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I. Introduction

In the last decade, the U.S. Supreme Court issued some important decisions regarding mandatory arbitration clauses and agreements. On April 27, 2011, the Court ruled in *AT&T Mobility LLC v. Concepcion* that the Federal Arbitration Act ("FAA") preempts state laws that "stand as an obstacle to the accomplishment of the FAA's objectives."[1] Furthermore, on May 21, 2018, the U.S. Supreme Court decided *Epic Sys. Corp. v. Lewis* in which it reaffirmed its position that "Congress has instructed that arbitration agreements . . . must be enforced as written."[2]

It does not appear that there is much room for exceptions to mandatory arbitration agreements based on these recent Supreme Court decisions. However, the FAA still preserves the traditional state law defenses to arbitration such as duress, unconscionability, or fraud.[3] Despite the Court's stance on arbitration agreements and provisions, in the face of the "#MeToo" movement, a few states, including New York, New Jersey, Vermont, Washington, California,

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[1] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 343 (2011).

[2] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018).

[3] Triston O'Savio, *Does FAA Prevent States from Barring Mandatory Arbitration?*, CORP. COUNS. BUS. J. (Mar. 17, 2020), https://ccbjournal.com/articles/does-faa-prevent-states-from-barring-mandatory-arbitration [https://perma.cc/T9ZN-MS6Q].

and Maryland, have passed laws banning mandatory arbitration clauses that restrict sexual harassment claims.[4] These states have essentially carved out exceptions for sexual harassment claims where mandatory arbitration agreements or clauses would apply, arguing that they "discourage employees from pursuing claims of sexual harassment and conceal alleged employer misconduct from the public."[5] As of now, only the New York and California laws have been challenged.[6]

The movement does not seem to be affecting Indiana though, at least not in the mandatory arbitration realm.[7] This is, in part, due to Indiana's conservative nature and its public policy to favor arbitration proceedings.[8] The Indiana Uniform Arbitration Act states that "[a] written agreement to submit to arbitration is valid, and enforceable, an existing controversy or a controversy thereafter arising is valid and enforceable, except upon such grounds as exist at law or in equity for the revocation of any contract."[9] When construing arbitration agreements, all doubts are resolved in favor of arbitration; however, courts do not "extend arbitration agreements beyond the clear language of the agreement and . . . will not extend arbitration agreements by construction or implication."[10]

There is an obvious and growing interest among states to provide greater protection for those employees seeking remedies for sexual harassment in the workplace outside of arbitration. Indiana's lack of a legislative reaction,

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[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] Olivia Covington, *Attorneys, Arbitrators: #MeToo Isn't Changing Employment Arbitration Agreements*, IND. LAW. (May 1, 2018), https://www.theindianalawyer.com/articles/46885-mandating-resolutions [https://perma.cc/6DRQ-T23Y].
[8] *Id.*
[9] IND. CODE § 34-57-2-1 (2020).
[10] Progressive Se. Ins. Co. v. Empire Fire & Marine Ins. Co., 88 N.E.3d 188, 194 (Ind. Ct. App. 2017).

in this sense, stands in contrast to the aforementioned reactions in other states. A deeper analysis into the issue may shed light on Indiana's most likely action or inaction on the matter moving forward. Such an analysis may also indicate why its response may be in its best interest considering highly probable preemption issues and the broader picture surrounding individual instances of mandatory arbitration in the state and individuals generally.

This note argues that it is in the best interest of sexual harassment victims and the state of Indiana to not follow suit in passing legislation that prohibits employers from requiring mandatory arbitration in sexual harassment cases. This is based on an analysis of the potential factors underlying Indiana's current lack of legislative movement, the weight of the arguments for and against mandatory arbitration, and consideration of the preemption issues surrounding state laws banning mandatory arbitration. Part II sets the foundation for this note by laying out the most pertinent parts of the FAA and analyzing how the U.S. Supreme Court has interpreted this statute—specifically within the employment context. Part III looks at the development of the #MeToo movement and how it influenced a wave of legislative action at the state level. Part IV narrows the focus by looking at Indiana's current stance on mandatory arbitration agreements based on both statutory and case law. Finally, Part V argues that it is in the best interest of both sexual harassment victims and Indiana for the state to refrain from passing legislation that bans the enforcement of mandatory arbitration agreements in the employment context for cases of sexual harassment. This argument is based on an analysis of the pros and cons of such legislation, particularly focusing on contradicting the #MeToo movement's lead arguments in favor of such legislation, and the undeniable barrier to such legislation regarding preemption under the FAA.

II. The Federal Arbitration Act in the U.S. Supreme Court

A. What is the Federal Arbitration Act?

President Coolidge signed the FAA on February 12, 1925, in order to create a national policy favoring arbitration agreements.[11] It is codified at and encompasses the entire Title 9 of the United States Code; however, the most pertinent and substantive parts of the Act are found in Sections 1 and 2.[12] Section 2 states:

> 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 the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[13]

Congress enacted Section 2 with the intent and hope to promote the enforcement of mandatory arbitration agreements.[14] While this section seems to only apply to written contracts involving maritime transactions or transactions involving commerce, the scope of "a transaction involving commerce" or what is sufficient evidence to show such a transaction has often been a point of contention.[15] However, in *Allied-Bruce Terminix Cos., Inc. v. Dobson*, the Supreme Court settled some of the confusion by finding that the words "involving commerce" in Section 2 were meant to

[11] JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RSCH. SERV., R44960, MANDATORY ARBITRATION AND THE FEDERAL ARBITRATION ACT 2 (2017).
[12] 9 U.S.C. §§ 2, 3 (2020).
[13] 9 U.S.C. § 2 (2020).
[14] SHIMABUKURO & STAMAN, *supra* note 11.
[15] SHIMABUKURO & STAMAN, *supra* note 11, at 3.

include Congress' broad power to regulate commerce.[16] Furthermore, the Court found that Section 2 applied to all contracts involving commerce, not just those that contemplated interstate commerce.[17]

Section 1 is the FAA's exemption clause and importantly defines "maritime transactions" and "commerce" as used in Section 2.[18] It states:

> "Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.[19]

The exemption under Section 1 is a seemingly narrow one on its face that only applies to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate

[16] Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 273–74 (1995).
[17] *Id.* at 278.
[18] 9 U.S.C. § 2 (2020).
[19] 9 U.S.C. § 1.

commerce."[20] However, this exemption was also frequently contested. In 2001, the U.S. Supreme Court resolved this matter in *Circuit City Stores, Inc. v. Adams*.[21] This decision had a major impact on the landscape of mandatory arbitration agreements in the employment context.[22]

B. Expansion of Mandatory Arbitration Under the FAA

In *Circuit City Stores, Inc.*, the U.S. Supreme Court held that the FAA covers all employment agreements that require arbitration to resolve work-related disputes.[23] It further held that employment contracts excluded by Section 1 are limited to seamen, railroad employees, and other transportation employees.[24]

