MLA) invalidates arbitration provisions in loans to active-duty military personnel.³⁷ Finally, the Dodd-Frank Wall Street Reform and Consumer Protection Act bars the arbitration of some whistleblower claims³⁸ and voids predispute arbitration clauses in residential mortgages.³⁹ Nevertheless, more ambitious bills ran into a brick wall of Republican opposition. For instance, the Arbitration Fairness Act (AFA) and the Forced Arbitration Injustice Repeal Act (FAIR Act) – both of

32. *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1428-29 (2017).

33. *Dr.’s Assocs., Inc. v. Casarotto (Casarotto II)*, 517 U.S. 681, 688-89 (1996).

34. *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533-34 (2012).

35. Note, *State Courts and the Federalization of Arbitration Law*, 134 HARV. L. REV. 1184, 1186 (2021).

36. Pub. L. No. 107-273, 116 Stat. 1758 (codified as amended at 15 U.S.C. § 1226(a)(2)) (“[W]henver a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing.”); Pub. L. No. 110-234, 122 Stat. 923 (codified as amended at 7 U.S.C. § 197c) (“Any livestock or poultry contract that contains a provision requiring the use of arbitration to resolve any controversy that may arise under the contract shall contain a provision that allows a producer or grower, prior to entering the contract to decline to be bound by the arbitration provision.”).

37. Pub. L. No. 109-364, 120 Stat. 2083 (codified as amended at 10 U.S.C. § 987(f)(4)) (“[N]o agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable against any covered member or dependent of such a member, or any person who was a covered member or dependent of that member when the agreement was made.”).

38. Pub. L. No. 107-204, 116 Stat. 802 (codified as amended at 18 U.S.C. § 1514A(e)(1)-(2)); *Daly v. Citigroup Inc.*, 939 F.3d 415, 422-23 (2d Cir. 2019) (explaining that Dodd-Frank created a new right of action for retaliation against employee whistleblowers and also made such claims nonarbitrable).

39. Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended at 15 U.S.C. § 1639c(e)(1)) (“No residential mortgage loan and no extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer may include terms which require arbitration . . .”).

which would have precluded forced arbitration in antitrust, civil-rights, consumer, and employment cases – routinely died in committee.⁴⁰

However, support for a narrower ban on the forced arbitration of sexual wrongdoing started to build in 2005, when a Halliburton employee named Jamie Leigh Jones was drugged and gang raped by coworkers in Baghdad.⁴¹ When Jones sued, her employer tried to enforce the arbitration clause in her contract.⁴² Although the trial court denied the motion in part and the Fifth Circuit affirmed,⁴³ the case made national headlines and cast a harsh spotlight on forced arbitration.⁴⁴ In 2009, Congress responded by passing the Franken Amendment, which barred the Department of Defense from entering into contracts for more than a million dollars with companies that require their employees to arbitrate sexual-assault claims.⁴⁵ Five years later, President Obama extended a similar embargo to all federal contractors by executive order.⁴⁶

This antiarbitration momentum accelerated in 2016 with the rise of #MeToo. A parade of disturbing allegations against powerful men led to a “reckoning and an airing of truths about sexual harassment and assault at work.”⁴⁷ These stories highlighted that arbitration’s privacy and confidentiality permit “offender[s] to

40. See, e.g., Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3092 n.131 (2015) (describing the Arbitration Fairness Act (AFA)); Levi Sumagaysay, *FAIR Act Is Being Revived in Washington, Raising Hopes for End to Forced Arbitration*, MARKETWATCH (Feb. 11, 2021, 10:44 AM ET), <https://www.marketwatch.com/story/reintroducing-the-fair-act-bill-would-end-forced-arbitration-11613057369> [<https://perma.cc/72CV-DJU3>] (surveying the Forced Arbitration Injustice Repeal Act (FAIR Act)); Joshua T. Mandelbaum, Note, *Stuck in a Bind: Can the Arbitration Fairness Act Solve the Problems of Mandatory Binding Arbitration in the Consumer Context?*, 94 IOWA L. REV. 1075, 1104 (2009) (discussing conservative opposition to these bills).

41. See Jeffrey Adams, *The Assault of Jamie Leigh Jones: How One Woman’s Horror Story Is Changing Arbitration in America*, 11 PEPP. DISP. RESOL. L.J. 253, 254-55 (2011).

42. See *Jones v. Halliburton Co.*, 583 F.3d 228, 233 (5th Cir. 2009).

43. *Jones v. Halliburton Co.*, 625 F. Supp. 2d 339, 356-57 (S.D. Tex. 2008), *aff’d*, *Jones v. Halliburton Co.*, 583 F.3d 228, 242 (5th Cir. 2009) (holding that some of Jones’s claims did not fall within the scope of the arbitration clause).

44. See Wade Goodwyn, *Rape Case Highlights Arbitration Debate*, NPR (June 9, 2009, 10:50 AM ET), <https://www.npr.org/2009/06/09/105153315/rape-case-highlights-arbitration-debate> [[https://perma.cc/7\]XK-TD8K](https://perma.cc/7]XK-TD8K)].

45. See H.R. 3326, 111th Cong. § 8116 (2009).

46. See Andrew C. Fillmore, *Thanks, Obama! “Fair Pay and Safe Workplaces” Come at the Cost of Mandatory Pre-Dispute Employment Arbitration*, 7 Y.B. ON ARB. & MEDIATION 237, 237 (2015).

47. See Terri Gerstein, *Forced Arbitration in Workplace Sexual Assault Cases Is Ending. But What About Other Disputes?*, NBC NEWS (Feb. 11, 2022, 11:57 AM EST), <https://www.nbcnews.com/think/opinion/forced-arbitration-workplace-sexual-assault-cases-ending-what-about-other-ncna1288968> [<https://perma.cc/GW7H-GE6E>].

potentially evade accountability and continue the harassment.”⁴⁸ For example, Fox News anchor Gretchen Carlson became a vocal opponent of forced arbitration after her boss, Roger Ailes, invoked the process in her sexual-harassment cases against him.⁴⁹ As Carlson put it, “Forced arbitration is a sexual harasser’s best friend: It keeps proceedings secret, findings sealed, and victims silent.”⁵⁰ In addition, commentators argued that arbitration’s informal rules and lack of meaningful appellate rights are inappropriate for allegations of serious wrongdoing.⁵¹ As public pressure mounted, a variety of white-shoe law firms and tech companies voluntarily exempted claims of sexual misconduct from their forced-arbitration clauses.⁵²

Congress also began to consider excluding #MeToo-related causes of action from the FAA. In 2017, the unlikely allies of Senators Kirsten Gillibrand and Lindsey Graham cosponsored the Ending Forced Arbitration of Sexual Harassment Act.⁵³ The proposed statute would have precluded forced arbitration of a “sex discrimination dispute,” which it defined to include any allegation that stemmed from conduct that violated Title VII of the Civil Rights Act of 1964.⁵⁴ As with the AFA and FAIR Act, proarbitration lobbyists defeated the measure.⁵⁵ Yet their response was subdued. Indeed, they “were hesitant to publicly denounce [the bill] for fear of criticism that they were silencing victims of sexual harassment.”⁵⁶

