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## Sign or Else: Employment Arbitration in the Wake of an *Epic* Decision

Brendan Williams

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**SIGN OR ELSE: EMPLOYMENT ARBITRATION IN THE  
WAKE OF AN *EPIC* DECISION**

**Brendan Williams\***

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## I. INTRODUCTION

Arbitration is on the march. Mandatory arbitration agreements have become a common feature in employment, as a *Vox* article noted: “Millions of American workers have given up their right to go to court just to earn a paycheck. They can’t sue their employer for sexual harassment, or for racial discrimination, or for stealing their wages, or for nearly anything else.”<sup>1</sup>

As the article pointed out, this even has the potential to thwart the #MeToo movement: “Women are coming forward, often for the first time, with stories of widespread sexual harassment at work, only to discover that they’ve been shut out of the court system because they signed an arbitration agreement.”<sup>2</sup>

This trend is concerning. As Stephen Stachowski, has written:

One of the key, if not predominant, purposes of arbitration is to serve as an effective and efficient form of alternative dispute resolution. In the world of capitalism such a purpose may even be considered a virtue. However, this purpose may be especially disheartening because in its pursuit of efficiency arbitration leaves behind another virtue: *justice*.<sup>3</sup>

Surely we might agree that there are employment

1. Alexia Fernández Campbel & Alvin Chang, *There’s a Good Chance You’ve Waived the Right to Sue Your Boss*, VOX (Sep. 7, 2018), <https://www.vox.com/2018/8/1/16992362/sexual-harassment-mandatory-arbitration>

2. *Id.* Among those affected was former Fox News anchor Gretchen Carlson:

She ended up suing Roger Ailes for sexual harassment, and they settled for an undisclosed amount. But Carlson could not sue Fox News for the company’s role in allowing the sexual harassment to persist, and neither could dozens of other women who accused the media company of tolerating sexual harassment, had they decided they wanted to sue.

*Id.*

3. Stephen Stachowski, *Arbitration’s Use of Experts Hinders Justice*, ARB. L. REV. BLOG (Dec. 26, 2017) (emphasis added), <https://sites.psu.edu/arbitrationlawreview/2017/12/26/arbitrations-use-of-experts-hinders-justice/>.

situations in which complainants should have access to the courtroom. While sexual harassment is a sympathetic reason, and has precipitated congressional legislation described later in this piece, what of wage theft? Wage theft is surely as injurious, and can often disproportionately affect women – particularly in the service economy.<sup>4</sup> And what of racial discrimination – especially at a time when immigrants are being targeted for deportation and may be afraid to interact with those enforcing workplace laws?<sup>5</sup>

As one scholar says of arbitration generally:

Inasmuch as arbitration doctrine stifles the judiciary’s essential role in declaring ‘what the law is,’ so too does it diminish the deliberative character of democratic governance that the Petition Clause facilitates. It privatizes the once-public dialogue between court and litigant, and in turn, *shuts the public out of an entire branch of government*.<sup>6</sup>

This article first examines the landscape for mandatory employment arbitration under the Federal Arbitration Act,<sup>7</sup> as interpreted by the U.S. Supreme Court in its May 2018 decision in *Epic Systems v. Lewis*.<sup>8</sup> Has mandatory arbitration become, as Professor Cynthia Estlund maintained even before *Epic*, a “black hole into which matter collapses and no light escapes”?<sup>9</sup>

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4. See, e.g., *Justice for Nail Salon Workers*, N.Y. TIMES (May 11, 2015), <https://www.nytimes.com/2015/05/12/opinion/justice-for-nail-salon-workers.html>

(“Across the country, countless workers in the nail salon industry, mainly immigrant women, toil in misery and ill health for meager pay, usually with no overtime, abused by employers who show little or no consideration for their safety and well-being.”) *Id.*

5. See, e.g., Laura D. Francis, *Fear of Immigration Raids May Harm Workplace Rights*, BLOOMBERG (Mar. 1, 2017), <https://www.bna.com/fear-immigration-raids-n57982084586/>. (“With the highest rates of wage and hour violations among undocumented immigrants—particularly women—employer threats of calls to Immigration and Customs Enforcement are ‘very strong,’ Haeyoung Yoon, director of strategic partnerships at the National Employment Law Project, said[.]”) *Id.*

6. See Matthew J. Stanford, *Diminution Doctrine: Arbitration’s First Amendment Problem*, 52 UC DAVIS L. REV. ONLINE 73, 93-94 (2018) (emphasis added).