Saint Clair Adams applied for a job in October of 1995 at Circuit City and got hired shortly after.[25] The job application, which he signed, contained a clause requiring that all employment related disputes be resolved through arbitration.[26] Two years into employment, Adams filed a discrimination suit against the employer, but the employer filed suit to compel arbitration.[27] The district court entered the order to compel arbitration but upon the employee's appeal, the circuit court reversed and found that all

[20] *Id.*
[21] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001).
[22] Andrew W. Bagley, *Circuit City Stores v. Adams: The Supreme Court Strikes a Blow in Favor of Resolving Employment Disputes Through Mandatory arbitration* (Mar. 1, 2001), https://www.crowell.com/NewsEvents/AlertsNewsletters/all/Circuit-City-Stores-V-Adams-The-Supreme-Court-Strikes-A-Blow-In-Favor-Of-Resolving-Employment-Disputes-Through-Mandatory-Arbitration (last visited Oct. 1, 2021, 11:55 AM) ("*Circuit City v. Adams* nonetheless represents good news for employers seeking to enforce mandatory arbitration agreements. The Court's construction of the FAA, which preempts most state laws that would limit such arbitration agreements, removes a significant obstacle to these efforts.").
[23] *Id.*
[24] *Id.* at 119.
[25] *Id.* at 109.
[26] *Id.* at 109–110.
[27] *Id.* at 110.

employment contracts were exempted from the FAA under Section 1.[28] Noting that the Ninth Circuit's decision contradicted the decisions of other circuits and created a circuit split, the Supreme Court granted certiorari.[29]

The Court first reasoned that holding all employment contracts were exempt from the FAA would render the specific exemptions under Section 1 superfluous.[30] After analyzing Congress' intent in the FAA, the Court determined that the FAA's text foreclosed the Ninth Circuit's construction, which would exempt all employment contracts from the FAA's reach.[31] On these grounds, the Court concluded that "Section 1 exempts from the FAA only contracts of employment of transportation workers."[32]

Circuit City Stores, Inc. is seen as the case that opened the floodgates to mandatory arbitration agreements in employment contracts.[33] This decision certainly defined the Court's stance on mandatory arbitration in employer-employee contracts and settled some doubts concerning the scope of Section 1's exemption clause.[34] However, the reach of the FAA only continued to expand in the cases that followed, both in the employment context and in a general sense.[35] Major cases in the last decade show the Court's

[28] *Id.*
[29] *Id.* at 110–111.
[30] *Id.* at 113.
[31] *Id.* at 119.
[32] *Id.*
[33] *FAA Preemption: Forcing Arbitration in the States*, THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW AND POLICY, http://employeerightsadvocacy.org/our-work/ending-forced-arbitration-in-the-workplace/justice-denied/faa-preemption-forcing-arbitration-in-the-states/ (last visited Nov. 21, 2020).
[34] Bagley, *supra* note 22.
[35] Kristin McCandless, Circuit City Stores, Inc. v. Adams: The Debate Over Arbitration Agreements in the Employment Context Rages On, 80 DENV. U.L. REV. 225 (2002) (quoting 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, 53(1997).).

strong favor towards mandatory arbitration agreements and its intent to continue to enforce the FAA's public policy as envisioned when it was enacted.[36]

In *AT&T Mobility LLC*, the Court considered "whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of class wide arbitration procedures."[37] In 2002, cellular consumers entered into a service contract with AT&T, which made arbitration the solution for all disputes between the parties, and required parties to also arbitrate these matters in their individual capacities, not allowing the use of class actions.[38] Furthermore, the contract advertised a provision which seemed to include free phones; however, the consumers were still charged for sales tax on the retail value of the free phone.[39]

The misled consumers filed suit in a federal district court against AT&T, which was consolidated with a putative class action, but AT&T moved to compel arbitration based on the terms of the service contract.[40] The district court denied AT&T's motion, finding that "the arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions."[41] The Ninth Circuit affirmed.[42]

The Supreme Court first acknowledged that Section 2's "saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning

[36] *Id.* at 53–54.
[37] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 336 (2011).
[38] *Id.*
[39] *Id.* at 337.
[40] *Id.*
[41] *Id.* at 338.
[42] *Id.*

from the fact that an agreement to arbitrate is at issue."[43] The Court reasoned that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[44] However, the Court also found that this analysis was more complex when a generally applicable doctrine such as unconscionability was allegedly being applied in a way that disfavored arbitration against the FAA. [45] "Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." [46] Therefore, because the purpose of the FAA is to enforce arbitration agreements according to their terms to facilitate streamlined proceedings, "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[47] Indeed, the Court found that California's *Discover Bank* rule, which classified most collective-arbitration waivers in consumer contracts as unconscionable, was preempted by the FAA "[b]ecause it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[48]

Kindred Nursing Centers Ltd. Partnership reaffirmed the Court's position that states cannot enact laws that directly or indirectly disfavor arbitration.[49] Here, two unrelated individuals used their power of attorney to place their respective family members in a Kindred nursing

[43] *Id.* at 339 (quoting Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996)).
[44] *Id.* at 341.
[45] *Id.*
[46] *Id.* at 343.
[47] *Id.* at 344.
[48] *Id.* at 352 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
[49] *See generally* Kindred Nursing Ctrs. Ltd. P'ship. v. Clark, 137 S. Ct. 1421 (2017).

home.[50] The nursing home required both individuals to sign arbitration agreements governing all disputes arising out of the family members' stay at the facility.[51] After the passing of their family members, both individuals brought suit in Kentucky state court.[52] Kindred moved to dismiss based on the arbitration agreements, but both the district and appellate courts denied the motion.[53] The Kentucky Supreme Court consolidated the two cases and found that the state's clear-statement rule applied, meaning that "an agent could deprive her principal of an 'adjudication by judge or jury' only if the power of attorney 'expressly so provide[d].'"[54]

The U.S. Supreme Court found that rules that "single[] out arbitration agreements for disfavored treatment" are contrary to the FAA.[55] The Court began by noting that the FAA allows a court to "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.'" [56] Therefore, it reasoned that the FAA preempts rules that discriminate against arbitration on their face as well as those that accomplish the same goal by covertly discriminating against contracts with the attributes of arbitration agreements.[57] The Court held that because Kentucky's clear-statement rule hinged "on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial . . . [s]uch a rule is too

[50] *Id.* at 1425.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.* at 1426 (quoting Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306, 329 (Ky. 2015)).
[55] *Id.* at 1425.
[56] *Id.* at 1426 (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011)).
[57] *Id.*

tailor-made to arbitration agreements" and is therefore invalidated under the FAA.[58]

On May 21, 2018, the U.S. Supreme Court decided *Epic Systems Corp. v. Lewis* in which it emphasized that "Congress has instructed that arbitration agreements . . . must be enforced as written."[59] Specifically, the Court addressed the question of whether employers and employees are allowed to agree that all mandatory arbitrations must be brought on a one-on-one basis or if the right to form a class action should always exist.[60]

