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YOU HAVE GOT TO BE *KEATING* ME: WHY THE ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT IS A GOOD START

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I. INTRODUCTION

Imagine for a second that you are an actor. You work for a prestigious, world-renowned organization. You have the opportunity to take on a character and do so artfully. You get paid well. Then one of your co-stars of the opposite sex talks about you in public. They start making lewd comments, calling you "legs," and talking about taking you to their "rape van."[1] You are embarrassed, objectified, afraid, and unsure as to what to do. Retaliating is to surrender your career and prospects; being passive only sends a message to the perpetrator that they can repeat such behavior.[2] Eliza Dushku did not have to imagine this.[3]

Dushku privately complained about her co-star, Michael Weatherly, after he made exactly such comments throughout their time on the set of *Bull*.[4] She asked him to tone down his sexual comments, including comments about wanting to have a threesome with her and telling her he would rape her in front of about 100 other people.[5] CBSViacom—who produced *Bull* and employed Dushku—fired her after her conversation with Weatherly.[6] This was despite her having nothing but positive feedback from the network.[7] After suing CBSViacom, the trial court compelled her

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1.Nojan Aminosharei, *Eliza Dushku: "I can't go back to a system that requires me to sign away my rights"*, HARPER'S BAZAAR (Nov. 22, 2021), https://www.harpersbazaar.com/culture/features/a38271034/eliza-dushku-forced-arbitration-cbs-bull-harassment-congressional-testimony/.

2. Margaret Gardliner, *Why Women Don't Report Sexual Harassment*, HUFFPOST (July 21, 2016, 4:29 PM), https://www.huffpost.com/entry/why-women-dont-report-sex_b_11112996; Kim Elsesser, *Reporting Sexual Harassment Shouldn't Be Career Suicide*, FORBES (Apr. 25, 2022, 1:32 PM), https://www.forbes.com/sites/kimelsesser/2022/04/25/reporting-sexual-harassment-shouldnt-be-career-suicide/?sh=3d3827010caa.

3. Aminosharei, *supra* note 1.

4. Aminosharei, *supra* note 1.

5. Aminosharei, *supra* note 1.

6. Aminosharei, *supra* note 1.

7. Aminosharei, *supra* note 1.

case into arbitration, resulting in a subsequent non-disclosure agreement.[8] Dushku is now an advocate for ending compelled arbitration, specifically for sexual harassment and sexual violence claims. In November 2021, Dushku testified before the House Judiciary Committee to speak about her experience.[9] The hearing was titled: "Silenced: How Forced Arbitration Keeps Victims of Sexual Violence and Sexual Harassment in the Shadow."[10] Her story is heartbreaking, but it is not uncommon. During the COVID-19 coronavirus pandemic, United States employers took advantage of mandatory arbitration.[11]

In 2022, President Joseph R. Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFASASHA).[12] The Act seeks to prevent the enforcement of arbitration provisions for those exact claims.[13] It applies not only to federal courts but also to state courts and tribal courts for equivalent claims.[14] However, Congress's definitions of sexual assault and sexual harassment leave much to be desired. Furthermore, the law itself does not go far enough; while sexual harassment and assault are certainly invasive and dangerous, it makes sense that any Title VII[15] claim should be free from arbitration.[16] Questions have arisen as to the extent to which EFASASHA (eff-a-sah-shuh) applies; for instance, it

8. Aminosharei, *supra* note 1.

9. Ted Johnson, *Eliza Dushku Testifies to Congressional Committee About Being 'Fired in Silence' From CBS' 'Bull' After Claiming Sexual Harassment*, DEADLINE (Nov. 16, 2021, 8:34 AM), https://deadline.com/2021/11/eliza-dushku-congress-michael-weatherly-bull-cbs-1234875125/.

10. *Id.*

11. Abha Bhattarai, *As closed-door arbitration soared last year, workers won cases against employers just 1.6 percent of the time*, WASH. POST (Oct. 27, 2021, 7:00 AM), https://www.washingtonpost.com/business/2021/10/27/mandatory-arbitration-family-dollar/.

12. Emily T. Patajo, *President Biden Signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*, NAT'L L. REV. (Mar. 8, 2022), https://www.natlawreview.com/article/president-biden-signed-ending-forced-arbitration-sexual-assault-and-sexual.

13. Leigh Ann Caldwell, *Senate passes bill ending forced arbitration in sexual misconduct cases*, CNBC (Feb. 10, 2022, 12:01 PM), https://www.cnbc.com/2022/02/10/senate-passes-bill-ending-forced-arbitration-in-sexual-misconduct-cases.html.

14. *See* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90 (2022).

15. Referring to Title VII of the Civil Rights Act of 1964, commonly known for preventing discrimination on the basis of race, religion, sex, etc. by employers with 15 employees or more, *see* Pub. L. 88-352, 78 Stat. 241. Title VII can be enforced via either the Equal Employment Opportunity Commission or the aggrieved party, *see* 42 U.S.C. § 2000(e)(b). Sex was not originally included in the bill but was later included as an amendment in order to *kill* the bill, *see* Rebecca Onion, *The Real Story Behind "Because of Sex"*, SLATE (June 16, 2020, 5:54 PM), https://slate.com/news-and-politics/2020/06/title-vii-because-of-sex-howard-smith-history.html.

16. *See* Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187, 1229 (1993) ("Title VII represents a public justice value judgment that the elimination of racial discrimination is so important that forcing employers to bear some of the cost of pursuing that goal is justified. The extent of the costs that employers must bear is not specified in the statute. That issue is delegated to the politically accountable judges and administrative agencies to determine as a matter of interpretation. Under a system in which employment arbitrators make final and binding decisions in cases involving charges of discrimination based on Title VII, there will be serious concern about whether those decisions adequately reflect the public justice values at the heart of the statute.").

remains unclear if parties can force retaliation[17] claims into arbitration.[18] It similarly remains unclear why sex discrimination claims cannot avoid arbitration provisions. Claims may be segmented and appropriately resolved or pleading of sexual harassment may be enough to circumvent arbitration provisions. We do not know right now.[19]

In Section II-A[20] this paper will introduce the unique nature of Title VII and state law equivalents. Section II-B[21] will describe the Federal Arbitration Act and its use in state courts. Section II-C[22] will analyze EFASASHA and discuss its passage. Section III[23] will offer a critique of the current Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, along with relevant case law. Section IV[24] will proffer solutions, including doing away with forced arbitration completely.[25]

II. BACKGROUND

This section will do three things. First, it will highlight the potential avenues that sexual harassment plaintiffs can take to sue. It will outline the state laws and federal laws for victims to vindicate their rights by. Second, this section will highlight the Federal Arbitration Act, and explain why state laws alone cannot be a solution. Lastly, this section will highlight the events leading to EFASASHA's passage, including past and current attempts to do away with forced arbitration.

A. Title VII and State Law Equivalents

The Civil Rights Act was signed on July 2, 1964, by President Lyndon B. Johnson.[26] The groundbreaking law is divided up into eleven different sections or

17. *See* Sandra F. Sperino, *Retaliation and the Reasonable Person*, 67 FLA. L. REV. 2031 (2016). When a plaintiff complains to their employer of discriminatory behavior by a co-worker or superior and the plaintiff faces adverse actions, such as a losing compensation, benefits, having a worse work environment etc., the plaintiff can bring a retaliation claim under the Civil Rights Act of 1964 or state law equivalent, *id.*

18. *Compare* Hyderally & Associates, *President Biden Signs Landmark Ban on Mandatory Arbitration of Sexual Assault and Sexual Harassment Claims*, EMP. LITIG. BLOG (Apr. 5, 2022), https://www.employmentlit.com/2022/04/05/president-biden-signs-landmark-ban-on-mandatory-arbitration-of-sexual-assault-and-sexual-harassment-claims/ (saying sexual retaliation claims cannot be compelled into arbitration) *with* MLE Law, *EFASASHA: Ending Forced Arbitration of Sexual Assault and Sexual Harassment*, MLE L. (Mar. 10, 2022), https://mlelawfirm.com/blog/employment-law/efasasha/ (arguing that sexual retaliation claims are subject to compelled arbitration).

19. In other words, if a sex discrimination claim and sexual harassment claim are both alleged, does the discrimination claim go to arbitration and the harassment claim to district court? Or does merely alleging harassment allow the discrimination claim to be heard in court as well? The former focuses on formality, the latter on judicial efficiency.

20. *Infra* § II-A.

21. *Infra* § II-B.

22. *Infra* § II-C.

23. *Infra* § III.

24. *Infra* § IV.

25. To be clear, this is not to completely do away with *all* arbitration. Consented to arbitration is not discussed by this article.

26. *The Civil Rights Act of 1964: A Long Struggle for Freedom*, LIBR. CONG., https://www.loc.gov/exhibits/civil-rights-act/civil-rights-act-of-1964.html (last visited Apr. 24, 2022). For a full history on the passing of the Civil Rights Act, *see* ESKRIDGE ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND CREATION OF PUBLIC POLICY 2–18 (6th ed. 2019).

"titles."[27] Some of those titles are well-known, such as Title II, which prohibits discrimination on the basis of race, color, religion, and disability[28] in public accommodations.[29] Title VI prohibits federally assisted programs such as universities from invidiously discriminating.[30] Title VII prohibits covered employers from discriminating on the basis of color, sex, race, [31] religion, and national origin.[32]

Sexual harassment is categorized as discrimination on the basis of sex, and thus is prohibited by Title VII.[33] More importantly, an employee can sue an employer who knows of other employees sexually harassing the plaintiff and does nothing or not enough to prevent the harassment. This is called the hostile work environment claim.[34] Hostile work environment claims stem from Title VII's language preventing sexual and racial discrimination.[35] Title VII also only applies to an employer with 15 or more employees in the last 20 calendar weeks or 20 weeks in the

27. Congressional Research Service, *The Civil Rights Act of 1964: Eleven Titles at a Glance*, LIBR. CONG. (Dec. 14, 2020), https://crsreports.congress.gov/product/pdf/IF/IF11705#:~:text=Though%20its%20eleven%20titles%20collectively,to%20racial%20discrimination%20and%20segregation.