7. See 9 U.S.C. § 1 et seq. (1990).

8. *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018); see also Nina Tottenberg, *Supreme Court Decision Delivers Blow To Workers’ Rights*, NPR (May 21, 2018), <https://www.npr.org/2018/05/21/605012795/supreme-court-decision-delivers-blow-to-workers-rights> (At stake, though the facts were lacking in the opinion, “[t]he ruling came in three cases — potentially involving tens of thousands of nonunion employees — brought against Ernst & Young LLP, Epic Systems Corp. and Murphy Oil USA Inc.”)

9. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 682 (2018).

The article then examines some state, and federal, legislative efforts to shed some light on at least the employment sexual harassment claims that might otherwise disappear into the “black hole” that Professor Estlund evocatively describes.<sup>10</sup>

In its third part, the article takes notice of two Eleventh Circuit decisions that suggest even arbitration is not without its risks for businesses.<sup>11</sup>

The article concludes with the author recommending a congressional approach, as well as a clever approach taken by one state, replicable in others, that would appear to not be preempted under the FAA.<sup>12</sup>

## II. EPIC SYSTEMS V. LEWIS

Under the Obama Administration, the National Labor Relations Board (NLRB) was curtailing the use of arbitration agreements. As the NLRB has recounted: “The Board first held that the maintenance of individual arbitration agreements containing class-action waivers violated the Act in 2012. During the six years that this rule was in place, Board decisions invalidated arbitration agreements and policies used by many employers.”<sup>13</sup>

As described by the NLRB in 2012:

The National Labor Relations Board has ruled that it is a violation of federal labor law to require employees to sign arbitration agreements that prevent them from joining together to pursue employment-related legal claims in any forum, whether in arbitration or in court.

The decision examined one such agreement used by nationwide homebuilder D.R. Horton, under which employees waived their right to a judicial forum and agreed to bring all claims to an arbitrator on an individual basis. The agreement prohibited the arbitrator from consolidating claims, fashioning a class or collective action, or awarding relief to a group or class of employees.

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10. *See generally, id.*

11. *See, infra* Part IV.

12. *See, infra* Part IV.

13. Press Release, NAT'L LAB. REL. BOARD, Supreme Court Issues Decision in NLRB v. Murphy Oil USA (May 21, 2018), <https://www.nlr.gov/news-outreach/news-story/supreme-court-issues-decision-nlr-v-murphy-oil-usa>.

The Board found that the agreement unlawfully barred employees from engaging in “concerted activity” protected by the National Labor Relations Act. The Board emphasized that the ruling does not require class arbitration as long as the agreement leaves open a judicial forum for group claims.<sup>14</sup>

Yet the election of President Trump offered a chance to sweep away this restriction. And in *Epic* the U.S. Supreme Court’s newest justice, Neil Gorsuch, again proved his conservative bona fides by authoring an opinion, on a 5-4 split, that had business groups cheering, effectively ruling that the 1925 Federal Arbitration Act (FAA) trumps the rights the NLRB conferred upon workers through the 1935 National Labor Relations Act.<sup>15</sup>

In *Epic*, Gorsuch framed the questions at the outset of his opinion: “Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?”<sup>16</sup>

Allowing that “[a]s a matter of policy these questions are surely debatable,” Gorsuch read the Federal Arbitration Act as “a congressional command requiring us to enforce, not override, the terms of the arbitration agreements before us.”<sup>17</sup> He accorded no deference to the NLRB, noting “the Executive has disavowed the Board’s (most recent) position[.]”<sup>18</sup>

In a lengthy dissent, Justice Ginsburg wrote, “[t]he inevitable result of today’s decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers.”<sup>19</sup> She maintained that “[i]f employers can stave off collective employment litigation aimed at obtaining redress for wage and hours infractions, the enforcement gap is almost certain to widen.”<sup>20</sup> And she rejected the majority’s

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14. Press Release, NAT’L LAB. REL. BOARD, Board Finds that Certain Mandatory Arbitration Agreements Violate Federal Labor Law (Jan. 6, 2012), <https://www.nlr.gov/news-outreach/news-story/board-finds-certain-mandatory-arbitration-agreements-violate-federal-labor>.