This decision consolidated three different cases, which all involved an individual employee who attempted to sue as a class or collective action but had signed a mandatory arbitration agreement requiring that such arbitrations be conducted individually.[61] All employees in question argued that their claims were not barred from court by the FAA because the saving clause of the FAA removes agreements that violate some other federal law.[62] Specifically, they argued that requiring individualized arbitration violated the National Labor Relations Act's ("NLRA") protection of concerted activities.[63]

The Court noted that "the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration.'"[64] The Court reasoned that because the employees objected to the agreements' individualized arbitration requirement, rather than a generally applicable defense as to how the contract was formed, "the employees' argument seeks to interfere

[58] *Id.* at 1427.
[59] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018).
[60] *Id.* at 1619.
[61] *Id.* at 1616.
[62] *Id.*
[63] *Id.*
[64] *Id.* at 1622 (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011)).

with one of arbitration's fundamental attributes." [65] Furthermore, even if the illegality argument was available, the NLRA's "concerted activities" focuses on the right to organize unions and collective bargaining, not the preservation of a right to class or collective actions by employees.[66] On these grounds, the Court ruled that "[i]n the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings."[67]

Finally, in *Lamps Plus, Inc. v. Varela*, the Court considered "whether the FAA . . . bars an order requiring class arbitration when an agreement is not silent, but rather 'ambiguous' about the availability of such arbitration."[68] The Court found that "[l]ike silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice[] the principal advantage of arbitration.'"[69]

Here, a hacker tricked an employee of Lamps Plus into providing tax information for almost 1,300 of the company's employees, and filed a fraudulent tax return in the name of one of those employees whose information was disclosed.[70] This same employee had signed an arbitration agreement when he began to work for Lamps Plus.[71] The employee brought suit in a federal district court on behalf of a putative class, whose members also had their information leaked during the same incident, but Lamps Plus moved to compel arbitration on an individual basis based on the employee's arbitration agreement. [72] The district court

[65] *Id.*
[66] *Id.* at 1617.
[67] *Id.* at 1619.
[68] Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1412 (2019).
[69] *Id.* at 1416 (quoting *Concepcion*, 563 U.S. at 348).
[70] *Id.*
[71] *Id.* at 1413.
[72] *Id.*

compelled arbitration, but it allowed the employees to move forward in a class, rather than compelling individual arbitration.[73] The Ninth Circuit affirmed, finding the agreement to be ambiguous concerning class arbitration and applying California law that ambiguous agreements are to be construed against the drafter.[74]

The U.S. Supreme Court focused on the principle that state law is preempted where it stands as an obstacle to the FAA, looking specifically at the conflict between California's contract ambiguity principle and the FAA's principle that arbitration "is a matter of consent, not coercion."[75] The Court has noted the fundamental differences in individual versus class arbitration.[76] Therefore, "there [was] 'reason to doubt the parties' mutual consent to resolve disputes through classwide arbitration.'"[77] On these grounds, "courts may not infer consent to participate in class arbitration absent an affirmative 'contractual basis for concluding that the party agreed to do so.'"[78] The Court concluded that "[c]ourts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis."[79]

The U.S. Supreme Court's treatment of the FAA over the last two decades shows its clear intent to uphold and continue to enforce the primary purpose for which the FAA was enacted: to create a public policy favoring arbitration and ensure that courts are enforcing these private agreements according to the terms to which the parties stipulated. On

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[73] *Id.*
[74] *Id.*
[75] *Id.* at 1415 (*quoting* Stolt-Nielsen S.A. v. AnimalFeeds Intl. Corp., 559 U.S. 662, 681 (2010).
[76] *Id*. at 1416.
[77] *Id.* (*quoting* Stolt-Nielsen S.A. v. AnimalFeeds Intl. Corp., 559 U.S. 662, 685–86 (2010).
[78] *Id*. (*quoting* Stolt-Nielsen S.A. v. AnimalFeeds Intl. Corp., 559 U.S. 662, 684 (2010).
[79] *Id*. at 1419.

one hand, the Court's decisions regarding mandatory arbitration in the workplace have continuously strengthened the force of these agreements and their binding nature on the respective parties. On the other hand, and in a more general sense, the FAA has repeatedly been found to preempt state law and restrict states' power to alter or affect mandatory arbitration within their borders.

III. #MeToo and State Legislative Action

A. Overview of the #MeToo Movement

The #MeToo Movement brought national and international recognition to the types of sexual harassment that women face in both their daily and professional lives.[80] According to the movement's founder, Tarana Burke, the movement is meant to address sexual violence specifically and provide a framework for working toward ending it.[81]

The movement gained national attention in the U.S. in 2017 after sexual harassment allegations against Hollywood producer Harvey Weinstein dominated headlines.[82] However, the movement first started in 2006 after Burke spoke with a 13-year-old girl about the sexual abuse she was experiencing in her home.[83] On October 15, 2017, actress Alyssa Milano tweeted, "[i]f you've been sexually harassed or assaulted write 'me too' as a reply to this tweet," which resulted in 66,000 replies and began the #MeToo hashtag.[84] "Journalists like Ronan Farrow at the *New Yorker* and Jodi Kantor at the *New York Times* also helped push the #MeToo conversation forward with

[80] *See generally* Alix Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements—And How They're Alike*, TIME (Mar. 8, 2018, 6:00 AM EST), https://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements/.
[81] *Id*.
[82] *Id*.
[83] *Id*.
[84] *Id*.

dedicated investigative journalism that brought to light numerous sexual misconduct stories."[85]

Internationally, the movement has gained attention, but not a strict adoption due to differences in culture and judicial systems.[86] The movement has been modified to the needs of women from other countries to create new hashtags to share their stories and build community and bring awareness to the progress that is needed in laws regarding defamation and women's rights.[87]

The purpose of the movement is to focus on healing and survivorship, building community, providing resources, and giving a voice to those that have been affected.[88] Importantly for this note, which focuses on laws related to employer-employee relationships, eight percent of rapes occur in the workplace.[89]

B. Rise of State Legislative Action for Sexual Harassment Protection in Mandatory Arbitration Agreements

Despite the U.S. Supreme Court's stance on arbitration agreements and provisions, in the face of #MeToo, a few states have passed laws banning mandatory arbitration clauses that restrict sexual harassment claims, including New York, New Jersey, Vermont, Washington, California, and Maryland.[90] Such legislation has been a reaction to the #MeToo movement with the intent of strengthening human rights laws to combat sexual

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[85] *Id*.
[86] *See generally* Yaqiu Wang, Rituparna Chatterjee, Yumi Ishikawa, Nina Funnell, Rokhaya Diallo, Karen Attiah, Tamara De Anda, Mona Eltahawy, *#MeToo Is at a Crossroads in America. Around the World, It's Just Beginning.*, Washington Post (May 8, 2020), https://www.washingtonpost.com/opinions/2020/05/08/metoo-around-the-world/?arc404=true#Wang.
[87] *See id*.
[88] *See* Langone, *supra* note 80.
[89] *Statistics: Occupation*, ME TOO., https://metoomvmt.org/learn-more/statistics/ (last visited Oct. 10, 2020).
[90] O'Savio, *supra* note 3.

harassment in the workplace.[91] These states have essentially carved out exceptions for sexual harassment claims in mandatory arbitration agreements and clauses, arguing that they "discourage employees from pursuing claims of sexual harassment and conceal alleged employer misconduct from the public."[92] As of now, only the New York and California laws have been challenged.[93]

Furthermore, other states have also responded to the movement without going as far as banning arbitration clauses that restrict sexual harassment claims.[94] Some states have increased requirements in the workplace related to sexual harassment.[95] Responses to the #MeToo movement by state legislatures also include restricting the use of nondisclosure agreements in sexual assault or harassment settlements.[96] Ultimately, some argue that such legislation increases access to justice for victims,[97] while others say that it will only cause more harm than good.[98] Both sides will be explored more in depth as this note progresses.