28. Disability was amended into the Title II by the Americans with Disabilities Act of 1990, *see* 42 U.S.C. § 12181 (1990).

29. *See* Heart of Atlanta Motel v. U.S., 379 U.S. 241 (1964) (upholding constitutionality); *see also* Katzenbach v. McClung, 379 U.S. 294 (1964) (issued same day as Heart of Atlanta Motel). Because of these two decisions, virtually all hotels, restaurants, or other public accommodations are subject to the Civil Rights Act of 1964, *supra*. If a public accommodation can absolutely prove that it has both (1) made no purchases from out of state (*McClung*); and (2) a substantial portion of its revenue comes from in-state customers (*Heart of Atlanta*), only then could a public accommodation really make a colorable argument that it can evade the Civil Rights Act, *supra*. If done successfully, those organizations would still be subject to state laws, *supra.*

30. 42 U.S.C. § 2000d (2022). Originally, race, color, and national origin were the only protected categories, *id.* Sex was later added by Title IX of the Education Amendments Act of 1972, *see* 20 U.S.C. § 1681 (1972). Disability was later added by § 504 of the Rehabilitation Act of 1973, *see* 29 U.S.C. § 794 (1973). Emotional distress damages are often the only actual damages that a plaintiff can recover for violation of any of these statutes, *see* Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1579 (2022) (Breyer, J., dissenting). However, the Supreme Court has held that emotional distress damages are precluded under Title IX, Title VI, the Rehabilitation Act, and the Patient Protection and Affordable Care Act, *id*. at 1576. *See also* Yvette Borja, *The Supreme Court Does Not Take Civil Rights Seriously*, BALLS & STRIKES (May 2, 2022), https://ballsandstrikes.org/scotus/cummings-v-premier-keller-opinion-recap. The most obvious context for these statutes to apply is the university context, where public universities frequently consolidate all dispute into a generic "Title IX office," *id. See generally* Ben Trachtenberg, *How University Title IX Enforcement and Other Discipline Processes (Probably) Discriminate Against Minority Students*, 18 NEV. L.J. 107 (2017) (for notes on racial disparities in violation reporting). *See also* Ben Trachtenberg, *Hiring and Training Competent Title IX Hearing Officers*, 86 MO. L. REV. 261 (2021).

31. *See* Chuck Henson, *The Purpose of Title VII*, NOTRE DAME J. L., ETHICS, & PUB. POL'Y 221 (2019) (the exact purpose of Title VII perhaps falls short of a wider goal); *see* Eskridge et al., *Cases and Materials on Legislation and Regulation: Statutes and the Creation of Public Policy* 40-87 (6th ed. 2019) (for some interesting notes on interpretation of Title VII).

32. 42 U.S.C. § 2000e (2022).

33. Meritor Savings Bank v. Vinson, 477 U.S. 57, 60 (1986).

34. *See* Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 752 (1998); *see also* Henson v. Dundee, 682 F.2d 897 (11th Cir. 1982); *Meritor Savings Bank*, 477 U.S. at 65.

35. *Meritor Savings Bank*, 477 U.S. at 60; *see* Eugene Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 HARV. J.L. & PUB. POL'Y 307, 308 (1998) ("Courts also recognize two forms of sexual harassment: quid pro quo and 'hostile work environment'…Hostile work environment…comprises discriminatory comments, advances, touching, and the like that make the workplace hostile' or 'abusive.'") (citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993)); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 768 (1998) (Thomas, J., dissenting).

preceding calendar year.[36] So, a small enough business cannot—theoretically—be held accountable under Title VII.[37]

Because Title VII is part of the Civil Rights Act of 1964, any claim made under it is likely subject to federal question jurisdiction.[38] This is not to say that state courts cannot hear Title VII issues—this is to say that the most prudent defendants[39] facing a Title VII claim will most likely remove to federal court.[40] In order to give plaintiffs an option between federal and state court, almost all states have passed similar legislation to prevent discrimination on the basis of sex, race, religion, etc.[41] For example, Missouri passed the Missouri Human Rights Act[42] (MHRA) to give

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36. *See* 42 U.S.C. 2000 § (e)(b).

37. And perhaps this makes sense, given that the smaller a business is, the less likely it is that the business itself will affect interstate commerce. The interstate commerce clause is the power that allows Congress to pass such a law in the first place. *But see* Circuit City Stores, Inc. v. Adams 532 U.S. 105 (2001) (rejecting that same argument for applicability of the Federal Arbitration Act). *See also* Southwest Airlines Co. v. Saxon, 21-309, WL 1914099 (2022).

38. 28 U.S.C. § 1331.

39. 28 U.S.C. § 1441. Civil trials are dying in the court systems, at both the federal and state levels, *id*. However, summary judgment is more likely to be granted in the federal courts, *see* Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 JUDICTURE No. 4 (2017), https://judicature.duke.edu/articles/going-going-but-not-quite-gone-trials-continue-to-decline-in-federal-and-state-courts-does-it-matter/. This is one reason why the prudent defendant might consider removing to federal court, *id.*

40. As a matter of interesting civil procedure and constitutional law, a plaintiff must have Article III standing *along with* statutory jurisdiction to bring a claim in *federal* court, *see* Marbury v. Madison, 5 U.S. 137 (1803); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Spokeo, Inc. v. Robins, 578 U.S. 330 (2016); TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021) (involving a class action that lacked Article III standing and thus was not justiciable by the federal district courts). Ergo, when statutory jurisdiction is satisfied, a plaintiff can destroy federal jurisdiction by pleading that they do not have Article III standing, *supra*. The plaintiff can accomplish this by—counterintuitively—stating that it has no actual or imminent, concrete, *or* particularized injury-in-fact, *see Lujan*, 504 U.S. 555 (1992). If done successfully, the proper procedure would be to remand to the state court that the plaintiff originally filed in, *see* Thornley v. Clearview AI, 984 F.3d 1241 (7th Cir. 2021) (where plaintiffs sued Clearview for breach of privacy under Illinois's Biometric Information Privacy Act and defendants removed to federal court under the Class Action Fairness Act: plaintiffs alleged no concrete, particularized, *or* actual injury-in-fact and the seventh circuit agreed, remanding the case back to state court); Allison Frankel, *The 'bizarre' twist in Clearview AI's promised SCOTUS petition in biometric privacy case*, REUTERS (Feb. 25, 2021), https://www.reuters.com/article/legal-us-otc-clearview-idUKKBN2AP2PW. This requires there be a state court to remand to in the first place leaving great incentive for the plaintiff to *always* file a claim in state court first, *id.* Furthermore, the state court's standing doctrine must have a lower threshold than the Article III standing level, *see Thornley*, 984 F.3d 1241. Illinois happens to have one of the lowest state court standing requirements in the nation, thus giving the class the opportunity to plead mere statutory violations and avoid federal court jurisdiction, *see id*. This sort of posture cannot occur in Texas, whose state standing requirements mimic Article III's, *see In Re* Abbott, 601 S.W.3d 802, 807–08 (Tex. 2020); *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 154 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)) ("The Texas standing requirements parallel the federal test for Article III standing, which provides that '[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'"). So, a certified class alleging discrimination can allege mere statutory violations in Illinois but *not* in Texas, *see id.* The former will be able to proceed in state court, like they want to, while the latter must proceed in federal court, *id.* For discrimination plaintiffs it is plausible, though less probable, that they would be able to engage in the same sort of gamesmanship, *id.*

41. *See* Colorado Anti-Discrimination Act, Colo. Rev. Stat. Ann. § 24-34-601 (West 2016).

42. Mo. Ann. Stat. § 213.010 (West 2017). Some see the Missouri Human Rights Act (MHRA) as optimal compared to Title VII, *see generally id.* For example, the MHRA applies to employers of six or more, compared to 15, *id.* Paul D. Seyferth & Joseph H. Knittig, *Conflict of Balances: The Adjudication of Missouri Human Rights Act Claims in Federal Court*, 63 MO. L. REV. 307, 308 n.10 (1998). The MHRA used to have damages uncapped as to monetary damages whereas Title VII was capped, *id*. at

plaintiffs the option to take their claims to state court.[43] Some would even argue that the Civil Rights Act does not go far enough, and that state law needs to supplement federal law to achieve the eradication of employment discrimination.[44]

In order to sue under either Title VII or a state law equivalent, the plaintiffs must assert that they have exhausted their administrative remedies.[45] This is done by filing a charge with the appropriate agency and receiving judgment or a right to sue letter.[46] The appropriate agency depends on the enacted law that the plaintiff is suing under. If proceeding under Title VII, the appropriate agency is the Equal Employment Opportunity Commission (EEOC).[47] States have their own equivalents. In Missouri, the appropriate agency is the Missouri Commission on Human Rights (MCHR).[48] Missouri and many other states allow a plaintiff to cross-file, meaning that a plaintiff can submit the same charge to both the EEOC and MCHR.[49]

307–08. In 2017, the MHRA was amended to cap damages based on the size of the employer, Mo. Ann. Stat. § 213.111 (West 2017).

43. Of course, if a Missouri plaintiff sues an out-of-state defendant in Missouri state court and claims more than $75,000 in damages, the defendant may remove to federal court*, see* 28 U.S.C. § 1332.