-
48. Meagan Glynn, Note, *#TimesUp for Confidential Employment Arbitration of Sexual Harassment Claims*, 88 GEO. WASH. L. REV. 1042, 1047 (2020).
 49. See Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 201-02 (2019).
 50. Gretchen Carlson, *Gretchen Carlson: The Supreme Court Tried to End #MeToo. Here’s How We’re Fighting Back.*, FORTUNE (May 31, 2018, 11:06 AM EDT), <http://fortune.com/2018/05/31/gretchen-carlson-supreme-court-ruling-arbitration-metoo> [<https://perma.cc/HV53-WP8H>].
 51. See Rachel M. Schiff, Note, *Not So Arbitrary: Putting an End to the Calculated Use of Forced Arbitration in Sexual Harassment Cases*, 53 U.C. DAVIS L. REV. 2693, 2708-09 (2020) (“[A]rbitration reduces employee[s]’ opportunities to win against their employers.”).
 52. See Sternlight, *supra* note 49, at 204.
 53. S. 2203, 115th Cong. (2017); H.R. 4570, 115th Cong. (2017).
 54. S. 2203 § 401(2); H.R. 4734 § 401(1).
 55. See Sternlight, *supra* note 49, at 206-07.
 56. Kathleen McCullough, Note, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo- and Time’s Up-Inspired Action Against the Federal Arbitration Act*, 87 FORDHAM L. REV. 2653, 2677 (2019); Marina Fang, *Business Groups Might Be Quietly Killing a Bill that Would Bring Sexual Abuse Claims to Light*, HUFFINGTON POST (May 17, 2018, 4:02 PM EDT), https://www.huffingtonpost.com/entry/forced-arbitration-sexual-harassment_us_safda846e4boas9b4e019e0a [<https://perma.cc/QX42-QES5>].

Accordingly, in July 2021, Senator Gillibrand and Representative Cheri Bustos introduced the similar – but more narrowly focused – Ending Forced Arbitration Act in their respective chambers.⁵⁷ The bill contains two key parts. First, it amends section 2 of the FAA. Recall that, for nearly a century, this provision has made arbitration agreements in contracts that involve interstate commerce “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁵⁸ The Ending Forced Arbitration Act adds to the end of this sentence the words “or as otherwise provided in chapter 4.”⁵⁹ In turn, the bill sets out a new chapter 4 of the FAA, governing arbitration of sexual-assault and sexual-harassment disputes.⁶⁰ Thus, under the Ending Forced Arbitration Act, the price of admission into arbitration is drafting an agreement that complies both with black-letter contract law and the FAA’s freshly minted chapter 4.

Chapter 4 is the heart of the Ending Forced Arbitration Act. It declares that “no predispute arbitration agreement . . . 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.”⁶¹ The statute defines “sexual assault dispute” in sweeping terms, as one that “involve[s] a nonconsensual sexual act or sexual contact, . . . including when the victim lacks capacity to consent.”⁶² Likewise, a “sexual harassment dispute” includes any “conduct that is alleged to constitute sexual harassment.”⁶³ Notably, chapter 4 governs not just sexual-misconduct *claims*, but *cases* that “relate[] to” such disputes.⁶⁴ Thus, chapter 4 has the potential to apply to complaints such as wrongful firing,

57. S. 2342, 117th Cong. (2021); H.R. 4445, 117th Cong. (2021).

58. 9 U.S.C. § 2 (2018).

59. H.R. 4445 § 2(b)(1)(A).

60. *Id.* § 2(a).

61. 9 U.S.C. § 402(a) (2018). The Ending Forced Arbitration Act also prohibits “predispute joint-action waivers,” which are terms that relinquish the plaintiff’s right to bring or participate in a class action. *See id.* § 401(2). Likewise, in response to the rising use of delegation clauses – which empower the arbitrator to decide important issues about the arbitration itself – the statute states that “[t]he applicability of this chapter to an agreement to arbitrate . . . shall be determined by a court . . . irrespective of whether the agreement purports to delegate such determinations to an arbitrator.” *Id.* § 402(b); *see also* David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 370 (2018).

62. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, S. 2342, 117th Cong. § 401(3) (2021).

63. *Id.* § 401(4).

64. *Id.* § 402(a).

misclassification, or intentional infliction of emotional distress that happen to be alleged alongside sexual wrongdoing.⁶⁵

Despite its breadth, the bill sailed smoothly through the legislative process. It gathered support from fifty-three cosponsors, including seventeen Republicans.⁶⁶ It then passed the House on February 7, 2022, by a comfortable 335-97 margin and won approval three days later in the Senate by a voice vote.⁶⁷ On March 3, President Biden signed the law, declaring that it was a “momentous day for justice and fairness in the workplace.”⁶⁸

II. THE ENDING FORCED ARBITRATION ACT AND STATE LAW

This Part critiques Congress’s decision to insert the Ending Forced Arbitration Act within the FAA. It begins by revealing how this choice restricts the new statute’s scope. It then demonstrates that claims of sexual wrongdoing that slip through the cracks in federal law often must be arbitrated under state law.

-
65. See Robert Iafolla & Paige Smith, *Court Battles Loom Over #MeToo Arbitration Bill’s Unclear Scope*, BLOOMBERG L. (Feb. 16, 2022, 5:30 AM), <https://news.bloomberglaw.com/daily-labor-report/court-battles-loom-over-metoo-arbitration-bills-unclear-scope> [https://perma.cc/QA56-95LL] (observing that it is “unclear how courts will handle cases that also include other allegations, like race discrimination or wage-and-hour claims”). During debate, Senate Republicans argued that this aspect of the bill “should be narrowly interpreted.” 168 CONG. REC. S625 (daily ed. Feb. 10, 2022) (statement of Sen. Joni Ernst); see also *id.* (statement of Sen. Lindsey Graham) (“What we are not going to do is take unrelated claims out of the arbitration contract.”). Nevertheless, given the rise of textualism, these “comments may have limited impact on how the bill is interpreted.” Iafolla & Smith, *supra*.
66. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, S. 2342, 117th Cong. (2021); Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, H.R. 4445, 117th Cong. (2021).
67. *Roll Call 33*, CLERK OF THE U.S. HOUSE OF REPRESENTATIVES (Feb. 7, 2022), <https://clerk.house.gov/Votes/202233> [https://perma.cc/G2RD-JXWD]; see Carrie N. Baker, *Biden Signs Bill to End Forced Arbitration for Sexual Assault and Harassment Claims, Protect Right to File Class-Action Lawsuits*, MS. (Mar. 3, 2022), <https://msmagazine.com/2022/02/15/congress-ends-arbitration-protects-right-to-file-class-action-lawsuits> [https://perma.cc/8UJ2-P3TJ].
68. Morgan Chalfant, *Biden Signs Bill Banning Forced Arbitration in Sexual Misconduct Cases*, HILL (Mar. 3, 2022, 6:26 PM ET), <https://thehill.com/homenews/administration/596815-biden-signs-bill-ending-forced-arbitration-in-sexual-misconduct-cases> [https://perma.cc/5VEY-WVNM].

A. *The FAA's Limits*

This Section describes three ways the FAA and, therefore, the Ending Forced Arbitration Act might not govern a lawsuit.⁶⁹ It also shows that, while arbitration skeptics have fought tooth and nail to *expand* these gaps, this tactic will now boomerang on them in sexual-misconduct disputes.

1. *Section 1*

Section 1 of the FAA exempts “contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce.”⁷⁰ Most of the section 1 caselaw hinges on the meaning of “any other class of workers engaged in . . . interstate commerce,” which is known as the “residual clause.”⁷¹ Although the residual clause was once a mere pinprick in the FAA, courts have recently expanded its reach.