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[91] Keith J. Frank, *State Legislation Precluding Compelled Arbitration in Sexual Harassment Claims and the FAA*, A.B.A. (Feb. 24, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/03/compelled-arbitration/ [https://perma.cc/768T-9XXD].
[92] O'Savio, *supra* note 3.
[93] *Id*.
[94] *See The Latest Legislative Responses to #Metoo: New Requirements for Sexual Harassment Training, Arbitration and Settlement Agreements in New York and Evolving Legislation in Other States*, GIBSON DUNN (May 2, 2018), https://www.gibsondunn.com/latest-legislative-responses-to-metoo-new-requirements-for-sexual-harassment-training-arbitration-settlement-agreements/.
[95] *Id*.
[96] Jen Argyle, David Smith, *#MeToo One Year Later: The Legislative Reaction*, JD Supra (Oct. 18, 2018), https://www.jdsupra.com/legalnews/metoo-one-year-later-the-legislative-85920/.
[97] O'Savio, *supra* note 3.
[98] Alix Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements—And How They're Alike*, TIME (Mar. 22, 2018, 5:21PM EST), https://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements/. *See also* Helene Wasserman, *Unintended Consequences: How Legislative Responses to #MeToo May Harm Harassment*

IV. Indiana and Mandatory Arbitration Agreements

A. Indiana's Stance on Arbitration Agreements Based on Statutory Law

The arbitration framework in Indiana is established by statute, not common law.[99] The Indiana Uniform Arbitration Act ("IUAA") is codified in the Indiana Code from Sections 34-57-2-1 to 34-57-2-19.[100] Specifically, the IUAA reads as follows:

A written agreement to submit to arbitration is valid, and enforceable, an existing controversy or a controversy thereafter arising is valid and enforceable, except upon such grounds as exist at law or in equity for the revocation of any contract. If the parties to such an agreement stipulate in writing, the agreement may be enforced by designated third persons, who shall in such instances have the same rights as a party under this chapter. This chapter also applies to arbitration agreement between employers and employees or between their respective representatives (unless otherwise provided in the agreement).[101]

While the IUAA is based on the Uniform Arbitration Act, which was updated to the Revised Uniform Arbitration Act in 2000 by the National Conference of Commissioners on Uniform State Laws, Indiana has not yet indicated its intent to adopt the revised version.[102]

There are both similarities and differences between the IUAA and its federal counterpart, the FAA. Although, after much debate, the U.S. Supreme Court has already ruled

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Victims, LITTLER, WESTLAW (Feb. 27, 2018), https://www.littler.com/files/2-27-18_westlaw_journal_employment_-_helene_wasserman.pdf.

[99] Norris Cunningham & Christina L. Essex, *Compelling and Staying Arbitration in Indiana*, KATZ KORIN CUNNINGHAM, https://kkclegal.com/uploads/documents/Compelling-and-Staying-Arbitration-in-Indiana.pdf (last visited Oct. 12, 2020) [https://perma.cc/36YN-HHWF].

[100] *Id*. *See also* IND. CODE § 34-57-2-1(a) (2020).

[101] IND. CODE § 34-57-2-1(a) (2020).

[102] Cunningham & Essex, *supra* note 99.

that the FAA does indeed apply to agreements between employers and employees,[103] the IUAA explicitly states that the statute "applies to arbitration agreement[s] between employers and employees or between their respective representatives."[104] Another difference is that unlike the FAA, the Indiana statute specifically exempts consumer leases, sales, and loan contracts.[105] However, much like the federal government, this statute reflects the state's strong public policy favoring arbitration.[106] Furthermore, it explicitly preserves defenses against mandatory arbitration "upon such grounds as exist at law or in equity for the revocation of any contract."[107]

Naturally, the IUAA governs all arbitration matters in Indiana except where it is preempted by the FAA.[108] Where the agreement in question is indeed preempted by the FAA, the state court will apply the FAA in the place of the IUAA.[109] However, parties may contract around the IUAA by agreeing that their arbitration agreement will instead be governed by the FAA.[110] Although the IUAA can be preempted by the FAA in terms of the statute's substance and to enforce mandatory arbitration agreements, Indiana state law still governs such contracts when it comes to "Indiana contract law and cannons of contract interpretation in determining whether the parties agreed to arbitrate any dispute."[111]

B. Indiana's Stance on Arbitration Agreements Based on Case Law

[103] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001).
[104] IND. CODE § 34-57-2-1(a) (2020).
[105] *Id*. § 34-57-2-1(b).
[106] Cunningham & Essex, *supra* note 99.
[107] 9 U.S.C. § 2 (1947).
[108] Cunningham & Essex, *supra* note 99.
[109] *See id*.
[110] *Id*.
[111] *Id*.

Often times, arbitration matters first arrive in court upon a party's application to compel or stay arbitration.[112] When a court considers such applications, it has to answer the two threshold questions of "whether the parties agreed to arbitrate the particular disputes at issue and whether the contract containing the arbitration clause is valid." [113] However, the issue of whether the party seeking to compel arbitration has waived their right to arbitrate the matter by acting in a way that is inconsistent with the right to arbitrate may also be in dispute.[114] Once a court determines that an agreement that positively answers the threshold questions and meets the requirements under Indiana Code 34-57-2-1 exists, the court is required to compel arbitration.[115]

Much like the federal government, Indiana has a strong public policy favoring the enforcement of arbitration agreements.[116] When construing arbitration agreements, all doubts are resolved in favor of arbitration; however, courts do not "extend arbitration agreements beyond the clear language of the agreement and [courts] will not extend arbitration agreements by construction or implication."[117] Therefore, a court will not compel arbitration where a party has not agreed to arbitrate the matter.[118] "When considering whether parties agreed to arbitrate a dispute, a reviewing court must attempt to determine the intent of the parties at