15. *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018) (holding that “the Board hasn’t just sought to interpret its statute, the NLRB, in isolation; it has sought to interpret this statute in a way that limits the work of a second statute, the Arbitration Act. . . . it does not administer”).

16. *Id.* at 1619.

17. *Id.* at 1623.

18. *Id.* at 1621.

19. *Id.* at 1646 (Ginsburg, J., dissenting).

20. *Id.* at 1647 (Ginsburg, J., dissenting).

argument that it was simply applying statute: “[T]he edict that employees with wage and hours claims may seek relief only one-by-one does not come from Congress. It is the result of take-it-or-leave-it labor contracts harking back to the type called ‘yellow dog,’ and of the readiness of this Court to enforce those unbargained-for agreements.”<sup>21</sup>

Ginsburg noted that the FAA has become supersized through the Court’s interpretation: “In recent decades, this Court has veered away from Congress’ intent simply to afford merchants a speedy and economical means of resolving commercial disputes.”<sup>22</sup>

An article in *Current Affairs* described the case colorfully:

In April 2014, a Wisconsin healthcare company called Epic Systems sent an email to employees. The message contained 1) a new company policy—that all of their claims would now be subject to individual arbitration and 2) a sort of perverse contractual “choose your own adventure” game informing employees that they could either “confirm their consent” or ask that someone talk to them about the agreement. Some choice. Not wanting to be fired, the employees consented. What else were they going to do?<sup>23</sup>

Take-it-or-leave-it arbitration agreements in employment certainly beg the question of whether a true “meeting of the minds” has occurred, as contract law would normally require.<sup>24</sup> As the *Washington Post* reported:

Hours after the decision, one law firm, Ogletree Deakins, announced an “automated tool that quickly prepares custom arbitration agreements with class action waivers based on employers’ requirements and preferences.”<sup>25</sup>

21. *Id.* at 1648-49 (Ginsburg, J., dissenting).

22. *Id.* at 1643 (Ginsburg, J., dissenting). More than one legal scholar has criticized this trend. See Stanford, *supra* note 6, at 88 (“Despite an absence of preemptive text or legislative history, the Court has interpreted the FAA to relieve states of their power to require a judicial forum for certain disputes.”)

23. Sparky Abraham & Oren Nimni, *Everyone Needs The Right To Sue Their Employer*, CURRENT AFFAIRS (May 23, 2018), <https://www.currentaffairs.org/author/sparkyoren>.

24. See, e.g., Am. Jur. 2d Contracts § 29 (“There must be mutual assent or a meeting of the minds at the same time, on all the essential elements or terms to form a binding contract.”) (Footnotes omitted).

25. Robert Barnes, *Supreme Court rules that companies can require workers to accept individual arbitration*, WASH. POST (May 21, 2018), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-rules-that-](https://www.washingtonpost.com/politics/courts_law/supreme-court-rules-that-)

Justice Gorsuch's reasoning came under attack from Garrett Epps, a University of Baltimore law professor, in *The Atlantic*:

False dichotomy, meretricious piety, and pay-no-attention-to-that-man-behind-the-curtain misdirection are vital arrows in the quiver of any lawyer or judge, no matter of what persuasion. These tricks were on particularly egregious display in *Epic Systems Corp. v. Lewis*, a 5-4 decision announced Monday in which the Supreme Court's conservative majority continued its drive to narrow protection for employee rights.<sup>26</sup>