Traditionally, few plaintiffs found safe harbor within section 1. As mentioned above, *Circuit City* held that section 1 only covers “transportation workers” engaged in interstate commerce, reading the residual provision narrowly to “further the FAA’s purpose of overcoming ‘judicial hostility to arbitration agreements.’”⁷² Afterward, judges saw *Circuit City* as a more general directive to limit the ambit of the residual clause. For example, most courts required individuals to cross state lines while on the job to qualify for protection.⁷³ Likewise, because

69. There are other situations in which the FAA does not apply, but they are less likely to arise. For example, the FAA only applies to contracts that “evidenc[e] a transaction involving commerce.” 9 U.S.C. § 2 (2018). However, this element is almost always satisfied. See *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 58 (2003). In addition, parties can opt out of federal arbitration law by incorporating state law by reference. See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (recognizing that drafters have this power); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58-59, 63-64 (1995) (requiring a clear statement to displace federal rules). Yet it is unclear whether this technique can displace mandatory federal rules such as the Ending Forced Arbitration Act. See, e.g., Christopher R. Drahozal, *Contracting Around Hall Street*, 14 LEWIS & CLARK L. REV. 905, 921 (2010).

70. 9 U.S.C. § 1 (2018).

71. *Singh v. Uber Techs., Inc.*, No. 16-3044, 2021 WL 5494439, at *3 (D.N.J. Nov. 23, 2021). In addition, once in a long while, a dispute hinges on whether an employee is a “seaman” or “railroad employee.” See *Rodgers-Rouzier v. Am. Queen Steamboat Operating Co.*, 525 F. Supp. 3d 926, 929 (S.D. Ind. 2021).

72. *Carmona v. Domino’s Pizza, LLC*, 21 F.4th 627, 629 (9th Cir. 2021) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001)).

73. See *Magana v. DoorDash, Inc.*, 343 F. Supp. 3d 891, 899 (N.D. Cal. 2018); *Vargas v. Delivery Outsourcing, LLC*, No. 15-CV-03408, 2016 WL 946112, at *4 (N.D. Cal. Mar. 14, 2016) (rejecting the argument that plaintiffs were exempt from the FAA when the evidence did “not

Circuit City frequently mentioned the carriage of goods,⁷⁴ several lower-court opinions held that people who ferried passengers were not “transportation workers.”⁷⁵ Finally, almost every court to address the issue determined that independent contractors did not fall within section 1 because they were not bound by “contracts of employment.”⁷⁶ Even when a worker argued that she had been misclassified, judges deferred to the employer’s characterization of the relationship, which invariably led them to compel arbitration.⁷⁷

But in 2019, the Supreme Court changed course in *New Prime Inc. v. Oliveira*.⁷⁸ Speaking through Justice Gorsuch, the Court held that section 1 governs not only employees, but also independent contractors.⁷⁹ The Court reached this result by taking a deep dive into what the words “contracts of employment” meant in 1925.⁸⁰ As the Court observed, turn-of-the-twentieth-century dictionaries, legislation, and judicial decisions defined “‘employment’ more or less as a synonym for ‘work.’”⁸¹ The Court thus concluded that “the term ‘contracts of employment’ refer[s] to agreements to perform work.”⁸² Finally, the Court resisted the proarbitration arguments that had tipped the scales in *Circuit City*,

support the conclusion that [they] made interstate deliveries even occasionally”); *Levin v. Caviar, Inc.*, 146 F. Supp. 3d 1146, 1152 (N.D. Cal. 2015) (same where the plaintiff “has not shown that he or any other similarly situated delivery driver ever made trips across state lines”). *But cf.* *Int’l Bhd. of Teamsters Local Union No. 50 v. Kienstra Precast, LLC*, 702 F.3d 954, 957 (7th Cir. 2012) (finding that Illinois-based truckers were exempt because they “occasionally transported loads into Missouri”).

74. *See* *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 112, 121 (2001).

75. *See* *Gadson v. SuperShuttle Int’l*, No. 10-cv-01057, 2011 WL 1231311, at *5 (D. Md. Mar. 30, 2011), *rev’d on other grounds sub nom.* *Muriithi v. Shuttle Express, Inc.*, 712 F.3d 173 (4th Cir. 2013) (“Plaintiffs were not involved in the transportation of goods as railroad workers and seamen are, but rather, they provided ground transportation to airport passengers. Accordingly, the transportation work exclusion of the FAA is inapplicable to Plaintiffs.”); *Kowalewski v. Samandarov*, 590 F. Supp. 2d 477, 483 (S.D.N.Y. 2008) (“the interstate shipment of physical goods is central to the analysis” (emphasis omitted)).

76. *See, e.g.,* *Doe v. Swift Transp. Co.*, No. 10-cv-00899, 2015 WL 274092, at *3 (D. Ariz. Jan. 22, 2015); *Aviles v. Quik Pick Express, LLC*, No. CV-15-5214, 2015 WL 9810998, at *5 (C.D. Cal. Dec. 3, 2015), *vacated*, 703 F. App’x 631 (9th Cir. 2017).

77. *See* *Performance Team Freight Sys., Inc. v. Aleman*, 194 Cal. Rptr. 3d 530, 535-39, 543 (Cal. Ct. App. 2015).

78. 139 S. Ct. 532 (2019).

79. *See id.* at 543-44.

80. *See id.* at 539.

81. *Id.* at 539-40.

82. *Id.* at 543-44.

reasoning that judges should not “pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal.”⁸³

New Prime profoundly impacted employee arbitration. For one, it breathed new life into the residual clause by extending it to independent contractors, a category of increasing importance. More than a third of the American workforce now participates in the “gig economy,” a labor market dominated by independent contractors.⁸⁴ From Uber drivers to Instacart shoppers, millions of people participate in the rideshare or delivery industries and thus might be entitled to section 1’s protections after *New Prime*.⁸⁵

Moreover, *New Prime* cast doubt on many lower-court decisions that had read the residual clause narrowly. Indeed, the Court implied that these judges had been viewing the statute through the wrong lens. Rather than citing the FAA’s goals or *Circuit City* dicta, Justice Gorsuch hung his hat on the “fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.”⁸⁶ Arguably, this laser-like focus on the text undermines any opinion that used other tools to restrict section 1.⁸⁷ Even more importantly, *New Prime* suggested that courts had been asking the wrong question. The post-*Circuit City* caselaw had focused largely on the meaning of the phrase “transportation worker,” which does not appear in the FAA at all.⁸⁸ In contrast, *New Prime*

83. *Id.* at 543.

84. TJ McCue, *57 Million U.S. Workers Are Part of the Gig Economy*, FORBES (Aug. 31, 2018, 6:30 PM EDT), <https://www.forbes.com/sites/tjmccue/2018/08/31/57-million-u-s-workers-are-part-of-the-gig-economy> [<https://perma.cc/F243-HS8G>]; Bill Wilson, *What is the “Gig” Economy?*, BBC (Feb. 10, 2017), <http://www.bbc.com/news/business-38930048> [<https://perma.cc/GF9Z-ER2K>].

85. See, e.g., Melissa Berry, *How Many Uber Drivers Are There?*, RIDE SHARE GUY (Mar. 1, 2022), <https://therideshareguy.com/how-many-uber-drivers-are-there> [<https://perma.cc/Q2GQ-2GXU>] (discussing the number of Uber drivers in the United States and around the world).

86. *New Prime*, 139 S. Ct. at 539 (quoting *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018)) (internal quotation marks omitted). To be clear, *Circuit City* also relied heavily on the statutory text to reject the theory that section 1 excluded all employees from the FAA. See *supra* note 24. However, unlike *New Prime*, it also mentioned nontextual factors such as the “real benefits to the enforcement of arbitration provisions.” *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001).