44. Chuck Henson, *Title VII Works—And That's Why We Don't Like It*, 2 U. MIAMI RACE & SOC. JUST. L. REV. 41, 96 (2012). Plaintiffs can sue alleging either disparate treatment (facially discriminatory practices, like having races segregated in an office building) or disparate impact (a facially neutral policy that impacts different classes of people within an immutable category in different ways i.e. having a restriction on 'natural' hair styles), *id. See also* Chuck Henson, *In Defense of McDonnell Douglas: The Domination of Title VII by the At-Will Employment Doctrine*, 89 ST. JOHN'S L. REV. 551, 563 (2015); Sandra F. Sperino, *Revitalizing State Discrimination Law*, 20 GEORGE MASON L. REV. 545, 548 (2013); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (recognizing a disparate impact theory of discrimination under Title VII; McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (creating a three-part burden shifting scheme for a plaintiff to demonstrate a disparate impact claim under Title VII).

45. *See* Peter A. Devlin, *Jurisdiction, Exhaustion of Administrative Remedies, and Constitutional Claims*, 93 N.Y.U. L. REV. 1234 (2018).

46. Exhaustion of administrative remedies is a quasi-jurisdictional question. In order for any court to entertain a complaint, the plaintiff must exhaust administrative remedies. But what happens when a plaintiff has not filed an administrative charge, yet another plaintiff has filed against the same defendant? That answer depends on the Circuit Court of Appeals that hears the case. In the majority of Circuits, a non-exhausting plaintiff may become either an additional plaintiff or join a class action if the first plaintiff exhausted, *see* Tolliver v. Xerox Corp., 918 F.2d 1052 (2d Cir. 1990), White v. BFI Waste Servs., LLC, 375 F.3d 288 (4th Cir. 2004), Allen v. U.S. Corp., 665 F.2d 689 (5th Cir. 1982), Price v. Choctaw Glove & Safety Co., 459 F.3d 595, 599 (5th Cir. 2006), Peeples v. City of Detroit, 891 F.3d 622 (6th Cir. 2018), Kloos v. Carter-Day Co., 799 F.2d 397 (8th Cir. 1986), Foster v. Ruhupumpen, Inc., 365 F.3d 1191 (10th Cir. 2004). In these circuits, the initial charge must nevertheless put the defendant on notice that a class may exist and give the defendant a chance to reconcile with the filing plaintiff, *see* Peeples, 891 F.3d at 631-32. The Third and Seventh Circuits have elected to narrow the scope to class actions only, not additional plaintiffs, *see* Ruehl v. Viacom, Inc., 500 F.3d 375 (3rd Cir. 2007), Horton v. Jackson Cty. Bd. Of Cty. Com'rs., 343 F.3d (7th Cir. 2003). The First Circuit has recently declined to decide the issue, not having a "single-filing" or "piggybacking" rule at all, *see* Pérez-Abreu v. Metropol Hato Rey LLC, 5 F.4th 89 (1st Cir. 2021). So, under the Missouri Human Rights Act, non-exhausting plaintiffs may "piggyback" either as an additional or class plaintiff, *supra*. In Illinois, that same plaintiff could only be added to a certified class, *supra*. And in Massachusetts, that plaintiff is barred completely, *supra*.

47. *See* Pub. L. No. 92-261, 86 Stat. 103 (created by Title VII, the Equal Employment Opportunity Commission received the ability to enforce federal anti-discrimination laws in 1972 under the Equal Employment Opportunity Act of 1972).

48. *File a Complaint of Discrimination*, MO. DEP'T LAB. & INDUS'L RELS., https://labor.mo.gov/mohumanrights/File_Complaint (last visited Apr. 24, 2022).

49. This is referred to as a work-sharing agreement, *see What to Expect during the Complaint Process*, MO. DEP'T LAB. & INDUS'L RELS., https://labor.mo.gov/sites/labor/files/pubs_forms/MCHR-42-AI.pdf (last visited Apr. 24, 2022).

Plaintiffs have options when it comes to suing for sexual harassment. Someone like Eliza Dushku could sue in either federal or state court and likely bring into court a large enough employer in a plaintiff-friendly jurisdiction. Before EFASASHA's passage, if there is an arbitration provision in their employment contract, all of this becomes moot.[50] After EFASASHA, the court system retains jurisdiction over these specific claims. However, for Title VII claims alleging discrimination on the basis of race, religion, or national origin, arbitration may still be compelled. [51]

B. The Federal Arbitration Act and Preemption

The Federal Arbitration Act was Congress's attempt to enforce arbitration clauses in contracts.[52] Before the Federal Arbitration Act, the enforceability of arbitration clauses was unpredictable.[53] This unpredictability in American arbitration practice started in the colonial era. Both the Massachusetts Bay colony and Pennsylvania colony had instances of arbitration provisions in contracts.[54] George Washington himself used an arbitration provision in his will.[55] Some legislation predated the Federal Arbitration Act.[56] The Arbitration Act of 1888[57] and the Erdman Act of 1898[58] were reactions to railroad union strikes and proved unsuccessful.[59] The Newlands Labor Act of 1913 promulgated a three-member board that would arbitrate—but also mediate—labor disputes.[60]

In 1920, the American Bar Association got involved. The ABA Committee on Commerce, Trade, and Commercial Law wanted to mimic a New York state law[61] which enforced arbitration provisions. The following year that same committee drafted such legislation.[62] Julius Henry Cohen authored the United States Arbitration Act.[63] Cohen would later testify to Congress about the scope of the act and importance of enforcing arbitration provisions.[64] During his Congressional testimony in 1923, Cohen testified that the arbitration act was built on the idea of

50. *Infra* § II-B.

51. *See* Martin & Ladenson, *supra* note 16 (again, EFASASHA is narrow and does not cover these other forms of discrimination, but why should we care?).

52. IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORM, NATIONALIZATION, INTERNATIONALIZATION 84 OXFORD UNIV. PRESS (1992).

53. *See* Kill v. Hollister, (1746) 95 Eng. Rep. 532 (KB) (indeed, there was a history of not abiding by arbitration agreements before Congress even took up the matter); Vyinior's Case (1609) 77 Eng. Rep. 597; 8 Co. Rep. 81 b. (citing the revocability of a will to an alternative dispute resolution provision).

54. Steven A. Certilman, *A Brief History of Arbitration in the United States*, 3 N.Y. DISP. RESOL. LAW. 10 (2010).

55. Edward F. Sherman, *Arbitration in Wills and Trusts: From George Washington to an Uncertain Present*, 9 ARB. L. REV. 83 (2017). *See also* 21 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 57:2 (Richard A. Lord ed., 4th ed. 2003).

56. MACNEIL, *supra* note 52.

57. *See* 25 Stat. 501.

58. *See* 30 Stat. 424.

59. Dennis Nolan & Roger Abrams, *American Labor Arbitration: The Early Years*, 35 FL. L. REV. 373, 384 (1983).

60. *See* 38 Stat. 103 (codified as 42 U.S.C. §§ 103–05, repealed 1926).

61. *See* Berkovitz v. Arbib & Houlberg, 230 N.Y. 261 (1921) (for a review of the New York law at hand). *See* Julius Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 266 n. 4, 5 (1926) (New Jersey, Oregon, and Massachusetts also had similar laws at the time).

62. MACNEIL, *supra* note 52.

63. MACNEIL, *supra* note 52 at 85.

64. MACNEIL, *supra* note 52 at 114.

uniformity, but multiple times reiterated that the bill would be applicable in federal courts only.[65] The text of the bill indicates that the law applied to the District Courts of the United States.[66] The hearings were titled "Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories of with Foreign Nations."[67] Cohen contemplated the idea that a federal law may preempt states laws, but conceded that the FAA was not that law.[68] It is uncontroverted that the law was to apply only in federal courts.[69]

Even the Supreme Court presumed that section two of Federal Arbitration Act only applied to federal courts.[70] In *Prima Paint Corp v. Flood & Conklin Mfg. Co.*,[71] the Supreme Court enunciated that the Federal Arbitration Act had "created a whole new body of *federal* substantive law."[72] The Supreme Court reaffirmed this principle in *Moses H. Cone Mem'l Hospital v. Mercury Construction Corp*.[73] The Court's opinion in *Prima Paint*, alluded to the legislative intent of the draftsmen throughout the entire opinion.[74] That intent was to only apply the Federal Arbitration Act to federal courts.[75] The dissents did not touch on the application to state or federal courts because the cases originated in federal courts.