He stated: "Employees' objection to a 'no group arbitration' clause is that individual arbitration may concern amounts too small to make pursuing them worthwhile. Thus, these clauses make it easier for employers to maintain unfair or even unlawful employment structures and salary systems."<sup>27</sup> As David Leonhardt wrote, "[e]ffectively, this means workers often can't sue at all, because individual employees usually don't have the money to hire lawyers and file a claim."<sup>28</sup>

The libertarian Cato Institute saw it another way, with Walter Olson writing, "Since contracts of this sort typify most of the modern economy, the implication, usually not spelled out, is that modern consumer and workplace relationships have no moral basis in autonomy and should be second-guessed and have their terms freely substituted by one or another entity of the State."<sup>29</sup>

In response to the ruling, a *Restaurant News* article advised: "Restaurant operators should make mandatory arbitration agreements with collective-action waivers a standard part of their hiring practices, according to attorneys specializing in employment cases."<sup>30</sup> It cited "the \$5.25 million lawsuit

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companies-can-force-workers-into-individual-arbitration/2018/05/21/09a3a968-5cfa-11e8-a4a4-c070ef53f315\_story.html?utm\_term=.853967238140.

26. Garrett Epps, *An Epic Supreme Court Decision on Employment*, ATLANTIC (May 22, 2018), <https://www.theatlantic.com/ideas/archive/2018/05/an-epic-supreme-court-decision-on-employment/560963/>.

27. *Id.*

28. David Leonhardt, *The Supreme Court v. Your Paycheck*, N.Y. TIMES (May 22, 2018), <https://www.nytimes.com/2018/05/22/opinion/supreme-court-arbitration.html>.

29. Walter Olson, *Epic Systems v. Lewis: It's OK To Calm Down About Arbitration*, CATO INST. (May 22, 2018), <https://www.cato.org/blog/apocalypse-not-arbitration-survives-epic-systems-v-lewis>.

30. Mark Hamstra, *Should You Require Employees to Sign an Arbitration Agreement?*, NATION'S RESTAURANT NEWS (June 5, 2018),

settled in 2012 by celebrity chef Mario Batali and his business partners.”<sup>31</sup>

### III. FEDERAL AND STATE RESPONSES TO ARBITRAL OVERREACH

It seems questionable that in this hyper-partisan era Congress can address the most objectionable implications of *Epic*, although “[i]n the wake of the oral argument in *Epic*, Sen. Richard Blumenthal of Connecticut introduced the Arbitration Fairness Act of 2018 to prohibit enforcement of pre-dispute arbitration agreements in employment as well as in civil rights, consumer, and antitrust disputes.”<sup>32</sup> Bipartisan legislation has

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<https://www.nrn.com/workforce/should-you-require-employees-sign-arbitration-agreement>.

31. *Id.* Is it really objectionable that workers could collectively join together and recover for the alleged theft of their tips? To quote a 2012 article:

The lawsuit against Mr. Batali, filed in 2010, said that he and a partner, Joseph Bastianich, and their restaurants had a policy of deducting an amount equivalent to 4 to 5 percent of total wine sales at the end of each night from the tip pool and keeping the money.

Benjamin Weiser, *Mario Batali Agrees to \$5.25 Million Settlement Over Employee Tips*, N.Y. TIMES (Mar. 7, 2012), <https://dinersjournal.blogs.nytimes.com/2012/03/07/mario-batali-agrees-to-5-25-million-settlement-over-employee-tips/>. This was hardly a frivolous case. And Batali has other challenges now that arbitration may not preempt. *See, e.g.*, Sandra Gonzalez, *Mario Batali sued by woman who claims he groped her*, CNN (Aug. 24, 2018) <https://www.cnn.com/2018/08/24/entertainment/mario-batali-sexual-assault-lawsuit/index.html>. (“The suit comes several months after Batali first faced allegations of sexual misconduct.”).