87. The recently decided *Morgan v. Sundance, Inc.* provides more evidence that the Court has soured on the policy arguments that influenced *Circuit City*. See *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1712 (2022) (holding that courts cannot “create arbitration-specific variants of federal procedural rules, like those concerning waiver, based on the FAA’s ‘policy favoring arbitration’”) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

88. See *Lenz v. Yellow Transp., Inc.*, 431 F.3d 348, 351 (8th Cir. 2005) (“Because [the plaintiff] works in the transportation industry, we must determine whether his job duties are so closely

signaled a return to first principles: grappling with whether an individual belongs to a “class of workers engaged in . . . interstate commerce.”⁸⁹

Not surprisingly, over the three years since *New Prime* was decided, a wave of plaintiffs has successfully argued that they are exempt from the FAA under section 1. For example, in 2020, the First and Ninth Circuits cited 1925-era sources to find that the residual clause applied to Amazon’s “last mile” delivery drivers, who transport packages locally “on the last legs of interstate journeys.”⁹⁰ These holdings were major victories for public-interest organizations, whose amicus briefs made sophisticated arguments about the ordinary meaning of the residuary clause at the time of its enactment.⁹¹ Thus, although the dust is still settling—indeed, as this Essay was being finalized, the Supreme Court held in *Southwest Airlines v. Saxon* that the residual clause covers “transportation adjacent” employees, such as those who load cargo on the airport tarmac⁹²—section 1’s scope has already grown exponentially.

Nevertheless, inserting the Ending Forced Arbitration Act into the FAA turns this proplaintiff result on its head. Suppose an independent contractor for a delivery service files a lawsuit contending that her supervisor groped her. After *New Prime*, the plaintiff is likely exempt from the FAA. But this silver lining has a cloud: she is also excluded from the Ending Forced Arbitration Act’s protections.

2. Section 2

Two other potential dead zones in the FAA’s coverage are less well established than section 1. Under section 2, the FAA only applies to provisions in “a contract . . . to settle by arbitration a controversy thereafter arising out of such

related to interstate commerce as to consider him a ‘transportation worker’ and thus exempt from the FAA.”).

89. 9 U.S.C. § 1 (2018). Likewise, as noted above, the Justices recently held that courts cannot “create arbitration-specific variants of federal procedural rules, like those concerning waiver, based on the FAA’s ‘policy favoring arbitration.’” *Morgan*, 142 S. Ct. at 1712.
90. *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 13, 18–22 (1st Cir. 2020); *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 908, 912–13 (9th Cir. 2020).
91. See *Amicus Curiae* Brief of Public Justice Supporting Plaintiff-Appellee at 6, *Waithaka v. Amazon.com, Inc.*, No. 19-1848, 2019 WL 7169186 (1st Cir. Dec. 20, 2019).
92. See *Sw. Airlines Co. v. Saxon*, No. 21-309, slip op. at 4 (U.S. June 6, 2022). As with *New Prime*, the Justices during oral argument focused on section 1’s text rather than the FAA’s proarbitration purposes. As Justice Kagan put it, “you don’t get to just wave around the FAA’s purposes in order to construe the scope of Section 1.” Transcript of Oral Argument at 27, *Sw. Airlines Co. v. Saxon*, No. 21-309 (Mar. 28, 2022), 2022 WL 901492. Likewise, Justice Thomas’s opinion declined to elevate “statutory purpose” over “§ 1’s plain text.” *Sw. Airlines*, slip op. at 11.

contract.”⁹³ Thus, section 2 seems to require that an arbitration clause be contained in a “contract” and that the dispute between the parties “aris[es] out of [the] contract.”⁹⁴ This section discusses each element.

i. Contract

The FAA may not govern noncontractual documents, such as corporate by-laws, estate plans, and deals in certain criminal or family-law matters.⁹⁵ Indeed, section 2 instructs judges to enforce arbitration clauses in “contract[s].”⁹⁶ As a result, extending the FAA to an arbitration clause in, say, an irrevocable trust would chafe against the statute’s text. Trusts may be contract-like, but technically they are “not contracts.”⁹⁷

Likewise, applying the FAA to noncontractual instruments would be hard to square with section 2’s savings clause. That provision allows courts to invalidate arbitration agreements “upon such grounds as exist at law or in equity for the revocation of any contract,”⁹⁸ which include “fraud, duress, or unconscionability.”⁹⁹ But because some contract principles do not apply to noncontracts, it is unclear how courts would assess the validity of an arbitration clause in such a writing.¹⁰⁰ Excluding noncontracts from the FAA avoids this dilemma.

Admittedly, there is contrary authority. For example, the California Supreme Court held that the FAA applies to a condominium’s declaration of covenants,

93. 9 U.S.C. § 2 (2018).

94. *Id.*

95. See Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L.J. 583, 640 (2016) (arguing that “because corporate law is premised on fiduciary obligations, it is, for FAA purposes, noncontractual”); *Burgess v. Johnson*, No. 19-CV-00232, 2019 WL 11585415, at *1 (N.D. Okla. Oct. 23, 2019), *aff’d*, 835 F. App’x 330 (10th Cir. 2020) (avoiding the question of whether the FAA applies to an arbitration clause in a revocable trust); *Breazeale v. Victim Servs., Inc.*, 198 F. Supp. 3d 1070, 1073 (N.D. Cal. 2016), *aff’d*, 878 F.3d 759 (9th Cir. 2017) (refusing to apply the FAA to a deal “between a local prosecutor and a criminal suspect about how to address a potential state-law criminal violation”); *Genger v. Genger*, 252 F. Supp. 3d 362, 367 (S.D.N.Y. 2017) (“Even if Congress passed the FAA with the intention of encouraging arbitration, the Court cannot imagine that Congress meant to involve federal courts in disagreements stemming from divorce decrees.”).

96. 9 U.S.C. § 2 (2018).

97. *Schoneberger v. Oelze*, 96 P.3d 1078, 1082 (Ariz. Ct. App. 2004).

98. 9 U.S.C. § 2 (2018).

99. *Casarotto II*, 517 U.S. 681, 687 (1996).

100. *Cf.* David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1067-68 (2012) (exploring this tension in the context of wills and trusts).

conditions, and restrictions (CCRs).¹⁰¹ As the court explained, even though CCRs are not technically “contracts,” they are “contractual in nature.”¹⁰² Likewise, the Seventh Circuit reached the same conclusion for a tariff filed with the Federal Communications Commission.¹⁰³ Speaking through Judge Easterbrook, the appellate panel held that a tariff is “like [a] contract” because it is “an offer that the customer accepts by using the product.”¹⁰⁴ Thus, perhaps section 2’s references to “contract[s]” should not be read literally.

This issue is likely to intersect with the Ending Forced Arbitration Act in cases involving arbitration clauses in employment handbooks. To preserve the “at will” status of their workforce, companies sometimes specify that their manuals and policies are not “intended to create contractual obligations of any kind.”¹⁰⁵ Several courts have held that section 2 does not apply to arbitration clauses within these documents because they are “not part of an enforceable contract.”¹⁰⁶ Therefore, the conclusion that only contracts are covered under section 2 of the FAA now cuts two ways. For many plaintiffs, the FAA’s inapplicability will be a major victory. But for employees with sexual-misconduct claims, the fact that the FAA does not govern will also disable the Ending Forced Arbitration Act.

101. See *Pinnacle Museum Tower Ass’n v. Pinnacle Mkt. Dev. (US) LLC*, 282 P.3d 1217, 1221 (Cal. 2012).

102. *Id.* at 1231.

103. See *Metro E. Ctr. for Conditioning & Health v. Qwest Commc’ns Int’l, Inc.*, 294 F.3d 924, 925 (7th Cir. 2002).

104. *Id.* at 926. Inexplicably, Judge Easterbrook considered whether the tariff complied with section 3 of the FAA, rather than section 2. See *id.* at 925. Section 3 requires federal district courts to stay litigation “[i]f any suit or proceeding be brought . . . upon any issue referable to arbitration under an agreement in writing for such arbitration.” 9 U.S.C. § 3 (2018). Unlike section 2, which refers to a “contract,” section 3 uses the broader word “agreement.” But because the Seventh Circuit also called tariffs “a species of contract,” this distinction may not have affected the outcome. *Metro E.*, 294 F.3d at 926.