Given those holdings and the legislative intent behind the FAA, it might surprise the reader to learn that state courts are also bound by that Act. In *Southland Corp. v. Keating*,[76] the Supreme Court ruled that the FAA pre-empted a California state law that specifically held that arbitration clauses were unenforceable for a specific cause of action.[77] A group of 7-Eleven franchise owners sued Southland Corporation, their parent company, under California state law for merchandising and advertising discrepancies.[78] One provision of that California law prevented compelled arbitration for certain franchising contract breach claims. The Supreme Court ruled that the Federal Arbitration Act required arbitration clauses to be enforced *even in state courts.*[79]

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65. MACNEIL, *supra* note 52 at 85.
66. MACNEIL, *supra* note 52 at 98.
67. MACNEIL, *supra* note 52 at 114 (citing *Joint Hearings on S. 1005 and H.R. 646 Before the Subcommittee of the Committees on the Judiciary*, 68th Cong., 1st Sess. (1924)).
68. But you can take it from the draftsmen themselves: Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 277–78 (1926) ("The primary purpose of the statute is to make enforceable in the *Federal* courts such agreements for arbitration, and for this purpose Congress rests solely upon its power to prescribe the jurisdiction and duties of the *Federal* courts.") (emphasis added).
69. *Id.* at 277 ("so far as the present law declares simply the policy of recognizing and enforcing arbitration agreements in the federal courts it does not encroach upon the province of the individual states.").
70. IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW §§ 10.2, 10.3.1, 10.3.2 (1994 ed. Supp. 1999).
71. Prima Paint Corp v. Flood & Conklin Mfg. Co, 388 U.S. 395 (1967).
72. *Id.* at 420 (emphasis added).
73. 460 U.S. 1, 24 (1983).
74. *Prima Paint,* 388 U.S. at 404–07.
75. *Id.* at 401–04.
76. 465 U.S. 1 (1984).
77. *Id.* at 16.
78. *Id.* at 4.
79. *Id.* at 8, 10. The Court reached this reasoning by selectively using phrases from the Congressional testimony of Julius Henry Cohen and other ABA members, *id.* The idea is that the draftsmen favored a broad policy favoring arbitration, *see generally id.* Furthermore, the draftsmen lived in a pre-*Erie* world and thus could not have understood the concerns of forum shopping that the Court developed, *see*

It is easy to see that arbitration clauses under the FAA and *Southland Corp v. Keating* decision are enforceable, irrespective of the claims or courts.[80] This means that whether a plaintiff sues their employer under Title VII in federal court or the Missouri Human Rights Act in state court, if there is an arbitration clause, the matter must be resolved via arbitration. The arbitrator can also determine whether the arbitration provision is enforceable.[81] In *First Options of Chicago v. Kaplan*,[82] the Court held that questions of arbitrability are determined by the arbitrator and reviewed de novo unless otherwise 'agreed to' by the other parties.[83] This represented a stark contrast to the federal courts' tendency to resolve close calls in favor of arbitration.[84] Critics argue that this shift to a 'clear and unmistakable' standard may demonstrate a need for actual consent to arbitration clauses rather than implied consent.[85] Judge Easterbrook of the Seventh Circuit has adopted the implied consent standard, construing virtually anything as acceptance of the arbitration clause, albeit not in the employment contract context.[86]

Some have raised arguments that employment contracts are adhesion contracts, and thus that arbitration clauses therein are unenforceable.[87] Few courts have adopted this reasoning, although the Equal Employment Opportunity Commission

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generally id. Thus, the *Keating* court essentially closed concerns of forum shopping and applied Congress's chosen policy to *all* courts throughout the land, *see id.* at 26.

80. *See* Barrentine v. Ark.-Best Freight Sys., 450 U.S. 728 (1981) (the Supreme Court has expanded the preemptive effective of the FAA multiple times over multiple decades since, without any real detraction); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987); Perry v. Thomas, 482 U.S. 483 (1987); Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1989); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) (overruling Wilko v. Swan, 346 U.S. 427 (1953)); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Dr.'s Associates, Inc., v. Casarotto, 517 U.S. 681 (1996) (striking down a Montana statute requiring a first-page notice requirement for all contracts with arbitration clauses); Circuit City Stores v. Adams, Inc. 532 U.S. 105 (2001); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006); Preston v. Ferrer, 552 U.S. 346 (2008); Rent-A-Center v. Jackson, 561 U.S. 63 (2010); AT&T Mobility v. Concepcion, 563 U.S. 333 (2011); CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013); Kindred Nursing Ctrs. L.P. v. Clark, 581 U.S. 246 (2017); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018); Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906 (2022).

81. *See* Rent-A-Center v. Jackson, 561 U.S. 63 (2010). These are often called delegation provisions, where the enforceability of the arbitration provisions is considered by the arbitrator, *id.* Those delegation provisions can be challenged in a district court themselves*, id.* This means that a plaintiff wanting to bring suit in district court has to challenge: (1) the delegation provision itself, (2) the arbitration provision itself, (3) the claim itself in order to actually recover anything, *id.*

82. 514 U.S. 938 (1995).

83. *Id.* at 939.

84. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 626 (1985).

85. Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contract With Arbitration Provisions*, 56 SMU L. REV. 819, 859–61 (2003) (arguing that *Kaplan* conflicts with the regime adopted in *Prima Paint*); *but see* Alan Scott Rau, *The Arbitrability Question Itself*, 10 AM. REV. INT'L ARB. 287, 339 (1999) (arguing that *Prima Paint* does not conflict with *Kaplan*).

86. *See* Hill v. Gateway 2000, 105 F.3d 1147, 1149 (7th Cir. 1997) ("Competent adults are bound by such documents, read *or unread*.").

87. Monica L. Goodman, *Title VII and the Federal Arbitration Act*, 33 TULSA L.J. 665, 666 n.17 (2013).

has promoted it in the past.[88] The Ninth Circuit has denied this argument.[89] However, the EEOC may still prosecute claims of discrimination notwithstanding an arbitration clause between the employee and employers.[90]

In *Gilmer v. Interstate/Johnson Lane Corp.*,[91] the Court enforced an arbitration clause for a dispute arising under the Age Discrimination in Employment Act,[92] which, like Title VII, prohibits age discrimination in the workplace for anyone over forty. Many criticize the *Gilmer* decision for adopting a broad policy in favor of mandatory arbitration.[93] Class-wide arbitrations have largely been rejected by the Court because of the fundamental change in the nature of the agreement.[94]

Some have argued that the federal Arbitration Act does not apply to employees.[95] This stems from the language in the first section of the FAA regarding the exemption of the employments of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[96] However, this argument was expressly rejected in *Circuit City Stores, Inc. v. Adams*.[97] The *Adams* court held that only specific employees in certain occupations were meant to receive this exemption from the FAA.[98] Recently, airport cargo loaders were included under the FAA's interstate commerce exemption.[99]

State level judicial and executive officials have protested the *Keating* jurisprudence as well. In *Doctor's Associates, Inc. v. Cassarotto*,[100] the Supreme Court of the United States struck down a Montana statute by reading it as directly conflicting with the FAA.[101] The Montana Supreme Court had two justices who refused to sign

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88. EEOC v. River Oaks Imaging & Diagnostic, 1995 WL 264003 (S.D. Texas 1995); *see also Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, EEOC (July 10, 1997); b*ut see Recission of Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment,* EEOC*,* https://www.eeoc.gov/wysk/recission-mandatory-binding-arbitration-employment-discrimination-disputes-condition (last visited May 23, 2022) (EEOC reversed its policy); Erin Mulvaney, *EEOC Rescinds Policy Against Binding Arbitration for Workers*, BLOOMBERG L. (Dec. 17, 2019), https://news.bloomberglaw.com/daily-labor-report/eeoc-rescinds-policy-against-binding-arbitration-for-bias-claims. The EEOC then applauded the passing of EFASASHA, *see EEOC Chair Applauds Passage of Ending Forced Arbitration Act*, EEOC (Mar. 3, 2022), https://www.eeoc.gov/newsroom/eeoc-chair-applauds-passage-ending-forced-arbitration-act.

89. Cont'l Airlines, Inc. v. Mason, 87 F.3d 1318 (9th Cir. 1996) (upholding an arbitration provision found in an employee handbook.).

90. EEOC v. Waffle House, Inc., 534 U.S. 279 (2002).

91. 500 U.S. 20 (1991).

92. 29 U.S.C. § 623 (1967).

93. Katherine Van Wezel Stone, *Labor/Employment Law: Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990's*, 73 DENV. U. L. REV. 1017 (1996); 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, 167 (1997); Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996); Robert A. Gorman, *The* Gilmer *Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635 (1995); Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, (1996).

94. Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010); Epic Systems Corp. v. Lewis, 584 U.S. ___, 138 S. Ct. 1612 (2018); Lamps Plus, Inc. v. Varela, 587 U.S. ___, 139 S. Ct. 1407 (2019).

95. Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMPL. & LAB. L. 282 (1996).

96. 9 U.S.C. § 1 (1947).

97. 532 U.S. 105 (2001).

98. *Id.*

99. Southwest Airlines Co. v. Saxon, 142 S. Ct. 1783 (2022).

100. 517 U.S. 681 (1996).

101. *Id.*

on to the order remanding the case from the Supreme Court of the United States to the state trial court.[102] Specifically, they "could not in good conscience be an instrument of a policy which is as legally unfounded, socially detrimental and philosophically misguided as [*Cassarotto*]."[103] In *Allied-Bruce Terminix Cos. v. Dobson*,[104] 20 state attorneys general joined as amici asking the Court to overrule *Keating*.[105] The high court declined to do so. The FAA, *Keating*, and its progeny have led to strong feelings.[106]

One critique of forced arbitration is the uneven-handed nature of the parties.[107] Employers are more likely to win in arbitration than in federal court,[108] and are more likely to limit their damages in arbitration rather than federal court.[109] They are usually the draftsmen in the take-it-or-leave-it type negotiation.[110] Furthermore, employers usually pay the arbitrator since they are the wealthier party[111] and can even draft the rules surrounding the arbitral process, though those rules in sum cannot be so "egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith."[112] From a federalism perspective, this type of preemption disallows a state legislature to determine its own state common law.[113] This further harms plaintiffs in contracts cases from appropriately ascertaining the optimal forum for them to bring suit.[114]

All this to demonstrate the position that discriminated against employees may find themselves in. Their ability to pick the court they want to proceed in may be completely taken away from them *before* the discrimination dispute even occurs.

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102. Richard C. Reuben, *Western Showdown: Two Montana Judges Buck the U.S. Supreme Court*, 82 ABA J. 16, 16 (Oct. 1996).

103. *Id.*

104. 513 U.S. 265 (1995).

105. Lauri W. Sawyer, *Allied-Bruce Terminix Companies v. Dobson: The Implementation of the Purposes of the Federal Arbitration Act or an Unjustified Intrusion into State Sovereignty?*, 47 MERCER L. REV. 645, 651 n. 60 (1996).

106. Perhaps, the Montana Supreme Court justices felt…powerless, *see infra* § III-A. And perhaps the state attorneys general also felt the attempts of state legislatures to determine their law was…fruitless, *infra* § III-B.