[112] *Id*.
[113] Harlow v. Parkevich, 868 N.E.2d 822, 827 (Ind. Ct. App. 2007); *Id*.
[114] Cunningham & Essex, *supra* note 92.
[115] *Id*.; *see* IND. CODE § 34-57-2-3(a) (2020).
[116] Capitol Const. Servs., Inc. v. Farah, 946 N.E.2d 624 (Ind. Ct. App. 2011) (required a company to participate in arbitration in the interest of equity and fairness). *See also* Welty Bldg. Co. v. Indy Fedreau Co., 985 N.E.2d 792, 798 (Ind. Ct. App. 2013).
[117] Progressive Se. Ins. Co. v. Empire Fire & Marine Ins. Co., 88 N.E.3d 188, 194 (Ind. Ct. App. 2017).
[118] Sanford v. Castleton Health Care Ctr., 813 N.E.2d 411, 416 (Ind. Ct. App. 2004); Cunningham & Essex, *supra* note 92.

the time the contract was made by examining the language used to express their rights and duties."[119]

An arbitration agreement governed by the IUAA "is valid and enforceable, except upon such grounds as exist at law or in equity for the revocation of any contract."[120] Such traditional defenses to contracts found in Indiana's common law include unconscionability, fraud, duress, ambiguity, and lack of capacity.[121] If a court finds a traditional contract defense applicable to the arbitration agreement in question, it cannot be said that the agreement is valid, or, by extension, that the parties agreed to arbitrate the dispute.[122]

V. Argument Against a Sexual Harassment Exception in Indiana

A. Pros and Cons of Mandatory Arbitration Agreements for Sexual Harassment Claims

Although many argue arbitration is a harmful option for sexual harassment or assault victims in the workplace, many practicing arbitrators and employment lawyers believe arbitration can be more beneficial for employees than going to court.[123] Obvious reasons may include the brevity of the arbitration process as opposed to litigation and the significantly reduced costs, often none for the employee, that accompany arbitration.[124]

Much of the negative perception surrounding mandatory arbitration results from misinformation and the assumption that an employer that forces sexual harassment claims into arbitration is hiding something, which is usually not the case.[125] On the contrary, mandatory arbitration

[119] Doe v. Carmel Operator, 144 N.E.3d 743, 752 (Ind. Ct. App. 2020) (*citing* Progressive Se. Ins. Co. v. Empire Fire & Marine Ins. Co., 88 N.E.3d 188, 194 (Ind. Ct. App. 2017)).
[120] IND. CODE § 34-57-2-1(a).
[121] Brumley v. Commonwealth Bus. College Educ. Corp., 945 N.E.2d 770, 776 (Ind. Ct. App. 2011); Cunningham & Essex, *supra* note 92.
[122] Cunningham & Essex, *supra* note 92.
[123] Covington, *supra* note 7.
[124] Cunningham & Essex, *supra* note 92.
[125] Covington, *supra* note 7.

agreements are not necessarily always subject to this "secrecy" of which opponents to such agreements complain about.[126] Indeed, accompanying nondisclosure agreements bind the parties to confidentiality rather than the mandatory arbitration agreement itself.[127]

As previously mentioned, Indiana has been largely unaffected by the movement to enact sexual harassment exceptions for mandatory arbitration in response to #MeToo campaigns, at least in terms of legislative action, unlike other states. This is not to say there has been no level of activism in the state surrounding the #MeToo movement or that the movement has not prompted any response from other subset constituencies in Indiana, such as employers themselves. Furthermore, it certainly is not meant to imply that these issues do not exist in Indiana at all. However, an examination of these responses, while valid, extend beyond the scope of this note. At the time of the writing of this note, Indiana has neither enacted nor has the legislature hinted an intent to enact legislation that would ban mandatory arbitration agreements in employer-employee relationships for sexual harassment claims.

Though by no means exhaustive, a few factors may explain Indiana's lack of movement toward such legislation. First, Indiana has a conservative nature and a public policy favoring arbitration.[128] As previously discussed, the IUAA "reflects Indiana's strong public policy favoring arbitration" and covers all arbitration agreements in Indiana, including those in employment contracts, unless otherwise indicated in the agreement. [129] Furthermore, Indiana's conservative

[126] Jonathan Ence, Comment, *I Like You When You Are Silent: The Future of NDAS and Mandatory Arbitration in the Era of #MeToo*, 2019 U. MO. L. Rev. 165, 166 (2019).
[127] *Id*. at 167.
[128] *Id*.
[129] Cunningham & Essex, *supra* note 99, at 2.

nature lends itself to favoring freedom of contract in the workplace and agreements between private parties.[130]

Second, few sexual harassment claims actually go to arbitration.[131] Only about 3.5% of the American Arbitration Association's ("AAA") arbitrated matters between 2014 and 2016 were related to sexual harassment.[132] Given this fairly small percentage in the grand scheme of arbitration cases, sexual harassment does not appear to be a prevailing issue in arbitration matters. Therefore, it is a disproportionate response to ban all workplace sexual harassment claims from arbitration, given the small number of sexual harassment claims that actually go to arbitration. Other factors may also contribute to such a small percentage of sexual harassment claims in arbitration. One such factor may be that not all employers actually require mandatory arbitration because doing so may not be in their respective best interests.[133] For example, employers may prefer a waiver of jury trial to seek a bench ruling, which is perceived as more objective.[134] Another reason that an employer may not necessarily prefer mandatory arbitration is that while arbitration may be cheaper for

[130] *See, e.g.*, Brian Howey, *Indiana's Deep Historical Conservative Roots*, DAILY NEWS (Nov. 25, 2014), https://www.greensburgdailynews.com/opinion/columns/indianas-deep-historical-conservative-roots/article_6c9d34e9-4a54-56fa-9094-1ad9478e32b3.html; Michael W. Padgett, *Indiana Adopts Right-to-Work Law*, JACKSONLEWIS (Feb. 2, 2012), https://www.jacksonlewis.com/resources-publication/indiana-adopts-right-work-law; Christopher Hagenow, *Oral Contracts Are Enforceable in Indiana…*, BLACKWELL, BURKE & RAMSEY, P.C.: BLOG, CONTRACTS, REAL ESTATE (July 2, 2015), https://bbrlawpc.com/2015/07/oral-contracts-in-indiana/ (illustrating private agreement between two parties in real estate context).
[131] Covington, *supra* note 7.
[132] *Id.*
[133] *Id.*
[134] *Id.*

employees, the employer typically takes on a large share of those costs in arbitration.[135]

Third, the #MeToo movement has changed the discourse around workplace sexual harassment. Opponents of mandatory arbitration may argue that the low number of arbitration cases related to sexual harassment is a result of women being afraid to come forward and face possible backlash from their employers and coworkers.[136] Certainly, that fear may affect some sexual harassment victims. However, while fear of being shamed may have led to lower sexual harassment arbitrations in the past, the #MeToo movement has largely changed this by "spurr[ing] change in the way society views harassment victims, which has prompted employers to review their human resources policies."[137] From this perspective, the lower number of sexual harassment cases in arbitration may be less a result of the fear of sexual harassment victims of coming forward, and more likely a product of swifter action on the part of employers to investigate and discipline where necessary in hopes that the matter does not require arbitration.[138]

Fourth and finally, mandatory arbitration does not prevent the alleged victim from seeking other forms of nonjudicial remedies, such as filing claims with the Equal Employment Opportunity Commission ("EEOC").[139] In *E.E.O.C. v. Waffle House, Inc.*, the Supreme Court held that the EEOC could pursue victim-specific judicial relief regardless of whether the employee had signed a mandatory arbitration agreement.[140]

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[135] Wasserman, *supra* note 98 ("In arbitration, the employer pays the arbitrator fees, significant administrative fees and the typical costs and fees that are also inherent in any litigation.").
[136] Covington, *supra* note 7.
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 296 (2002).