105. *Bradley v. Wolf Retail Sols. I, Inc.*, 443 F. Supp. 3d 959, 960 (N.D. Ill. 2019) (emphasis omitted).

106. *Phox v. Atriums Mgmt. Co.*, 230 F. Supp. 2d 1279, 1283 (D. Kan. 2002); see *id.* at 961–62; *Ex parte Beasley*, 712 So. 2d 338, 340 (Ala. 1998). But see *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997) (reaching the opposite conclusion).

ii. *Contractual Nexus*

Section 2 only covers allegations “arising out of” the contract that contains the arbitration clause (the “container” contract).¹⁰⁷ After years of ignoring this “contractual nexus” requirement,¹⁰⁸ judges have started to enforce it.

Courts have always struggled to decide whether a cause of action falls within the ambit of an arbitration clause. Companies typically use “broad” provisions that mandate arbitration for “any controversy or claim . . . arising out of or relating to” the container contract.¹⁰⁹ Broad clauses create a potent “presumption of arbitrability” that covers any cause of action that merely “touch[es] matters” connected to the container contract.¹¹⁰ Thus, courts generally hold that broad provisions extend to allegations that are one step removed from the parties’ deal, such as torts and antitrust violations.¹¹¹

However, not every dispute falls into this dragnet. For instance, judges have refused to compel arbitration of an employee’s tort claims against an employer stemming from a coworker’s sexual wrongdoing. These courts have reasoned that “rape does not ordinarily arise out of the employment context”¹¹² and that an arbitration clause’s “scope certainly stops at [the plaintiff’s] bedroom door.”¹¹³

As I have discussed elsewhere, cases like these prompted some employment-contract drafters to use “infinite” provisions that mandate arbitration for any claim, including those with no logical relationship to the container contract.¹¹⁴ For instance, Steiner Transocean, which provides spa services on cruise lines, insists that its employees arbitrate “all disputes, claims or controversies *whatsoever*.”¹¹⁵ In 2017, in *Haasbroek v. Princess Cruise Lines, Ltd.*, a Florida district court took this language at face value and compelled arbitration of a complaint filed

107. 9 U.S.C. § 2 (2018).

108. David Horton, *Infinite Arbitration Clauses*, 168 U. PA. L. REV. 633, 643 (2020).

109. *Mehler v. Terminix Int’l Co. L.P.*, No. CIV. A. 397CV2390, 1998 WL 893149, at *7 (D. Conn. Sept. 28, 1998) (calling this “the paradigm of a broad arbitration clause”), *rev’d*, 205 F.3d 44 (2d Cir. 2000).

110. *Snyder v. CACH, LLC*, No. 16-00097, 2016 WL 6662675, at *11 (D. Haw. Nov. 10, 2016).

111. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (compelling arbitration of antitrust claims).

112. *Hill v. Hilliard*, 945 S.W.2d 948, 952 (Ky. Ct. App. 1996).

113. *Jones v. Halliburton Co.*, 583 F.3d 228, 239 (5th Cir. 2009).

114. *See Horton*, *supra* note 108, at 639.

115. *Haasbroek v. Princess Cruise Lines, Ltd.*, 286 F. Supp. 3d 1352, 1355 (S.D. Fla. 2017) (emphasis added).

by a Steiner employee who had been raped and impregnated by a coworker.¹¹⁶ The plaintiff argued that the attack was unrelated to her contract with Steiner because it occurred after hours in a residential section of the vessel.¹¹⁷ Yet because the arbitration clause stretched beyond “claims arising from, or relating to, employment” to cover any controversy between the parties, the court held that this argument was “irrelevant.”¹¹⁸

Nevertheless, recent decisions have taken the contractual-nexus requirement more seriously. For example, in *Calderon v. SIXT Rent a Car, LLC*, the plaintiff used Orbitz.com to rent a car from SIXT.¹¹⁹ Orbitz’s terms of service require customers to arbitrate disputes stemming from “any services or products provided.”¹²⁰ Later, the plaintiff filed a class action against SIXT for erroneously charging him seven hundred dollars for damage to the vehicle.¹²¹ SIXT responded by trying to piggyback on Orbitz’s arbitration clause on the grounds that its rentals are a “service[] . . . provided” through the website.¹²² SIXT bolstered this theory with “the canon of construction that ‘any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.’”¹²³ However, the Eleventh Circuit refused to compel arbitration. The court observed that the proarbitration presumption emanates from the FAA, which did not apply because the plaintiff’s “suit against Sixt d[id] not ‘aris[e] out of’ his contract with Orbitz within the meaning of [section] 2.”¹²⁴ Likewise, judges on the Fourth and Ninth Circuits as well as federal district courts have recognized that a clause that “purports to require arbitration of claims wholly unrelated to the contract in which it is contained . . . is arguably not even subject to the FAA.”¹²⁵

^{116.} *See id.* at 1354-55.

^{117.} *Id.* at 1358.

^{118.} *Id.* at 1360 n.8.

^{119.} 5 F.4th 1204, 1207 (11th Cir. 2021).

^{120.} *Id.* at 1206-07.

^{121.} *See id.* at 1208.

^{122.} *Id.* at 1208-09.

^{123.} *Id.* at 1212 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

^{124.} *Id.* at 1213-14. Bizarrely, the court failed to consider that if section 2 did not apply, there were no grounds under federal law to compel arbitration. *See Recent Case: Calderon v. SIXT Rent a Car, LLC*, HARV. L. REV. BLOG (Oct. 24, 2021), <https://blog.harvardlawreview.org/recent-case-calderon-v-sixt-rent-a-car-llc> [<https://perma.cc/442Q-SBQ3>].

^{125.} *McFarlane v. Altice USA, Inc.*, 524 F. Supp. 3d 264, 278 (S.D.N.Y. 2021); *see Revitch v. DIRECTV, LLC*, 977 F.3d 713, 717 (9th Cir. 2020) (O’Scannlain, J., concurring); *Recent Case, Revitch v. DIRECTV, LLC*, 977 F.3d 713 (9th Cir. 2020), 134 HARV. L. REV. 2871, 2877 (2021) (urging other courts to follow Judge O’Scannlain’s concurrence); *Mey v. DIRECTV, LLC*, 971 F.3d 284, 305 (4th Cir. 2020) (Harris, J., dissenting).

The Ending Forced Arbitration Act makes opinions like *Calderon* a double-edged sword. To be sure, in many cases, the contractual-nexus requirement will benefit plaintiffs by exempting them from the FAA's presumption in favor of arbitration and allowing them to pursue their cases in court. But consider how the contractual-nexus doctrine functions in a fact pattern like *Haasbroek*. If an employee signs an infinite arbitration clause, is sexually assaulted by a coworker, and files a tort claim against the firm, a judge might cite the contractual-nexus requirement to hold that such shocking conduct does not relate to the employment contract. At first glance, this ruling seems like a proplaintiff outcome because it obviates the FAA. But the FAA's inapplicability means that the Ending Forced Arbitration Act also does not control. Thus, if courts continue to insist on the contractual-nexus requirement, some victims of sexual misconduct will not be able to claim the protections of the new statute.

* * *

Some cases with sexual-misconduct claims will escape the orbit of the FAA and the Ending Forced Arbitration Act. Thus, the arbitrability of these disputes will hinge on state law¹²⁶ – which, as I discuss next, is surprisingly proarbitration.

B. Proarbitration State Laws

States have a reputation for being hostile to arbitration.¹²⁷ Counterintuitively, though, state arbitration statutes often require plaintiffs to arbitrate allegations of sexual wrongdoing.