107. *See* Amy Schmitz, *American Exceptionalism in Consumer Arbitration*, 10 LOY. U. CHI INT'L L. REV. 81 (2012) (some have recognized this power imbalance, even in the consumer context).

108. Ross Eisenbrey, *Mandatory arbitration unfairly tilts the legal system in favor of corporations and employers*, ECON. POL'Y INST. (Jan. 28, 2016), https://www.epi.org/publication/mandatory-arbitration-unfairly-tilts-the-legal-system/?utm_content=buffer76362&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer.

109. *Id.*

110. *See* William A. Nelson II, *Take It or Leave It: Unconscionability of Mandatory Pre-Dispute Arbitration Agreements in the Securities Industry*, 17 J. BUS. L. 573 (2015).

111. *Id.*

112. Hooters of America, Inc. v. Phillips, 173 F.3d 933 (3rd Cir. 1999) (refusing to enforce arbitration clause where arbitration rules set forth by Hooters of America effectively deprived the Title VII plaintiff of a fair arbitral process). Such rules included Phillips not being able to appeal any arbitral award, not being able to raise claims outside the complaint, not being able to cancel the arbitration, all while Hooters were able to, *id.* Furthermore, Phillips had to disclose all discovery whereas Hooters did not have to, *id.* The trial court and appellate court found this to defeat the prospect of there being any neutral arbitration and denied the motions to compel arbitration, *id.*

113. *Supra* § II-B. Some might find this to be the least interesting from a laymen's point of view, *id.* After all, it is not frequent for civil litigants to fully appreciate the tension between the United States as a sovereign along with every state as a sovereign, *id.* In some sense, they are correct, *id.* As a matter of merit, it is extremely logical that an aggrieved person can recover in court, *id.*

114. *See* Ronald A. Conway, *Federal Preemption of Arbitration - Southland Corp v. Keating*, 1984 J. DISP. RESOL. 193, 195 (1984).

The only class of plaintiffs that have the full options are sexual assault and sexual harassment plaintiffs.[115]

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

EFASASHA was introduced in the House by Representative Cheri Bustos of Illinois in July of 2021.[116] The law itself amends Title Nine of the United States Code, adding a fourth chapter with two sections.[117] The first section provides the definitions used in the second.[118] The second section instructs all courts to not enforce arbitration provisions for sexual assault and sexual harassment cases.[119]

During House debate, the Democrats were led by testimony from Representatives Jerry Nadler, Pramila Jayapal, Rosa DeLauro, Sheila Jackson Lee, Hakeem Jefferies, Jamie Raskin, David Cicilline, Sylvia Garcia, and of course Cheri Bustos.[120] The Republicans chose Representative Michelle Fischbach to lead them,

115. I would be remiss if I did not point out one critical ruling occurring between the drafting and publication of this piece. On June 24th, 2022, the Supreme Court of the United States overturned Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood of SE Pa. v. Casey, 505 U.S. 833 (1992), in Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). Simply put, the former two cases guaranteed a constitutional right to an abortion under the Fourteenth Amendment's Due Process Clause, *supra.* That right no longer exists, and the issue is left to the states, unlike the common law surrounding enforcement of arbitration agreements, *supra*. Some states were quick to ban abortion with so called 'trigger laws,' *see* Adam Edelman, *With Roe v. Wade overturned, here's where things start with 'trigger' laws and pre-Roe bans*, NBC NEWS (Feb. 24, 2022), https://www.nbcnews.com/politics/politics-news/roe-v-wade-overturned-things-stand-trigger-laws-pre-roe-bans-rcna35282. Missouri became the first to do so, also having no rape or incest exceptions to those abortion prohibitions, *see* Kurt Erickson, *Abortions in Missouri: Prohibited, no exceptions for rape or incest*, ST. LOUIS POST-DISPATCH (June 25, 2022), https://www.stltoday.com/news/local/govt-and-politics/abortions-in-missouri-prohibited-no-exceptions-for-rape-or-incest/article_7aa1deaa-63a7-5b53-b45a-b89ecd733762.html; *see also* Mo. Rev. Stat. § 188.010. At the risk of being the bearer of bad news, this will have profound ramifications for uterus having individuals in Missouri who are sexually assaulted by a colleague and become pregnant. They have six months to file a complaint and must wait an additional six months to sue. By that time, they may have an infant that they are forced to either care for or put up for adoption. The only exception to Missouri's abortion law is the life of the birth giver being in jeopardy, *see* Mo. Rev. Stat. § 188.010. So, a sexual assault survivor might be reeling from one traumatic event, only to be compelled into birth and parenting. Yet another traumatic event. During which they must also retain counsel within a six-month period. That is practically very difficult for just about anyone. The burden becomes a barrier. The most egregiously treated in the workplace will seldom be able to vindicate their civil rights in front of a tribunal. Other states that do not have a rape exception include Alabama, Arkansas, Kentucky, Louisiana, Michigan, Mississippi, Ohio, Oklahoma, Tennessee, and Texas, *see* Elaine Godfrey, *The GOP's Strange Turn Against Rape Exceptions*, ATLANTIC (May 4, 2022), https://www.theatlantic.com/politics/archive/2022/05/supreme-court-overturn-roe-v-wade-no-rape-incest-exceptions/629747/. Alabama, Mississippi, Tennessee, and Arkansas are the four most religious states in the union, *see How religious is your state?*, PEW RSCH. CTR. (Feb. 29, 2016), https://www.pewresearch.org/religion/interactives/how-religious-is-your-state/?state=alabama. Louisiana and Kentucky are tied for sixth with Oklahoma, Missouri, and Texas taking the eleventh, twelfth, and thirteenth, respectively, *see id.* Ohio takes the fifteenth spot, *see id*. Of these states, only one (Michigan) cracks the top thirty in terms of overall educational attainment, *see* Adam McCann, *Most & Least Educated States in America*, WALLETHUB (Feb. 14, 2022), https://wallethub.com/edu/e/most-educated-states/31075. Of course, I would not dare call this causation.

116. H.R. 4445, 117th Cong. (2022).

117. Pub. L. 117-90, 136 Stat. 26 (2022).

118. 9 U.S.C. § 401 (2022).

119. 9 U.S.C. § 402 (2022).

120. 168 CONG. REC. H. 983-993 (2022).

who herself was in opposition.[121] Republicans in favor of passing EFASASHA included Representatives Matt Gaetz, Ken Buck, and Morgan Griffith.[122]

Eliza Dushku was not the first person to come forward to speak out against compelled arbitration. In 2016, Gretchen Carlson was a Fox News Host who dared to accuse Roger Ailes of sexually harassing her.[123] Carlson sued Fox News and was compelled into arbitration, unable to litigate her issue.[124] Instead, her lawyer decided to sue Ailes himself in order to get around the arbitration provision.[125] Since then, Carlson has become an advocate to banning the practice of forced arbitration, at least for sexual harassment and assault claims. Both Eliza Dushku and Gretchen Carlson were mentioned in the house debate.[126]

EFASAHSA was passed on February 7, 2022, by the House of Representatives. The vote was 335-97. All Democrats voted in favor, while a majority of Republicans (about 54%) voted in favor of EFASASHA.[127] In case you were wondering, out of California's 53 Representatives, only 4 voted against EFASASHA.[128] On February 10, 2022, the Senate passed EFASASHA via voice vote.[129] Senators Kirsten Gillibrand,[130] Chuck Schumer, Dick Durbin, Lindsey Graham, and Jodi Ernst were the key figures in passing EFASASHA in the Senate.[131] On March 3, 2022, President Joseph R. Biden signed EFASASHA into law.[132] While this bipartisan legislation gives relief to the loud issue of compelled arbitration. For the reasons mentioned earlier, it is still disquieting that many will be barred from recovering in court.

III. CORRECTING THE EVIL TO BE CORRECTED[133]

This section will illustrate the potential solutions to this problem. The first two subsections will focus on the state level solutions, including state attempts to regain

121. *Id.*
122. *Id.*
123. Hope Reese, *Gretchen Carlson on how forced arbitration allows companies to protect harassers*, Vox (May 21, 2018), https://www.vox.com/conversations/2018/4/30/17292482/gretchen-carlson-me-too-sexual-harassment-supreme-court.
124. *Id.*
125. Of course, this is not a solution in every case of sexual harassment or hostile work environment claim. It is incredibly rare that high-profile CEOs themselves actually sexually harass someone to trigger a choice of suing the company or CEO personally. Furthermore, it is quite possible for a co-worker to be sued successfully. However, that person may be insolvent compared to a company which has an insurance policy that covers sexual assault/harassment in the workplace.
126. 168th Cong. Rec. H 988, 989 (2022).
127. *Roll Call 33 | Bill Number: H.R. 4445,* CLERK U.S. H. REP. (Mar. 17, 2022), https://clerk.house.gov/Votes/202281.
128. *Id.* (as is noted later, California has tried a few times to get around *Keating*, *infra* note 199).
129. Amy B. Wang, *Senate passes bill to end forced arbitration in sexual assault, sexual harassment cases*, WASH. POST (Feb. 10, 2022), https://www.washingtonpost.com/politics/2022/02/10/senate-sexual-assault-forced-arbitration/.
130. Senator Gillibrand, a Democrat from New York, actually introduced the same bill at the same time as Representative Bustos did in July of 2021, but the House passed EFASASHA first, *see* S.2342, 117th Cong. (2021).
131. Wang, *supra* note 129.
132. Sara Sirota & Austin Ahlman, *Biden Signs Law Banning Forced Arbitration—But Only Over Sexual Misconduct*, INTERCEPT (Mar. 3, 2022), https://theintercept.com/2022/03/03/sexual-harassment-forced-arbitration-fair-act/.
133. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 269 (1926). In Julius Henry Cohen's article in the Virginia Law Review explaining his legislation, Mr.

control over their common law. The last two sections will focus on the solutions at the federal level, including current and past efforts to circumvent the FAA and *Keating*.