Here, the employee signed a mandatory arbitration agreement for all claims arising from employment and was fired only sixteen days after starting work and suffering a seizure while at work.[141] Though the employee never initiated arbitration, he filed an Americans with Disabilities Act of 1990 ("ADA") discrimination complaint with the EEOC.[142]

The EEOC brought suit on the employee's behalf in federal district court, but the employer filed a petition under the FAA to compel arbitration based on the employee's agreement even though the employee himself was not a party to the case.[143] The appellate court found that a valid arbitration agreement did exist but that it did not bind the EEOC because they were not a party to the agreement.[144] Still, the appellate court determined "that the EEOC was precluded from seeking victim-specific relief in court because the policy goals expressed in the FAA required giving some effect to [the employee]'s arbitration agreement" and, more specifically, because the EEOC is primarily concerned with securing the public's interests more so than those of private individuals.[145]

The U.S. Supreme Court first examined the EEOC's enforcement power under Title VII, finding that the agency had the ability to seek injunctive, compensatory, and punitive relief and that an arbitration agreement between the employer and employee did not alter those statutory enforcement powers.[146] Additionally, the Court examined the FAA's purpose and the binding nature on parties to such agreements and found that "[t]he FAA does not mention enforcement by public agencies; it ensures the enforceability of private agreements to arbitrate, but otherwise does not

[141] *Id*. at 282–83.
[142] *Id*. at 283.
[143] *Id*. at 283–84.
[144] *Id*. at 284.
[145] *Id*. at 284–85.
[146] *Waffle House, Inc.*, 534 U.S. 279 at 286–88.

purport to place any restriction on a nonparty's choice of a judicial forum."[147] Because the EEOC was not a party to the agreement, nor did it agree to arbitrate its claims, the Court concluded that the EEOC was not bound by the employee's arbitration agreement as a nonparty and that "the pro arbitration policy goals of the FAA do not require the agency to relinquish its statutory authority if it has not agreed to do so."[148]

1. The Pros of Mandatory Arbitration

Despite the negative connotations that opponents of mandatory arbitration have assigned to it,[149] the reality is that arbitration provides several benefits for the involved parties. Arbitration in the workplace context, even in sexual harassment cases, is no exception.[150] For instance, although arbitrators are often inclined to "split the baby," meaning that the parties' demands are typically split down the middle without either party having to make major concessions, it is often still skewed in favor of the employee, while a bench ruling may be significantly "more reasoned and objective."[151] One could arguably say that if an employer were to seek a waiver of jury trial rather than a mandatory arbitration agreement, the employee would be in a more disadvantaged position.[152]

Because the dangers of employer secrecy are such a prominent argument against mandatory arbitration, it is essential to note that mandatory arbitration itself is not inherently confidential.[153] Instead, the confidentiality that is often referenced stems from either a confidentiality agreement signed during the arbitration process or from a

[147] *Id.* at 289.
[148] *Id.* at 294.
[149] *See infra*, Part V.A.2.
[150] Covington, *supra* note 7.
[151] *Id.*
[152] *See id.*
[153] *Id.*

nondisclosure agreement that accompanies the employee's arbitration agreement.[154] However, confidentiality that stems from the specific terms of the arbitration agreement itself is not an inherent trait of mandatory arbitration agreements.[155]

Another benefit of mandatory arbitration is that it allows both parties to have a say in selecting the arbitrators and determining terms of discovery, schedules, and available remedies.[156] In fact, issues in arbitration proceedings are often linked back to a party's failure to make full use of the customizability of arbitration and its various tools.[157] Taking advantage of these aspects of arbitration may be very beneficial to the sexual harassment victim by ensuring that it is closer to litigation, assuming the victim truly believes that is in their best interest.

Depending on their contract, employees can also often opt out of the mandatory arbitration provisions after beginning employment.[158] While the employee can opt out of some provisions at any point after the commencement of employment, others require the employee to do so within a certain period of time after.[159] This ability to opt out is not "standard" in all mandatory arbitration agreements, but it is fairly common.[160] However, the specific terms always depend on the parties' specific agreement.

Furthermore, employers almost always pay 100% of all arbitration and related costs, making it much cheaper than litigation for an employee.[161] The availability of this avenue to seek a remedy actually creates a path of easier

[154] *Id*.
[155] *Id*.
[156] Covington, *supra* note 7.
[157] *Id*.
[158] Wasserman, *supra* note 98, at 2.
[159] *Id*.
[160] Covington, *supra* note 7.
[161] Wasserman, *supra* note 98, at 2.

access to justice as a result of the limited economic hurdles.[162] On the other hand, sexual harassment victims may actually be dissuaded from bringing forward their claims if litigation is the only option, since the employee may not necessarily have the means to cover the costs of litigation, or because the employee's economic priorities lie in other areas.[163]

The last prominent benefit of arbitration is that it is significantly more efficient than the judicial process, and without the option of arbitration, courts would be even further burdened, leading to greater delays.[164] This itself was one of the reasons for the FAA and its public policy favoring arbitration.[165] It is no secret that courts are already fully packed and heavily burdened.[166] Arbitration eases this burden in two ways. First, arbitration eases the caseload burden of the courts.[167] Second, arbitration allows for a swifter resolution of matters than litigation along with quicker access to justice and a remedy for the victim.[168]

2. The Cons of Mandatory Arbitration

Among the leading arguments against mandatory arbitration clauses is that they "discourage employees from pursuing claims of sexual harassment and conceal alleged

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[162] *See id*.
[163] *See id*. at 2–3.
[164] *Id*.
[165] JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RSCH. SERV., R44960, MANDATORY ARBITRATION AND THE FEDERAL ARBITRATION ACT 2–3 (2017).
[166] Lyle Moran, *Court Backlogs Have Increased by an Average of One-Third During the Pandemic*, AM. BAR. ASS'N J. (Aug. 31, 2021, 12:57 PM), https://www.abajournal.com/news/article/many-state-and-local-courts-have-seen-case-backlogs-rise-during-the-pandemic-new-report-finds; Wasserman, *supra* note 91, at 2.
[167] Katherine V. W. Stone & Alexander J. S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, ECON. POL'Y INST. (Dec. 7, 2015) [hereinafter "*Epidemic*"], https://files.epi.org/2015/arbitration-epidemic.pdf.
[168] *See* SHIMABUKURO & STAMAN, *supra* note 165 at 6, 10.