The forced-arbitration debate often casts federal and state law as bitter rivals. Supposedly, the doctrinal landscape is a kind of “game”: a clash of “institutional players, each with its own policy preferences.”¹²⁸ The Supreme Court expands the FAA. States push back by trying to protect the rights of weaker parties. The result is a “power struggle of Shakespearean magnitude.”¹²⁹

This dichotomy was particularly evident in the late twentieth century. During that time, about two dozen states exempted employment, tort, or insurance

¹²⁶. See *Smith v. Allstate Power Vac, Inc.*, 482 F. Supp. 3d 40, 47-48 (E.D.N.Y. 2020).

¹²⁷. See Salvatore U. Bonaccorso, Note, *State Court Resistance to Federal Arbitration Law*, 67 STAN. L. REV. 1145, 1148 (2015) (noting that “state courts across the country . . . developed novel strategies to limit the FAA’s preemptive effect”).

¹²⁸. Bruhl, *supra* note 18, at 1421.

¹²⁹. Bonaccorso, *supra* note 127, at 1145.

disputes from arbitration.¹³⁰ Likewise, some state judges made no secret of their belief that the Court's interpretation of the FAA "threaten[ed] to undermine the rule of law as we know it."¹³¹ Accordingly, as noted above, the Supreme Court invalidated an array of state rules under the Supremacy Clause for discriminating against arbitration and therefore contravening the FAA.¹³²

But over the past two decades, the relationship between state and federal arbitration law has become more nuanced. This shift began in 2000, when the National Conference of Commissioners on Uniform State Laws published the Revised Uniform Arbitration Act (RUAA).¹³³ Because the RUAA was created in the wake of the Supreme Court's vigorous expansion of the FAA's preemptive scope, its drafters took pains "to write provisions consistent with the FAA's pro-arbitration policy."¹³⁴ For example, because the Justices had emphasized that states cannot "singl[e] out arbitration provisions for suspect status," the RUAA does not exempt any type of case or claim.¹³⁵ Instead, its centerpiece, section 6(a), makes most predispute arbitration agreements binding: "An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract."¹³⁶ This philosophy was a sharp break from the ambivalence that many jurisdictions had previously expressed towards arbitration. Nevertheless, roughly half the states adopted the model statute.¹³⁷

Critically, upon close inspection, the RUAA does not merely assimilate state law with its federal counterpart. Rather, it goes further than the FAA in three ways. First, it applies to arbitration clauses in employment contracts and contains no exception like section 1 of the FAA. Accordingly, unlike the FAA, the RUAA governs claims filed by railroad employees, seamen, and transportation

130. See Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 NEB. L. REV. 397, 439 n.280 (1998).

131. *Casarotto v. Lombardi*, 886 P.2d 931, 941 (Mont. 1994), cert. granted, judgment vacated sub nom. *Doctor's Assocs., Inc. v. Casarotto (Casarotto I)*, 515 U.S. 1129 (1995).

132. See *supra* text accompanying notes 28-34.

133. See UNIF. ARB. ACT (UNIF. LAW COMM'N 2000) [hereinafter RUAA].

134. Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law*, 2001 J. DISP. RESOL. 1, 5.

135. *Casarotto II*, 517 U.S. 681, 687 (1996); RUAA, *supra* note 133.

136. RUAA, *supra* note 133, at § 6(a).

137. See *Arbitration Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=aoad71d6-085f-4648-857a-e9e893ae2736> [<https://perma.cc/TF4R-GYDJ>] (mapping states that have adopted the RUAA).

workers engaged in interstate commerce.¹³⁸ To borrow a hypothetical recently posed by a federal judge, suppose “a railroad conductor [who has signed an arbitration agreement] . . . br[ings] sexual harassment claims based on events that took place in the railroad company’s corporate office.”¹³⁹ The plaintiff’s status as a railroad employee exempts her from the FAA under section 1. But because the FAA and the Ending Forced Arbitration Act are coextensive, she also cannot invoke Congress’s new prohibition on forced arbitration of sexual-misconduct allegations. Thus, the arbitrability of her lawsuit hinges on state law – which, in a jurisdiction that follows the RUAA, mandates arbitration without excluding any category of workers or claims.

Second, the RUAA covers arbitration clauses in documents that are not contracts. Indeed, the RUAA validates arbitration clauses in “record[s]”¹⁴⁰: a far broader term than “contracts” that includes any “information that is inscribed on a tangible medium.”¹⁴¹ Recall that some courts have held that FAA section 2 does not govern employment handbooks that purport to be noncontractual in nature.¹⁴² Suppose a plaintiff who is subject to an arbitration provision in such a handbook sues her boss for sexual assault or harassment. There is no underlying “contract,” and therefore neither the FAA nor the Ending Forced Arbitration Act apply. But because the handbook is a “record,” the RUAA would send the case to arbitration.

138. Several states that once banned employment arbitration dropped this exclusion by passing the RUAA. Compare Sarah Rudolph Cole, *Uniform Arbitration: “One Size Fits All” Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759, 786 n.94 (2001) (noting that “[a]t least twelve states have specifically exempted non-union employer-employee disputes from the coverage of that state’s arbitration act” including Arkansas, Kansas, and Washington), with ARK. CODE ANN. § 16-108-206 (West 2022), KAN. STAT. ANN. § 5-425 (West 2022), and WASH. REV. CODE ANN. § 7.04A.060 (West 2022).

139. *Miller v. Amazon.com, Inc.*, No. 21-cv-00204, 2021 WL 5847232, at *3 (W.D. Wash. Dec. 9, 2021).

140. RUAA, *supra* note 133, at § 6(a). For states that have adopted the RUAA’s “record” language, see ARK. CODE ANN. § 16-108-206 (2021); COLO. REV. STAT. § 13-22-206 (2022); D.C. CODE § 16-4406 (2022); HAW. REV. STAT. § 658A-6 (2021); MICH. COMP. LAWS § 691.1686 (2022); MINN. STAT. § 572B.06 (2021); NEV. REV. STAT. § 38.219 (2019); N.J. STAT. ANN. § 2A:23B-6 (West 2022); N.M. STAT. ANN. § 44-7A-7 (2020); N.C. GEN. STAT. § 1-569.6 (2021); N.D. CENT. CODE § 32-29.3-06 (2021); OKLA. STAT. tit. 12, § 1857 (2022); OR. REV. STAT. § 36.620 (2021); UTAH CODE ANN. § 78B-11-107 (LexisNexis 2022); WASH. REV. CODE § 7.04A.060 (2022); W. VA. CODE § 55-10-8 (2022).

141. RUAA, *supra* note 133, at § 1(6). “Record” also includes data “that is stored in an electronic or other medium and is retrievable in perceivable form.” *Id.* The RUAA also announces that the term “record” is “intended to include arbitration provisions contained in the bylaws of corporate or other associations as valid and enforceable arbitration agreements.” *Id.* § 6 comm.

142. See *supra* text accompanying notes 107-111.

Third, the RUAA does not have a contractual-nexus requirement. Instead of validating arbitration agreements that apply to disputes arising out of the container contract, the RUAA mandates arbitration of “any controversy . . . between the parties.”¹⁴³ Assume that an employee signs an infinite arbitration clause and is then sexually assaulted by a colleague. As mentioned, some judges have determined that appalling torts do not arise out of the container contract and therefore fall outside the scope of FAA section 2.¹⁴⁴ That logic also exempts appalling torts from the Ending Forced Arbitration Act. And yet, the disconnect between the plaintiff’s allegations and the container contract makes no difference under the RUAA. Even if conduct is so aberrant that it was unforeseeable to the parties at the time of contracting, it is a “controversy . . . between the parties” that must be arbitrated.¹⁴⁵

To conclude, by linking the Ending Forced Arbitration Act to the FAA, Congress created an opening for state law to require plaintiffs to arbitrate sexual-misconduct allegations. In the next Part, I discuss ways to solve this problem.