32. Craig Becker, *Supreme Court Won’t Have the Last Word on Worker Rights*, CNN (June 27, 2018), <https://www.cnn.com/2018/06/27/opinions/supreme-court-deals-blow-to-unions-becker/index.html>. In the U.S. House, Rep. Pramila Jayapal (D., Wash.) has introduced a similar bill, and stated:

I actually believe that forced arbitration of all kinds is something that needs to be looked at and potentially removed—but in this bill we specifically say that sexual harassment should not be included in any forced arbitration agreement, and that employees who come to an employer should always be able to have the choice of bringing their complaint around discrimination, assault, or harassment either to an arbitrator, or to take action against the employer in court.

also been introduced to address the especially-outrageous fact that sexual harassment claims can be forced into arbitration.<sup>33</sup> A sponsor, New York Sen. Kirsten Gillibrand, a Democrat like Blumenthal, has “pointed out that employers paying out settlements are not ‘solving the problem’ and that companies with predators in place won’t ‘attract the best and the brightest,’ adding, that it ‘stifles growth.’”<sup>34</sup> Her Republican co-sponsor, South Carolina Sen. Lindsey Graham, joined her at a press event in unveiling the bill, and issued a press release that stated:

Today, an estimated 60 million Americans are subject to forced arbitration clauses in their employment contracts. The bipartisan legislation would void forced arbitration agreements that require arbitration of sexual harassment and discrimination claims and allow survivors of sexual harassment or discrimination to seek justice, discuss their cases publicly, and eliminate institutional protection for harassers.<sup>35</sup>

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Leah Fessler, *You’ve probably signed away your sexual harassment civil rights at work*, QZ.COM (Apr. 5, 2018), <https://qz.com/work/1244779/congresswoman-pramila-jayapal-on-how-mandatory-arbitration-hurts-sexual-harassment-victims/>.

33. Fessler, *supra* note 32.

34. Adina Genn, *Gillibrand: End Forced Arbitration in Sexual Harassment Cases*, LONG ISLAND BUS. NEWS (Jan. 26, 2018), <https://libn.com/2018/01/26/gillibrand-end-forced-arbitration-in-sexual-harassment-discrimination-cases/>. Every single attorney general in the United States and its territories has signed a letter to Congress urging them to exclude sexual harassment claims from arbitration:

While there may be benefits to arbitration provisions in other contexts, they do not extend to sexual harassment claims. Victims of such serious misconduct should not be constrained to pursue relief from decision makers who are not trained as judges, are not qualified to act as courts of law, and are not positioned to ensure that such victims are accorded both procedural and substantive due process.

Letter from Pamela Jo Bondi, Fla. Atty. Gen., et al. to Paul Ryan, Speaker of the House, et al. (Feb. 12, 2018), <http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/%24file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf>.

35. Press Release, U.S. Sen. Lindsey Graham of South Carolina, Graham, Gillibrand Announce Bipartisan Legislation To Help Prevent Sexual Harassment In The Workplace (Dec. 6, 2017) (on file Graham Senate Office). Graham is a perhaps an unlikely champion of encouraging women to “discuss their cases publicly” – when Supreme Court nominee Brett Kavanaugh was accused of sexual assault, Graham did not wait for his accuser to be able to tell her story before the Senate Judiciary

One can hope that the #MeToo movement, culminating in the 2018 uproar over the nomination of Judge Brett Kavanaugh to the U.S. Supreme Court, might at least move forward in 2019 legislation to guarantee sexual harassment victims access to courts, though partisanship might hold even *this* legislation back.<sup>36</sup>

At least, some employers in the private sector may do the right thing, absent legislation. In November 2018, after thousands of workers staged a walkout protesting workplace policies, Google announced “it would end its requirement for employee sexual-harassment claims to be handled in private arbitration[.]”<sup>37</sup> Facebook followed suit.<sup>38</sup>

Absent congressional action, the ability of states to do much may be limited. In Washington, Democratic Governor Jay Inslee issued an executive order directing that:

[t]o the extent permissible under state and federal law, when making purchasing and other procurement decisions, all state executive and small cabinet agencies shall seek to contract with qualified entities and business owners that can demonstrate or will certify that their employees are not required to sign, as a condition of employment, mandatory individual arbitration clauses and class or collective action waivers.<sup>39</sup>

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Committee: “Graham repeatedly expressed doubt about the allegation . . . based on the amount of time that has passed since the alleged assault and the lack of evidence.” William Cummings, *I’m not going to ruin Judge Kavanaugh’s life over this: Sen. Graham doubts Ford’s story*, USA TODAY (Sept. 23, 2018), <https://www.usatoday.com/story/news/politics/onpolitics/2018/09/23/brett-kavanaugh-allegation-sen-lindsey-graham-has-doubts-ford/1403189002/>.