employer misconduct from the public."[169] This may be the case because arbitration is viewed as a more internal or private process.[170] Furthermore, opponents may perceive that an employee would assume that the process is rigged in favor of the employer.[171] However, mandatory arbitration is not inherently confidential.[172] Many aspects of litigation may also chill victims' desires to pursue their claims, such as the high costs of litigation or the victims' personal desires to not relive such experiences or air out such personal accounts in court.[173]

Opponents of arbitration argue that arbitrators are not neutral because they are picked and paid for by the employer.[174] However, fees are set by the arbitration organization (e.g. the AAA),[175] and both parties have a say in who the arbitrator will be.[176] Additionally, to say that arbitrators would not remain neutral would be to undermine the entire arbitration system and to imply that arbitrators are willing to ignore their professional code of ethics.[177]

Another popular argument states that courts tend to favor employees, while arbitration tends to favor employers.[178] However, the statistics relied on for such assertions do not consider state versus federal courts, nor do they consider jury versus judge decisions.[179] Additionally,

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[169] O'Savio, *supra* note 3.
[170] Stone & Colvin, *supra* note 167.
[171] *Id*.
[172] Covington, *supra* note 7.
[173] Wasserman, *supra* note 98, at 2.
[174] *See* Covington, *supra* note 7.
[175] *Rules, Forms & Fees*, AM. ARB. ASS'N, https://adr.org/Rules (last visited Oct. 14, 2020).
[176] Covington, *supra* note 7.
[177] *See* Stone & Colvin, *supra* note 167.
[178] Alexander J. S. Colvin, *The Growing Use of Mandatory Arbitration: Access to the Courts is Now Barred for More Than 60 Million American Workers*, ECON. POL'Y INST. (Apr. 6, 2018), https://files.epi.org/pdf/144131.pdf [https://perma.cc/U746-Q8AT]; *Epidemic*, *supra* note 167.
[179] *See* Colvin, *supra* note 178; Stone & Colvin, *supra* note 167.

although arbitrators often "split the baby," the process often favors the employee.[180]

Lastly, opponents of arbitration also argue that it is harder for a victim to secure a lawyer for arbitration than for litigation.[181] On the contrary, litigation may make it harder for victims to secure a lawyer because many take these cases on a contingency fee basis.[182] Contingency fee attorneys may turn down traditionally litigated cases, due to the longer completion time compared to arbitrated cases, knowing that they will not get paid for a while.[183] Alternatively, lawyers billing at an hourly rate make it significantly more expensive, and often unaffordable, for most individual clients to pursue traditional litigation.[184]

3. Consequences of Banning Mandatory Arbitration Clauses

In addition to the ordinary pros and cons of mandatory arbitration, banning mandatory arbitration agreements for claims related to workplace sexual harassment would bring about its own set of unintended consequences.[185] First, while some women may want to draw public attention to the issue at large, many women would not want to air out these issues in a public court.[186] However, banning such agreements would do exactly that and leave the victim without any other recourse but to relive those experiences in open court.[187]

Second, litigation may drag matters on for a significantly longer time than arbitration; consequently, it will also be longer before the victim receives any form of

[180] Covington, *supra* note 7.
[181] *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, 183 (2019).
[182] Wasserman, *supra* note 98, at 2.
[183] *See id*.
[184] *Id*.
[185] *See id*.
[186] *Id.* at 2–3.
[187] *See id.* at 1–2.

compensation or other remedy.[188] Not only does this delay procure a remedy, but it also creates greater costs for the victim in terms of attorney's fees.[189] In the end, it seems to result in a double loss for the victim.

The culmination of these unintended consequences may result in victims not raising their claims and never obtaining any form of justice.[190] Many victims may forgo bringing forward their claims if their only option for recourse involves being forced to relive awful experiences in court and depositions. In this way, the victims weigh pursuing justice against the perceived shame and embarrassment inherent with this particular claim.[191] Additionally, the high costs related to litigation may leave victims not only unwilling but also completely unable to bring forward their claims.[192] If increasing access to justice is the primary argument for banning mandatory arbitration in workplace sexual harassment claims, it seems that banning such agreements is not only unwise but also contradictory and detrimental to their purpose and goals.[193]

B. The Likely Preemption of State Exceptions for Sexual Harassment Claims to Mandatory Arbitration

All fifty states in the U.S. have their own state law that governs mandatory arbitration alongside the FAA.[194] Furthermore, many states have attempted to require judicial forums for certain issues deemed unfair or unsuitable for

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[188] Wasserman, *supra* note 98, at 2.
[189] *Id.* (noting that an attorney "may elect to charge hourly fees" which many victims cannot afford. However, the author also notes that "[w]hile many states permit prevailing parties to recover attorney fees separately from any judgment, there still needs to be a judgment, and a fee award, before the employee's lawyers are paid.").
[190] *Id*.
[191] *Id*.
[192] *Id*.
[193] *See id*. *But see* Sternlight, *supra* note 181, at 170 (discussing the primary argument against mandatory arbitration agreements).
[194] SHIMABUKURO & STAMAN, *supra* note 168, at 5.

arbitration.[195] This is exactly the way that states have responded to the #MeToo movement.[196] Because Section 2 of the FAA limits the grounds on which a court may refuse to enforce an arbitration agreement, courts usually find that the FAA preempts state laws that restrict the enforcement of such agreements.[197] In fact, "the Court has routinely held that the FAA supersedes state requirements that restrain the enforceability of mandatory arbitration agreements."[198]

The FAA's preemption over state law stems from the federal Constitution's Supremacy Clause.[199] Preemption typically occurs where state law is inconsistent with federal law.[200] When this occurs, either because the goals of the statutes cannot both be achieved consistently or the language of the two is contradictory, the federal statute preempts the state statute, and the state statute is void.[201]

The two general types of preemption are express and implied preemption.[202] Express preemption concerns the specific language of the federal statute written to preempt state law, while implied preemption concerns instances in which federal law cannot achieve its goals because state law acts as a barrier.[203] The FAA does not contain express language that preempts state law, and the U.S. Supreme Court has held that based on implied preemption, the FAA preempts state laws that act as barriers to the achievement of the FAA's objectives.[204]

Part II of this note sets out how the U.S. Supreme Court has consistently extended the FAA's reach. Not only

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[195] *Id*.
[196] *See* O'Savio, *supra* note 3.
[197] *Id*.
[198] *Id*.
[199] *Id*. at 5.
[200] *Id*. at 5–6.
[201] *Id*. at 6.
[202] O'Savio, *supra* note 3, at 6.
[203] *Id*.
[204] *Id*. at 6–7.