III. SOLUTIONS

This Part explains how the legal system can prevent sexual-misconduct claims from being arbitrated. It starts by urging Congress to modify the Ending Forced Arbitration Act. It then surveys what state legislators and judges can do if federal lawmakers fail to act.

A. Congress

The easiest way to close the loopholes in the Ending Forced Arbitration Act would be for Congress to take a mulligan. Lawmakers could unlink the Ending Forced Arbitration Act from the FAA and reapprove it as standalone legislation. As mentioned above, this is the model that Congress used to enact subject-specific antiarbitration rules like the Fairness Act, the MLA, the FCE, and Dodd-Frank.¹⁴⁶ This would free the Ending Forced Arbitration Act from the FAA’s

¹⁴³. ARIZ. REV. STAT. ANN. § 12-1501 (2022); CONN. GEN. STAT. § 52-408 (2021); IDAHO CODE § 7-901 (2022); IND. CODE § 34-57-2-1 (2021); MASS. GEN. LAWS ch. 251, § 1 (2021); ME. STAT. tit. 14, § 5927 (2021); MO. REV. STAT. § 435.465 (2022); 42 PA. STAT. & CONS. STAT. ANN. § 7303 (West 2022); S.D. CODIFIED LAWS § 21-25A-1 (2022); VA. CODE ANN. § 8.01-581.01 (2022); VT. STAT. ANN. tit. 12, § 5652 (2022).

¹⁴⁴. See *supra* text accompanying notes 112-115.

¹⁴⁵. RUAA, *supra* note 133, at § 6(a).

¹⁴⁶. See *supra* text accompanying notes 36-39.

exceptions. It would also allow Congress to clarify that the statute supersedes contrary state law.¹⁴⁷

This standalone version of the Ending Forced Arbitration Act would better effectuate Congress's intent. The bill's history suggests that Congress wanted to bar arbitration of *all* disputes involving sexual assault or harassment. During floor debates, lawmakers described the statute as comprehensive. For instance, Representative Morgan Griffith endorsed the legislation because he believed it federalized the arbitrability of sexual-misconduct cases:

[Mandatory arbitration of these claims] is a violation of public policy, in my opinion, and should be eliminated as part of a contract.

I am surprised courts haven't already come to that conclusion, but instead of having each court in each of the States and territories make that decision, this act will do it once and for all¹⁴⁸

Similarly, Representative Cheri Bustos explained that the bill “will invalidate *any* forced arbitration clause in *any* contract or agreement in the case of sexual assault or harassment.”¹⁴⁹ And Senator Lindsey Graham declared that “the days of taking sexual harassment and sexual assault claims and burying them in the basement of arbitration are over.”¹⁵⁰ These definitive statements suggest that lawmakers simply did not realize that the FAA's exceptions and proarbitration state law might conspire to thwart their wishes.

Likewise, Congress did not design the Ending Forced Arbitration Act as an amendment to the FAA to further any policy objective. Instead, Congress did so because it used the AFA and the FAIR Act as a template. As noted, these far-reaching prohibitions on forced arbitration tried to revise the FAA to exempt antitrust, civil-rights, consumer, and employment cases.¹⁵¹ The architects of the

147. For example, the Fairness Act applies to the full extent of Congress's Commerce Clause authority and preempts any state law that “direct[ly] conflict[s]” with its commands. 15 U.S.C. § 1225 (2018). Likewise, the MLA overrides “any State . . . rule, or regulation, . . . to the extent that such law, rule, or regulation is inconsistent with this section.” 10 U.S.C. § 987(d)(1) (2018).

148. 168 CONG. REC. H987 (daily ed. Feb. 7, 2022) (statement of Rep. Morgan Griffith). Other speakers also described the Ending Forced Arbitration Act as a total ban on forced arbitration of sexual-misconduct cases. *See id.* (statement of Rep. Sheila Jackson Lee) (“It is a bipartisan piece of legislation that will not allow *any* pre-dispute arbitration agreement . . . to be valid or enforceable . . .” (emphasis added)).

149. *Id.* at H986 (statement of Rep. Cheri Bustos) (emphasis added).

150. 168 CONG. REC. S628 (daily ed. Feb. 10, 2022) (statement of Sen. Lindsey Graham).

151. *See generally* FAIR Act, H.R. 1423, 116th Cong. (2019); Arbitration Fairness Act of 2018, S. 2591, 115th Cong. (2018).

Ending Forced Arbitration Act borrowed the AFA's and the FAIR Act's language and within-the-FAA structure.¹⁵²

However, the authors of the Ending Forced Arbitration Act apparently failed to recognize crucial differences between the earlier, failed bills and the Ending Forced Arbitration Act. Placing the AFA and the FAIR Act within the FAA made sense because they would have dramatically overhauled federal arbitration law and left little room for state law to shine through. For instance, they would have deleted section 1's carveout for certain workers' contracts in order to implement one of their core commands—that “no predispute arbitration agreement . . . shall be valid or enforceable” if it requires arbitration of an employment dispute.¹⁵³ But the Ending Forced Arbitration Act is far narrower. Unlike the AFA and the FAIR Act, which would have rewritten the FAA, the Ending Forced Arbitration Act is a mere asterisk that could exist elsewhere in the U.S. Code. Because it only strikes down arbitration clauses in a single context, it does not override the FAA's exceptions, making it vulnerable to subversion. Untangling the Ending Forced Arbitration Act from the FAA would eliminate this unintended consequence.

Of course, as with any expansion of federal power, my proposal would come at the expense of states' rights. As noted, some jurisdictions have become increasingly receptive to forced arbitration.¹⁵⁴ Consider West Virginia. For decades, the Mountain State refused to enforce predispute arbitration agreements.¹⁵⁵ But in 2015, it swung to the opposite extreme by embracing the RUAA and announcing that arbitration “offers in many instances a more efficient and cost-effective alternative to court litigation.”¹⁵⁶ Indeed, there are plausible arguments that victims of sexual misconduct are better off pursuing claims outside of the cumbersome judicial system and that the law should address concerns about sexual predators and secrecy by regulating other terms, such as

152. This was also true of the earlier (and broader) Ending Forced Arbitration of Sexual Harassment Act. See S. 2203, 115th Cong. (2017); H.R. 4570, 115th Cong. (2017); see also *supra* text accompanying notes 53-54.

153. H.R. 1423 § 402(a), (b)(1); S. 2591 § 402(a), (b)(1). At the same time, neither the AFA nor the FAIR Act addresses the “contract” and “contractual nexus” requirements of section 2.9 U.S.C. § 2 (2018). Presumably, this oversight stems from the fact that these possible exceptions in the statute are more obscure than section 1's exclusion.

154. See *supra* text accompanying notes 133-144.

155. See *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 275-76 (W. Va. 2011), *vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012).

156. W. VA. CODE ANN. § 55-10-2 (West 2022).

nondisclosure agreements.¹⁵⁷ Expanding the domain of the Ending Forced Arbitration Act would deny states the authority to make those judgment calls in matters that are exempt from the FAA.

Nevertheless, federalism considerations do not justify congressional inaction. For the most part, the federalism ship sailed when lawmakers approved the Ending Forced Arbitration Act. The statute deprives states of a voice in most lawsuits involving sexual assault or harassment allegations. Given what the bill already accomplishes, fine-tuning it to completely effectuate Congress's goals and foreclose the possibility of arbitration in sexual-misconduct cases would do little additional harm to state sovereignty.