A. State Court Judges and Their Powerless Position in Determining Common Law

States usually determine their own contract common law.[134] States can differ on damages, injunctive relief, availability of specific performance, and claims arising from contract law.[135] However, the *Keating* court stripped state courts of the power to address arbitration provisions and their enforceability.

State common law almost always stems from the individual states' Supreme Courts. For instance, if I wanted to know the common law on construction contracts in Missouri, I would look to the Missouri Supreme Court for an answer. However, if the construction contract has an arbitration provision, that provision and its enforceability would be governed by federal law.[136] Thus, as a matter relating to arbitration provisions, state courts are left in a powerless position.

What state court judges *can do* is expand the definition of sexual battery or sexual harassment in order to bring more claims under EFASASHA and thus avoid forced arbitrations.[137] In other words, state courts of last resort may include more acts under sexual battery and harassment to circumvent otherwise enforceable arbitration clauses.

This may be the only way in which state courts can use EFASASHA to bring more sexual assault and sexual harassment cases into their courts. Because those definitions would be considered substantive and not procedural, any state common law definitions of sexual assault may be used in federal court when invoking diversity jurisdiction.[138] This solution leaves little room for states to determine their own common law and still does not allow for racial or religious discrimination to circumvent arbitration. It relies upon the justices of the 50 states' and 6 territories' highest courts to agree on expanding the definition of sexual battery or harassment.[139] This solution, while helpful, faces the barrier of requiring many actors to act similarly.

Cohen uses the title "The Evil to Be Corrected" when outlining the problems that the FAA sought to solve, *id.* (I remix that title out of respect).

134. *See generally* Stephen A. Plass, *Federalizing Contract Law*, 24 LEWIS & CLARK L. REV. 191 (2020).

135. *Id.*

136. *See* Southland Corp. v. Keating, 465 U.S. 1 (1984).

137. Of course, this expansion cannot be so burdensome as to make all sex discrimination equivalents to sexual harassment. One thing state court judges can do, for all arbitration provisions, is require a stringent quantum of evidence to be met by the party attempting to compel arbitration, Brown v. Chipotle Servs., LLC, 645 S.W.3d 518 (Mo. Ct. App. 2022). Chipotle attempted to enforce a motion to compel arbitration and provided undated papers and did not meet the threshold matter for demonstrating that an arbitration provision was signed, *id*. The trial court denied the motion to compel arbitration, *id.* The Western District Court of Appeals affirmed, *id.*

138. *See generally* 28 U.S.C. § 1332; Erie R.R. v. Thompkins, 304 U.S. 64 (1938). For instance, an Illinois plaintiff suing a Missouri company may use the more expansive definition of sexual battery, have their case removed to federal court (if damages exceed $75,000) and simply use that friendly definition in federal court, *supra*. So, the state common law determined by, let's say, the Supreme Court of Illinois, is completely relevant, even in a federal district court, *supra*.

139. *See* Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 826 (1986) (Brennan, J., dissenting); *but see* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1576 (2008). Indeed, some might

Some state courts, in response to *Keating*, have lowered the threshold for contract defenses to make it easier for plaintiffs to avoid arbitration.[140] Plaintiffs may challenge an arbitration provision as unconscionable or as part of an adhesion contract.[141] If state court judges agree with those plaintiffs, the arbitration provision would be unenforceable. If the plaintiff challenges the entire contract under the unconscionability doctrine, then the arbitrator would determine that issue.[142] If the arbitration provision alone is challenged, then the courts decide that matter alone.[143] That is called the separability principle.[144]

Determining the elements or requirements for a plaintiff to assert unconscionability is up to state court judges, absent congressional intent to the contrary.[145] This is a power they retain. Thus, this limited issue allows state court judges some power.

B. State Legislatures and Their Past Attempts Proving Fruitless

As highlighted in section II-B, the Federal Arbitration Act has ensured the enforceability of arbitration provisions in all contracts, including employment contracts. The Federal Arbitration Act enforces all arbitration clauses in federal courts.[146] The decision in *Southland Corp. v. Keating* extended the Federal Arbitration Act to apply in state courts.[147] This is strange, considering that contract law is usually up to the common law of a state.[148]

The decision in *Southland Corp. v. Keating* does something more than adopt a broad policy favoring arbitration; it strips the individual state legislatures of the ability to make law for their own courts. States can no longer create causes of actions that can circumvent arbitration clauses.[149] In *Keating*, a California state statute was in question. Specifically, the California Franchise Investment Law (CFIL)[150] required that a franchisor, in this case Southland Corporation, make certain disclosures to the franchises, in this case the class of 7-Elevens. CFIL's language

argue that having EFASASHA warrants a *narrower* definition of these phrases as to only allow higher quality claims to see district courts, *supra*. Some states may adopt a narrower definition while some adopt the broader definition, *supra*. This would defeat the purpose of federal law: uniformity, *supra*. Indeed, this result would warrant a more encompassing federal bill that strictly invalidates all arbitration provisions for Title VII or state law equivalent claims, *see* § III-C.

140. David Horton, *Unconscionability Wars*, 106 NORTHWESTERN U. L. REV. COLLOQUY 387 (2011); *State Courts and the Federalization of Arbitration Law*, 134 HARV. L. REV. 1184 (2021).

141. *See* David Horton, *The Shadow Terms; Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 658 (2010*); see also* Susan Landrum*, Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751, 780 (2014) (detailing the level that states have embraced unconscionability as a defense since the FAA—some not embracing it at all, some embracing it more.); Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1995); Doctor's Associates v. Casarotto, 517 U.S. 681, 688 (1996).

142. Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Development of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1436 (2008).

143. *Id.*

144. *Id; see also* Prima Paint Corp v. Flood & Conklin Mfg. Co, 388 U.S. 395, 402–04 (1967).

145. *See generally* Bruhl, *supra note* 142; *see also Prima Paint*, 388 U.S. at 404.

146. 9 U.S.C. § 2.

147. Southland Corp. v. Keating, 465 U.S. 1, 15 (1984).

148. Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 VA. L. REV. 1523, 1533 (2016).

149. *See supra* § II-B (many of the cases already cited in § II-B give rise to this conclusion); *see also* Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1924 (2021).

150. California Franchise Investment Law, Cal. Code §§ 31000-31516 (2016).

explicitly required adjudication of all claims, seemingly bypassing any arbitration provisions to the contrary.[151]

So, does the *Federal* Arbitration Act apply to state courts adjudicating on a *state* law matter? After *Keating*, the answer is a resounding "yes."[152] In doing so, the Supreme Court effectively stripped the power of state legislatures to make decisions regarding arbitration clauses in their own state.[153]

Now there is some area where the state retains its power to determine its own common law on arbitration—defenses.[154] States are still able to determine the threshold to be met for a defense to a contract, such as unconscionability,[155] reasonable expectation of assent,[156] duress, or coercion.[157] The breach of the covenant of good faith and fair dealing may also be asserted by a plaintiff to challenge the validity of an arbitration clause.[158] Both the legislature and judiciaries of the individual states have some limited ability to expand upon defenses. But they cannot do so in a manner that discriminates against arbitration provisions or unevenly applies the unconscionability doctrine.[159] State court legislatures must be careful in expanding the unconscionability doctrine as to not effectively moot the FAA.

C. Congress and the Almighty Power to Write the Law

The Ending Forced Arbitration in Sexual Assault and Sexual Harassment Act adequately provides a loophole for two very specific claims.[160] Yet, legislation begs some questions. For instance, if a sexual harassment claim is one of many ways in which a plaintiff faced sex discrimination, will the case be stayed for arbitration or will EFASASHA apply? In the same hypothetical, will the sexual harassment claim be severed and tried by a jury while the bulk is sent to arbitration?[161] Another

151. *Id.*

152. *Keating*, 465 U.S. at 6 ("Section 31512 of the California statute directly conflicts with § 2 of the United States Arbitration Act and hence violates the Supremacy Clause.").

153. Compare David Schwartz, The Federal Arbitration Act and the Power of Congress Over State Courts, 83 OR. L. Rev. 541, 628 (2004) (arguing that the FAA is unconstitutional), with Christopher R. Drahozal, In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act, 78 Notre Dame L. Rev. 101 (2002) (arguing that that the Court had a weak argument but came to the correct conclusion).

154. Kindred Nursing Ctrs. L.P. v. Clark, 581 U.S. 246 (2017) ("A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" (quoting AT&T Mobility v. Concepcion, 563 U. S. 333, 339 (2011))).

155. See generally Graham v. Scissor-Tail, Inc., 28 Cal.3d 807, 819 (1981); Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 114 (Ct. App. 2000); Chavarria v. Ralph's Grocery Co., 733 F.3d 916, 919 (9th Cir. 2013).

156. Broemmer v. Abortion Servs. of Phoenix, Ltd., 173 Ariz. 148, 152 (1992) (invalidating an arbitration provision under Restatement (Second) of Contracts § 211 in which a party has reason to believe that the other party would not assent if they knew about a specific term).

157. Prima Paint Corp v. Flood & Conklin Mfg. Co, 388 U.S. 395, 404 (1967).

158. Badie v. Bank of America, 67 Cal. Rptr. 2d 273, 284 (1998).

159. Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987).