has the Court extended its reach, but it has also consistently upheld the FAA's preemption over state law.[205] At its foundation, the FAA states that "[a] written agreement to submit to arbitration is valid, and enforceable . . . except upon such grounds as exist at law or in equity for the revocation of any contract . . . ."[206] Though contract law is left to the states, the general categories of defenses against contracts available among states are fairly consistent.[207] However, the details of those defenses may vary.[208]

Among the first FAA cases that the Court entertained, the Court concluded in *Southland Corp. v. Keating* that that the FAA could apply in state courts—just the same as in federal courts—and that California's statute, which acted to compel judicial review even in the presence of a mandatory arbitration agreement, was preempted by the FAA.[209] The Court reasoned that "[i]n enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[210] In many cases since *Southland Corp.*, the Court has restated its position that the FAA evinces "a healthy regard for the federal policy favoring arbitration."[211] Similarly, the Court has found that "Congress has instructed that arbitration agreements . . . must be enforced as written."[212]

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[205] SHIMABUKURO & STAMAN, *supra* note 165, at 5, 7.
[206] 9 U.S.C. § 2 (2012).
[207] SHIMABUKURO & STAMAN, *supra* note 165, at 9–10. Generally applicable contract defenses include "fraud, duress, or unconscionability." *Id.* at 9 n.91 (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011)).
[208] *See* SHIMABUKURO & STAMAN, *supra* note 165, at 11.
[209] Southland Corp. v. Keating, 465 U.S. 1, 16–17 (1984).
[210] *Id.* at 10.
[211] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (citing Moses H. Cone Mem'l Hospital v. Mercury Constr. Corp., 460 U.S., 1, 24, (1983)).
[212] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018).

"Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."[213] It is evident from the Court's statement that state laws that disfavor arbitration or interfere with the FAA's fundament attributes are likely preempted by federal law.[214] Furthermore, the Court has specified that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[215] This principle hits the very argument behind the likely preemption of state statutes that seek to bar mandatory arbitration in sexual harassment claims. By carving out these exceptions, states are putting themselves in a position that outright prohibits the arbitration of a particular type of claim, that is, sexual harassment claims.[216] Challenges to such laws, as in New York and California, are already highlighting how states cannot carve out exceptions to arbitration agreements for sexual harassment claims because these statutes interfere with the FAA's objectives in violation of the Supremacy Clause by prohibiting employers from requiring arbitration for sexual harassment claims.[217]

In addition to the Court's repeated findings that federal law preempts state laws standing as barriers to the objectives of the FAA, "[i]n many cases over many years,

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[213] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 343 (2011).
[214] *Id.* at 344, 364; *see also* Phoebe Bodurtha, *Can States Ban Mandatory Arbitration of Harassment Cases?*, ON LABOR (May 30, 2019), https://www.onlabor.org/can-states-ban-mandatory-arbitration-of-harassment-cases/#:~:text=Most%20notably%2C%20Maryland%2C%20New%20York,arbitration%20agreements%20under%20federal%20law [https://perma.cc/32C9-6V2K.
[215] AT&T Mobility LLC, 563 U.S. at 341. *See also* Preston v. Ferrer, 552 U.S. 346, 353 (2008).
[216] Bodurtha, *supra* note 214.
[217] Chamber of Com. of U.S. v. Becerra, 438 F. Supp. 3d 1078 (E.D. Cal. 2020); Latif v. Morgan Stanley & Co., No. 18 CV 11528, 2019 U.S. Dist. LEXIS 107020 (S.D.N.Y. June 26, 2019); *see also* O'Savio, *supra* note 3; Frank, *supra* note 91.

[the U.S. Supreme Court] has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, the Court has rejected every such effort to date (save one temporary exception since overruled) . . . ."[218]

Based on the Court's treatment of FAA preemption over state law in its decisions, states are fairly limited in the restrictions that can be placed on mandatory arbitration.[219] As to the issue of banning mandatory arbitration in sexual harassment claims, the FAA would almost certainly preempt such state laws. Not only do such statutes stand as barriers to the objectives of the FAA and disfavor arbitration, but they also prohibit a particular type of claim. Should Indiana enact a similar law, it would face a steep uphill battle on the hill of preemption.

For the foregoing reasons, Indiana should not, and is unlikely to, codify an exception to mandatory arbitration agreements for sexual harassment claims in the workplace. Not only do the pros outweigh the cons, but the cons are based on flawed, incomplete arguments with a great deal of speculation. Additionally, a statutory exception to mandatory arbitration agreements for sexual harassment claims in the workplace would raise a great deal of unintended consequences that would further discourage victims from bringing their claims. Overall, such an exception in Indiana would be detrimental and stand as an obstacle to justice for sexual harassment victims.

VI. Conclusion

The #MeToo movement has certainly gained momentum at a very fast rate since its "reignition" in 2017.[220] Furthermore, it has attracted both the American

[218] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1627 (2018); Bodurtha, *supra* note 214.
[219] *See* SHIMABUKURO & STAMAN, *supra* note 165, at 7–11.
[220] *See* Elena Nicolaou & Courtney E. Smith, *A #MeToo Timeline To Show How Far We've Come—& How Far We Need To Go,* REFINERY 29 (October 5,

public and world's attention to a very important issue.[221] The reality is that many women, and even men, face sexual harassment in the workplace on a regular basis, and it is an issue that warrants acknowledgement and action.[222] Indeed, states have listened to their constituents and responded through legislative action with all the right intentions. However, the reality is that such laws banning mandatory arbitration for sexual harassment claims face not just an uphill battle, but rather clear barriers of preemption under the FAA as is evident from the U.S. Supreme Court's firm, precedent-grounded public policy of favoring arbitration and enforcing such private agreements according to their terms.[223] Such laws may also bring about unintended consequences that hinder, rather than benefit, victims.

Additionally, the arguments laid out by advocates for prohibiting mandatory arbitration in sexual harassment claims face barriers of their own. Not only do the pros outweigh the cons of mandatory arbitration, but arguments against such agreements stand in contradiction to the realistic circumstances and outcomes of the world of arbitration. In fact, the movement's most popular argument takes issue not with arbitration agreements, but rather nondisclosure agreements.

The circumstances surrounding arbitration in Indiana also strongly demonstrate why the state is unlikely to follow suit in passing legislation to prohibit mandatory arbitration in claims of sexual harassment. Such circumstances include its statutory and common law stances on arbitration as well as the nature of the state as a whole and policies in the workplace. In light of the factors underlying Indiana's current lack of legislative movement, the arguments for and against mandatory arbitration, and the

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2019, 9:55 AM), https://www.refinery29.com/en-us/2018/10/212801/me-too-movement-history-timeline-year-weinstein.
[221] *Id.*
[222] *See Statistics: Occupation*, *supra* note 89.
[223] *See* O'Savio, *supra* note 3; Frank, *supra* note 91.

preemption issues surrounding state laws banning mandatory arbitration, it is in the best interest of sexual harassment victims and the state itself for Indiana to refrain from passing legislation that prohibits employers from requiring mandatory arbitration in sexual harassment cases.