36. See, e.g., Phillip Bump, *Some Conservatives Have Identified the Real Victims in the Kavanaugh Fight: Men*, WASH. POST (Sept. 24, 2018), [https://www.washingtonpost.com/politics/2018/09/24/some-conservatives-have-identified-real-victims-kavanaugh-fight-men/?utm\\_term=.42f43357acfe](https://www.washingtonpost.com/politics/2018/09/24/some-conservatives-have-identified-real-victims-kavanaugh-fight-men/?utm_term=.42f43357acfe). (“In a recent Pew Research Center poll, no group was less likely than Republican men to say that discrimination against women was a barrier to top executive positions or higher political office. About 15 percent of Republican men believed that gender discrimination was a major reason for low representation of women in either area.”).

37. Douglas MacMillan, *Google to End Forced Arbitration for Sexual-Harassment Claims*, WALL STREET J. (Nov. 8, 2018), <https://www.wsj.com/articles/google-to-end-forced-arbitration-for-sexual-harassment-claims-1541696868>.

38. See Jena McGregor, *Google and Facebook ended forced arbitration for sexual harassment claims. Why more companies could follow*, WASH. POST (Nov. 12, 2018), [https://www.washingtonpost.com/business/2018/11/12/google-facebook-ended-forced-arbitration-sex-harassment-claims-why-more-companies-could-follow/?utm\\_term=.4457e4d36c11](https://www.washingtonpost.com/business/2018/11/12/google-facebook-ended-forced-arbitration-sex-harassment-claims-why-more-companies-could-follow/?utm_term=.4457e4d36c11).

39. Wash. Exec. Order 18-03 (June 12, 2018), [https://www.governor.wa.gov/sites/default/files/exe\\_order/18-03%20-%20Workers%20Rights%20%28tmp%29.pdf](https://www.governor.wa.gov/sites/default/files/exe_order/18-03%20-%20Workers%20Rights%20%28tmp%29.pdf).

States can certainly do this much.

California took things a step further in 2018, with what one newspaper described as a “#MeToo-driven bill” to ban mandatory arbitration in employment contracts.<sup>40</sup> Democratic Governor Jerry Brown had vetoed such a ban before,<sup>41</sup> and he vetoed the 2018 bill too.<sup>42</sup> However well-intended, such an action would surely violate the FAA.<sup>43</sup> To quote a majority opinion by Justice Kagan, the FAA “preempts any state rule discriminating on its face against arbitration. . . . And not only that: The Act also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements.”<sup>44</sup>

For that reason, a New York law enacted in 2018 is likely void.<sup>45</sup> It purports to ban “any clause or provision in any contract which requires as a condition of the enforcement of the contract or obtaining remedies under the contract that the parties submit to mandatory arbitration to resolve any allegation or claim of an unlawful discriminatory practice of sexual harassment.”<sup>46</sup>

The Disclosing Sexual Harassment in the Workplace Act of 2018 enacted in Maryland seems to be self-defeating in its preamble:

*Except as prohibited by federal law, a provision in an employment contract, policy, or agreement that waives any substantive or procedural right or remedy to a claim that accrues in the future of sexual harassment or retaliation for reporting or asserting a right or remedy based on sexual harassment is null and*

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40. Ethan Baron, *Proposed ban on mandatory arbitration moves ahead with California Senate vote*, MERCURY NEWS (Aug. 23, 2018), <https://www.mercurynews.com/2018/08/22/proposed-ban-on-mandatory-arbitration-moves-ahead-with-state-senate-vote/>.