160. H.R. 4445, 117th Cong. (2021). Indeed, Congress laid out the ways that something can qualify for sexual assault or sexual harassment, *id.* It points both to federal law, state laws that Congress could not specifically point to, and Tribal law, *id.*

161. Consider this possible scenario. A person is sexually harassed and also treated differently on the basis of their sex. They have both a sexual harassment *and* sexual discrimination claim against the same defendant. If both are brought in a two-count complaint, will the district court sever the claims and compel arbitration for the sex discrimination claim or apply EFASASHA and hear both counts? Given

question—why is sex discrimination under Title VII still arbitrated? Why not amend Title VII to expressly include sexual assault, harassment, and an arbitration loophole provision? Could the FAA also be amended to expressly not apply to state courts—superseding *Keating* by statute?

As a separate issue, EFASASHA unquestionably applies to contracts moving forward. However, the retroactive effect of EFASASHA is unclear. Can unresolved claims that accrue before March 3, 2022, invoke EFASASHA to avoid arbitration? The answer may become clear in another case involving Fox News. Andrea Tantaros, much like Gretchen Carlson, was a Fox News host accosted by Roger Ailes.[162] Tantaros has litigated her claim for years.[163] Finally, after EFASASHA's passage, Tantaros's legal team argued that EFASASHA has retroactive effect and applies to her claim, evading arbitration.[164]

The fact that these questions, and likely many more, exist shortly after the bill is signed, hints that the draftsmen did not exhaust all creative legislative solutions when trying to accomplish a noble goal. While the preemptive effect is likely stronger than that from the FAA, since the text of the bill is more direct, the question still arises—can Congress determine the state common law for contracts? Adopting a combination of the solutions listed above could have saved Congress from further inquiries into the seemingly short nature of this bill.

The Forced Arbitration Injustice Repeal Act of 2022[165] (FAIR Act) seeks to answer at least some of those concerns.[166] This bill was re-introduced in the 117th Congress.[167] The same bill was proposed in the 116th Congress.[168] The earlier bill passed the House of Representatives[169] but died in the Senate Judiciary Committee.[170] The current FAIR Act has also passed the House and sits in the Senate Judiciary Committee.[171] The FAIR Act passed the House 222-209, virtually along party lines, though technically bipartisan passage.[172] Only one Republican, Matt Gaetz of

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the current language in EFASASHA, read strictly, the former seems the most plausible. Given the information that sexual harassment claims stem from sex discrimination claims under Title VII, the latter now seems more likely.

162. Tantaros v. Fox News Network, LLC, 12 F.4th 135, 139 (2d Cir. 2021).

163. *Id.*

164. *See generally id.*

165. H.R. 963, 117th Cong. (2021). The FAIR Act was introduced by Representative Henry Johnson, a Democrat from Georgia, *id.* The bill passed the House of Representatives and has moved on to the Senate as of March 27, 2022, *id.*

166. *See generally id.* The bill has been assigned to the House Judiciary Committee and Senate Judiciary Committees, *id.* The House passed the bill 222-209, after failing two roll call votes earlier in the day it was passed, *id.*

167. *Id.*

168. H.R. 1423, 116th Cong. (2019). This bill was also introduced by Representative Henry Johnson, *id*. *See also* Alexia Fernandez Campbell, The House just passed a bill that would give millions of workers the right to sue their boss, Vox, Sept. 20, 2019, https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act.

169. H.R. 1423, 116th Cong. (2019–2020).

170. *See 116th United States Congress*, BALLOTPEDIA, https://ballotpedia.org/116th_United_States_Congress (last visited Apr. 24, 2022) (the 116th Congress was politically divided. The House of Representatives was controlled by the Democrats while the Senate was controlled by the Republicans, along with the White House controlled by Republicans); *see also Donald Trump: The 45th President of the United States*, WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/donald-j-trump/ (last visited Apr. 24, 2022).

171. H.R. 963, 117th Cong. (2022).

172. *Id.*

Florida, voted to pass the FAIR Act.[173] No Democrats defected to vote against the FAIR Act.[174]

This newest FAIR Act amends Title nine of the United States Code to add a fifth chapter with two sections, similar to EFASASHA.[175] Again, the first section highlights definitions to be used by the second section.[176] The second section explicitly rendered unenforceable any arbitration agreement or joint-action waiver for employment, consumer, antitrust, or civil rights dispute.[177] The section goes on to say that application shall be determined under Federal Law, with the Courts deciding, not the arbitrator.[178]

FAIR differs from EFASASHA in that it does not seem to use the same language that gives preemptive effect.[179] This difference puts reviewing courts in a bind. If the FAA can apply to state courts, despite language and intent to the contrary, it seems that the FAIR Act's language should be given the same preemptive effect. However, the drafters of the FAIR Act are also 97 years wiser than the drafters of the FAA. The FAIR Act's drafters are also the same drafters of EFASASHA, the latter of which explicitly wanted preemptive effect and wrote the bill detailing so. Indeed, putting EFASASHA and FAIR Act right next to each other suggests that the preemptive effect wanted in the former was wanted for the latter. Whether a court would interpret the current FAIR Act as having preemptive effect is an interesting predicament for another time.

If the FAIR Act was passed and does not get a preemptive effect, then the FAIR Act would only apply to federal courts, meaning that plaintiffs will attempt to forum-shop for federal courts. The FAA and EFASASHA would nevertheless apply to state courts. This still means that state or federal law claims in state court would be bound to arbitration provisions while state or federal law claims in federal court would remain in court. In this world, almost everyone is dissatisfied—the anti-compelled arbitration camp because some arbitration agreements are enforceable, and the pro-compelled arbitration camp because the plaintiff may be able to forum-shop their way out of the arbitration agreement.

State level legislators and judges have some limited powers in allowing discrimination claims to progress to their courts. EFASASHA gives them full power for two narrow claims. But for many Title VII claims, they are virtually powerless. Without the passage of an amended FAIR Act, state judges and legislators will remain so.

IV. IT TAKES A BIG SUPREME COURT TO ADMIT IT WAS WRONG

Throughout multiple points of this note, *Southland Corp. v. Keating* came up as a limit on a state's ability to determine its own common law. Perhaps the decision in *Keating* was the greatest mistake of all. If a reader, judge, academic, or common observer wanted to know want Congress would write to articulate a desire to

173. *Roll Call 81 | Bill Number: H.R. 963,* CLERK U.S. H. REP. (Mar. 17, 2022), https://clerk.house.gov/Votes/202281.
174. *Id.*
175. H.R. 963, 117th Cong. (2022).
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*

preempt, they could look no further than the language in EFASASHA. The language of that bill is clear; Congress wanted no scenario, in any court, where a sexual assault or harassment plaintiff was compelled into arbitration.

However, the language of the FAA is not so clear. First, there is ambiguity in its title; Whether we take the original "United States Arbitration Act" or commonly used "Federal Arbitration Act," it would remain unclear whether the act creates a body of *federal* law. Second, the draftsmen testified multiple times that the bill should be enforced via Congress's interstate commerce power.[180] This is so prevalent that the majority in *Keating* concedes as much.[181] In dissent, Justice Sandra Day O'Connor[182] stressed that the preemptive effect given to the FAA is an augmentation of the intent of the draftsmen.[183]

From 1984 to now, any state that wanted to pass a state-level bill like EFASASHA could not. Plaintiffs were sent to arbitration in state court all because of the decision in *Keating*. One might wonder whether the legislative intent of the Federal Arbitration Act is currently being honored. Of course, the Federal Arbitration Act is almost 100 years old,[184] and the exact circumstances that gave rise to the act being passed may not be present.[185]

In 2022, the Supreme Court had the opportunity to progress on the matter in *Viking Cruise Lines, Inc., v. Moriana*.[186] In *Moriana*, the plaintiff brought a Private Attorney General Act (PAGA)[187] claim against her former employer Viking Cruises Lines.[188] Moriana successfully argued that her PAGA claim did not bind the state of California into arbitration. Thus, she cannot be compelled to arbitrate.[189] Viking Cruise Lines argued unsuccessfully that the pre-dispute agreement to arbitrate is binding under the Federal Arbitration Act and the Supreme Court's ruling in *Epic Systems Corp. v. Lewis*.[190] The California Court of Appeals agreed with Angela

180. MACNEIL, *supra* note 52. *See also* U.S. Const. Art. I § 8.

181. Southland Corp. v. Keating, 465 U.S. 1, 11 (1984).

182. Josh Hammer & Ilya Shapiro*, Reimagining the Legal Conservative Movement*, PAIRAGRAPH (Feb. 22, 2021), https://www.pairagraph.com/dialogue/e132dd04fe394133bfa19a8d2c3823ea/1 ("Far more often, Republican-nominated Supreme Court jurists—Anthony Kennedy, Sandra Day O'Connor, David Souter, John Roberts—have disappointed in big cases and proven pliable as would-be 'useful idiots' *du jour*."). Justice Sandra Day O'Connor was appointed by Ronald Reagan and was the first woman to become a Supreme Court Justice, *id*. Justice O'Connor has always received some praise along with some gripes, from both conservatives and liberals, *id.*; *see also* Stuart Taylor Jr., *How O'Connor and the Court Have Drifted Leftward*, ATLANTIC (Jul. 2005), https://www.theatlantic.com/magazine/archive/2005/07/how-oconnor-and-the-court-have-drifted-leftward/304146/.

183. *Southland*, 465 U.S. at 35.

184. *See id.*(the FAA was passed in 1925 and this article was written 97 years later in 2022).

185. Thomas Hanna, *A History of Nationalization in the United States: 1917-2009*, NEXT SYSTEM (Nov. 4, 2019), https://thenextsystem.org/history-of-nationalization-in-the-us (alluding to the nationalization of the U.S. economy.).

186. Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906 (2021).

187. CAL. LAB. CODE § 2698. California's Private Attorney General Act was passed to give the power of the Attorney General to the private actors who choose to enforce California law on behalf of not only themselves but the executive branch of California, *see id.* The idea is that because arbitration provisions are unenforceable against government actors, a plaintiff suing under PAGA can avoid arbitration clauses, *see id.*

188. 142 S. Ct. at 734.