Moreover, it would be ironic if federal law bent to accommodate states in this context when it has not in so many others. Since the Court began to interpret the FAA broadly, “the nation’s laboratories of democracy have been shut down.”¹⁵⁸ For example, in *Circuit City*, the Court rejected a request by twenty-one state attorneys general to exempt employment contracts from the FAA to avoid “intrud[ing] upon the policies of the separate States.”¹⁵⁹ Likewise, plaintiffs’ lawyers and public-interest groups have often waved the banner of states’ rights,¹⁶⁰ and time and time again, these “[l]iberal [f]ederalists [l]os[t].”¹⁶¹ Thus, respect for states has never stemmed the tide of forced arbitration, and it would be perverse if it moved the needle in the other direction by preventing Congress from making the Ending Forced Arbitration Act an all-inclusive anti-arbitration rule.

B. State Legislatures and Courts

Alternatively, if Congress does nothing, other actors can step up. For one, state lawmakers can create their own bans on compulsory arbitration of cases involving sexual assault and harassment. In fact, some jurisdictions were already

157. These are the concerns that opponents of the Ending Forced Arbitration Act raised. See 168 CONG. REC. H986 (daily ed. Feb. 7, 2022) (statement of Rep. Michelle Fischbach) (“Arbitration is not intrinsically secret or otherwise confidential. . . . [I]n all likelihood, this bill would effectively end most arbitration in these contexts, even when arbitration would benefit a victim.”).

158. Note, *supra* note 35, at 1184.

159. *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001); see also *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (dismissing federalism concerns raised in a brief filed by twenty state attorneys general).

160. See Brief of Amicus Curiae Public Citizen, Inc., in Support of Respondents at 3, *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015) (No. 14-462), 2015 WL 4550207.

161. Brendan Maher, *Liberal Federalists Lose*, PRAWFSBLAWG (Apr. 28, 2011, 2:37 AM), <https://prawfsblawg.blogs.com/prawfsblawg/2011/04/liberal-federalists-lose.html> [<https://perma.cc/5TVK-4N2Y>].

trending in that direction before the passage of the Ending Forced Arbitration Act. For example, in 2018, New York adopted a statute that “renders ‘null and void’ any provision in an employment contract that requires the arbitration of claims of unlawful discriminatory sexual harassment.”¹⁶² In 2020, Illinois approved the Workplace Transparency Act, which exempts claims of “unlawful employment practice[s]” from predispute arbitration clauses.¹⁶³ And Maryland and New Jersey recently announced that they will refuse to enforce any term in an employment contract that waives “procedural rights” in a matter involving sexual harassment,¹⁶⁴ including “the right to pursue an action in court.”¹⁶⁵

At the time, these laws were seen as symbolic. In fact, policymakers in the Empire State candidly acknowledged that their legislation was “inconsistent with the [FAA], which reigns supreme over the enforceability of arbitration agreements.”¹⁶⁶ And indeed, courts repeatedly held that the FAA precludes these statutes from striking down an arbitration clause.¹⁶⁷

Now, however, these state antiarbitration rules play a vital gap-filling role. True, the Ending Forced Arbitration Act renders them unnecessary in any sexual-misconduct case that once would have been governed by the FAA.¹⁶⁸ But as I have discussed, not every dispute fits that description. Accordingly, other states should pass similar laws to close the circle and bar forced arbitration if the

^{162.} N.Y. C.P.L.R. 7515 (McKinney 2022).

^{163.} 820 ILL. COMP. STAT. ANN. 96/1-25(b) (West 2022).

^{164.} See MD. CODE ANN., LAB. & EMPL. § 3-715(a) (West 2022) (invalidating “a provision in an employment contract, policy, or agreement that waives any substantive or procedural right or remedy to a claim that accrues in the future of sexual harassment or retaliation for reporting or asserting a right or remedy based on sexual harassment”); N.J. STAT. ANN. § 10:5-12.7a (West 2022) (overriding “[any] provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment”). In addition, the New Jersey law penalizes anyone who attempts to enforce such a provision by saddling them with the employee’s “attorney fees and costs.” *Id.* § 10:5-12.9. A New Jersey appellate court has ruled that the statute is preempted by the FAA with respect to a wrongful termination claim. See *Cangiano v. Doherty Grp.*, No. A-3082-19, 2022 WL 1052214, at *5 (N.J. Super. Ct. App. Div. Apr. 8, 2002).

^{165.} *Antonucci v. Curvature Newco, Inc.*, 270 A.3d 1088, 1096 (N.J. Super. Ct. App. Div. Feb. 15, 2022) (quoting N.J. STAT. ANN. § 10:5-13a(1) (West 2021)).

^{166.} N.Y. C.P.L.R. 7515 cmt. (McKinney 2022).

^{167.} See *Budzyn v. KFC Corp.*, No. 21 C 4152, 2022 WL 595735, at *3 (N.D. Ill. Feb. 28, 2022); *Lee v. Engel Burman Grande Care at Jericho, LLC*, No. 20-CV-3093, 2021 WL 3725986, at *6 (E.D.N.Y. Aug. 23, 2021); *Aguirre v. Conduent Patient Access Sols., LLC*, No. A-3542-20, 2022 WL 893636, at *5 (N.J. Super. Ct. App. Div. Mar. 28, 2022).

^{168.} And on the flip side, the FAA continues to preempt these statutes when plaintiffs do not seek relief for sexual misconduct. See *Antonucci*, 270 A.3d at 1096-97 (finding that the FAA eclipses a #MeToo statute in a discrimination and wrongful-termination case).

plaintiff is a transportation worker engaged in interstate commerce, an arbitration clause appears in a noncontractual document, or a cause of action does not arise out of the container contract—the gaps in the FAA and Ending Forced Arbitration Act.

In addition, judges can invoke the public-policy contract defense to exempt allegations of sexual assault or harassment from arbitration. Courts rarely enjoy this power. Because the FAA combats discrimination against arbitration, it forbids judges from treating the fact that a party must arbitrate (rather than litigate) as inherently unfair as a matter of public policy.¹⁶⁹ Thus, no matter how well intentioned, any “categorical rule prohibiting arbitration of a particular type of claim . . . is contrary to the terms and coverage of the FAA.”¹⁷⁰ Yet if a matter falls into one of the FAA’s exceptions, this constraint no longer applies. Accordingly, judges can legislate from the bench and refuse to enforce arbitration clauses in matters featuring sexual wrongdoing.¹⁷¹

CONCLUSION

The Ending Forced Arbitration Act seeks to “restore access to justice for millions of victims of sexual assault or harassment who are currently locked out of the court system.”¹⁷² Although the statute is a quantum leap in the right direction, this Essay has revealed that it does not go far enough. Only by separating the Ending Forced Arbitration Act from the FAA or by weaving its antiarbitration rule into the fabric of state law can policymakers and judges prevent corporations from sending complaints about sexual misconduct into the black hole of private dispute resolution.

Martin Luther King, Jr. Professor of Law, University of California, Davis, School of Law. Thanks to Sarah Walker and the Yale Law Journal for excellent editorial assistance.

169. See *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987) (reasoning that courts cannot “construe [an arbitration agreement] in a manner different from that in which it otherwise construes nonarbitration agreements under state law” or “rely on the uniqueness of an agreement to arbitrate” when deciding whether to enforce the agreement).

170. *Marmet Health Care Ctr. v. Brown*, 565 U.S. 530, 533 (2012).

171. See *Breazeale v. Victim Servs.*, 198 F. Supp. 3d 1070, 1079–83 (N.D. Cal. 2016), *aff’d*, 878 F.3d 759 (9th Cir. 2017).

172. H.R. REP. NO. 117-234, at 4 (2022).