189. Moriana v. Viking River Cruises, Inc., No. B297327, 2020 WL 5584508, at *2 (Cal. Ct. App. Sept. 18, 2020).

190. 138 S. Ct. 1612 (2018).

Moriana.[191] Viking Cruise Lines appealed to the Supreme Court of the United States which granted certiorari on December 15, 2021.[192]

Here the Supreme Court had the chance to partially abrogate its ruling in *Keating* and give plaintiffs a loophole to continue suit. This would at least allow for states to redetermine their own common law on contracts again.[193] Then plaintiffs who bring state law claims may be able to avoid arbitration depending on the common law of those states.[194] Unfortunately, on June 15th, 2022, the Supreme Court held eight to one in favor of Viking Cruise Lines and reversed the decision of the California Court of Appeals.[195] The lone dissenter was Justice Thomas who merely cited his past dissents. Justice Thomas, much like the original authors of the FAA, believes that the FAA did not apply to state courts.[196]

Perhaps another day, *Keating* may be reversed. Overturning precedent is no easy task nor one to take lightly. There are certain factors that must be present for the Supreme Court to do that, at least in theory.[197] These factors were aggregated in a well-known case—*Planned Parenthood v. Casey.*[198] There are four[199] factors:

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191. 2020 WL 5584508 (Cal. App.).

192. Order List: 595 U.S. (Dec. 15, 2021).

193. *Moriana*, 2020 WL 5584508, at *1 (to be clear, Ms. Moriana is not suing under a civil rights cause of action, but rather a state wage law claiming that she did not receive the compensation that she was promised and labored for).

194. Southland Corp. v. Keating, 465 U.S. 1, 14 (1984). For sexual assault/harassment however, EFASASHA would indeed allow for state level claims to circumvent arbitration provisions, because that was the intent of Congress, *id.* Of course, states are in the perilous position of agreeing, *id.* However, one thing states *may* do is redefine what constitutes sexual harassment and broaden a plaintiff's ability to ignore the FAA, *id.* If more acts fall under state law sexual harassment, more disputes will be excluded from arbitration provisions, and thus more of these claims will be litigated in state court, *id*. States may do the same for what constitutes sexual battery and get the same effect, *id.*

195. Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906 (2021). *See also* Timothy Kim & Michele J. Beilke, *Supreme Court Reverses California Court of Appeal in Viking Cruises v. Moriana*, 12 NAT'L L. REV. 171 (2022).

196. *Compare* Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 276-77 (1926) ("so far as the present law declares simply the policy of recognizing and enforcing arbitration agreements in the federal courts it does not encroach upon the province of the individual states."), *with* Viking River Cruises, Inc., 142 S. Ct. at 1926 (Thomas, J., dissenting) ("I continue to adhere to the view that the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq*., does not apply to proceedings in state courts . . . ")

197. *See* U.S. v. Windsor, 570 U.S. 744 (2013) (Scalia, J., dissenting) (the Supreme Court can overturn whatever they want for whatever reason they want, but there are some institutionalist reasons that a jurist might exercise judicial temperance).

198. Planned Parenthood of S.E. Penn. v. Casey, 505 U.S. 833, 865–66 (1992), *overruled* by Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

199. *Casey*, 505 U.S. *Casey* adopts the four factors above, *id. Casey* being overruled by Dobbs v. Jackson Women's Health Org. does not overrule the factors, *id.* Justice Alito, however, employs a fifth factor in Dobbs that Justice Scalia mentioned in his *Casey* dissent, *id.* That factor is, succinctly put, quality of the decision to be overruled, *compare id., with* Dobbs v. Jackson Women's Health Organization. But much like Justice Scalia's dissent, Justice Alito's opinion fails to cite where exactly this fifth factor came from, and the distinction between the fifth factor and the latter four, *supra*. Justice Kavanaugh's concurrence in Dobbs only cites three factors: (i) the prior decision is not just wrong, but is egregiously wrong, (ii) the prior decision has caused significant negative jurisprudential or real-world consequences, and (iii) overruling the prior decision would not unduly upset legitimate reliance interests, *supra.* Whether the lower courts use the 4 Casey factors, the 5 Dobbs factors, or 3 Ramos factors remains to be seen, *see* Ramos v. Louisiana, 140 S. Ct. 1390, 206 (2020) (Kavanaugh, J., concurring in part). In fairness to Justice Alito, the five-factor test had been previously adopted in the First Amendment context not long before Dobbs was released, *see* Janus v. Am. Fed'n State, Cnty., & Mun. Emps., 138 S. Ct. 2448 (2018).

unworkability,[200] reliance on the law stemming from the previous case,[201] significant chance in facts since the inception of the old rule,[202] and abandonment of an old rule.[203] When the Court decided *Dobbs v. Jackson Whole Women's Health Org*.,[204] a fifth factor emerged: quality of reasoning.[205] As for *Keating*, the analysis would weigh in favor of reversing. The reliance interest for corporations and employers who benefit significantly from *Keating* is not nominal.

Without the protection provided by arbitration provisions, along with the promise that they will be enforced, companies may otherwise opt to not include arbitration provisions. California and other states have tried every which way to avoid adhesive arbitration provisions from being enforceable.[206] States are clearly protesting and want a work around. And lastly, the factual circumstances, along with the number of years since the passing of the FAA would weigh in favor of reversing. The landscape of commerce and employment contracts have changed drastically since the FAA was passed and since *Keating* was decided. There are more protected classes along with more ways in which an employer can creatively discriminate, in a facially neutral manner. As for the fifth quasi-factor in *Dobbs*, the reasoning of the *Keating* court is clearly erroneous in both language and intent of the draftsmen.

In *Chamber of Commerce of the U.S. v. Bonta*,[207] the same is true. California passed a law barring employers from requiring employees to waive their state law housing discrimination claims through an arbitration provision.[208] The law also prohibits employers from retaliating against employees (or potential employees) who refuse to sign an arbitration provision.[209] The Chamber of Commerce moved for a preliminary injunction to enjoin the law from being enforced.[210] The United States District Court for the Eastern District of California granted that relief.[211] The Ninth

200. *Casey*, 505 U.S. at 854 (citing Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965)) ("[W]hether the rule has proven to be intolerable simply in defying practical workability…").

201. *Id.* (citing U.S. v. Title Ins. & Tr., 265 U.S. 472, 486 (1924)) ("[W]hether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation.").

202. *Id.* at 855 (citing Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–11 (1932) (Brandeis, J., dissenting)) ("whether facts have changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.").

203. *Id.* (citing Patterson v. McLean Credit Union, 491 U.S. 164, 173–74 (1989)) ("whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine."). Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022), affirms this as a factor and cites Montejo v. Louisiana, 556 U.S. 778, 792 (2009), *Patterson*, 491 U.S., and Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 283–84 (1988).

204. 142 S. Ct. 2228 (2022).

205. *Id.* at 5.

206. *See* Preston v. Ferrer, 552 U.S. 346 (2008) (enforcing an arbitration clause in a dispute arising under California's Talent Agency Act which conferred original jurisdiction to a state level administrative commissioner.). Notably, California has been particularly adamant about avoiding arbitration clauses, *id.*

207. 13 F.4th 766 (9th Cir. 2021).

208. *Chamber of Commerce v. Bonta: Ninth Circuit Upholds Statute Prohibiting Forced Arbitration in Employment*, 135 HARV. L. REV. 1664 (2022); *see* Chamber of Commerce of the U.S. v. Bonta, 13 F.4th 766 (9th Cir. 2021).

209. *See Bonta*, 13 F.4th

210. Farber et al., *Federal Arbitration Act Partial Bar on California's Ban on Mandatory Arbitration Contracts, Court Holds*, 12 NAT'L L. REV. 87 (2022).

211. *See Bonta*, 13 F.4th.

Circuit affirmed, finding that California state law tried to abrogate the Federal Arbitration Act's effect in state court.[212]

Reversing *Keating* would be using the people's voice to aid those who are suing corporations, usually. But arbitrators need not fret, parties may still mutually *consent* to arbitration once the dispute has arisen. Alternative dispute resolution is fundamentally about avoiding court costs, pressures, and the adversarial nature of courts. However, forced arbitration between lobsided parties does more than consensually avoid court. It non-consensually removes cases that otherwise would be left to the courts. For Title VII and related claims, compelled arbitration has been criticized as cruel.[213]

EFASASHA is incomplete, but a good start. The FAIR Act provides a strong potion against compelled arbitration. Overturning *Keating* would return the power to determine contract common law to the states. However, some of those states may have an FAA equivalent, still forcing employees into arbitration against their employer. An Act that completely does away with forced arbitration, and which has pre-emptive effect, is the best remedy. Many can rejoice over the passing of EFASASHA, as they should. But others facing invidious discrimination must now ponder why their rights must be arbitrated in private. For now, people treated like Eliza Dushku and Gretchen Carlson can get a fair trial.

212. *See id.*

213. Do not just take it from me, *see* Gilmer v. Interstate Johnson Lane Corp., 500 U.S. 20, 41-42 (1991) (Stevens, J., dissenting, with whom Marshall, J., joins) ("Not only would I find that the FAA does not apply to employment-related disputes between employers and employees in general, but also I would hold that compulsory arbitration conflicts with the congressional purpose animating the [Age Discrimination in Employment Act of 1967] . . . Because commercial arbitration is typically limited to a specific dispute between the particular parties and because the available remedies in arbitral forums generally do not provide for class-wide injunctive relief, I would conclude that the essential purpose of ADEA is frustrated by compulsory arbitration of employment discrimination claims.") Or perhaps Chief Justice Burger is more compelling, *see* Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 750 (1981) (Burger, C. J., dissenting) ("Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes the guardians of the chickens.").