41. *Id.*

42. Melanie Mason, *Measures to end forced arbitration of sexual harassment claims, extend statute of limitations vetoed by Gov. Jerry Brown*, L.A. TIMES (Sept. 30, 2018), <https://www.latimes.com/politics/essential/la-pol-ca-essential-politics-may-2018-measures-to-end-forced-arbitration-of-1538341555-htm1story.html>.

43. *Id.* (“The direction from the Supreme Court since my earlier veto has been clear — states must follow the Federal Arbitration Act and the Supreme Court’s interpretation of the Act,” Brown wrote. He called any policy like AB 3080 “impermissible.”).

44. *Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S.Ct. 1421, 1426 (2017).

45. See N.Y. C.P.L.R. § 7515 (McKinney 2018).

46. *Id.* at § 7515(a)(2).

void as being against the public policy of the state.<sup>47</sup>

The problem, of course, is that this *is* prohibited by federal law.

The greatest act of state defiance occurred in Kentucky in September 2018, when the Kentucky Supreme Court enforced a state law prohibiting “employers from conditioning employment on the employee’s agreement to a contract provision mandating arbitration in the event of a dispute between them” and concluded that “the statute does not run afoul of the FAA under the facts of this case.”<sup>48</sup> The court artfully – perhaps *too* artfully – determined that the statute in question was:

not an anti-arbitration clause provision—it is an anti-employment discrimination provision. KRS 336.700(2) uniformly voids any agreement diminishing an employee’s rights against an employer when that agreement had to be signed by the employee on penalty of termination or as a predicate to working for that employer. As such, we hold that the FAA does not preempt KRS 336.700(2) because it does not discriminate against arbitration agreements but rather the conditioning of employment on an employee’s agreement to arbitrate.<sup>49</sup>

#### IV. BE CAREFUL WHAT YOU ASK FOR: TWO CAUTIONARY 11<sup>TH</sup> CIRCUIT DECISIONS ON ARBITRATION

In *Epic*, Justice Ginsburg had noted “that individual arbitration of employee complaints can give rise to anomalous results.”<sup>50</sup> However, that cuts both ways, and some evidence suggests businesses might want to be careful about what they have asked for. As a legal commentator, Alison Frankel, wrote, “The *Epic* decision tilted the already lopsided balance of power between employers and employees even more dramatically in companies’ favor. What could possibly go wrong?”<sup>51</sup>

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47. Md. Code Ann., Lab. & Empl. § 3-715(a) (2018) (emphasis added).

48. N. Ky. Area Dev. Dist. v. Snyder, 570 S.W. 3d 531 (Ky. 2018).

49. *Id.* (citing Ky. Rev. Stat. Ann. § 336.700(2) (West 2018), amended 2019). The Court has previously struck down an attempt by Kentucky to bypass the FAA. See *Kindred Nursing Centers*, 137 S. Ct. 1421.

50. *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1648 (2018) (Ginsburg, J., dissenting).

51. Alison Frankel, *From the 11th Circuit, a cautionary tale for employers imposing arbitration on workers*, REUTERS (Aug. 9, 2018), <https://www.reuters.com/article/us->

Answering her own question, Frankel looked to an August 2018 decision from the Eleventh Circuit, and stated:

Plenty, according to a ruling Wednesday from the 11th U.S. Circuit Court of Appeals in *Hernandez v. Acosta*, which provides a \$100,000 warning that individual employee arbitration is not necessarily a no-lose proposition for employers. “The idea is that employers prefer arbitration because it promises ‘quicker, more informal, and often cheaper resolutions for everyone involved,’” the 11th Circuit wrote, quoting Epic. “But as this case shows, arbitration does not always live up to this promise.”<sup>52</sup>

In that case, the employer, Acosta Tractors, complained: “Arbitration is meant to be a less costly and efficient substitute for litigation. In these cases, arbitration has instead turned into an overly-expensive, completely inefficient method of dispute resolution.’ Acosta said ‘[t]he arbitrators’ fees alone likely exceed the amount in controversy, exclusive of attorneys’ fees.’”<sup>53</sup>

In effect, the Eleventh Circuit gave Acosta a Pyrrhic victory. It noted, “[t]he District Court determined that Acosta’s default in the arbitration proceedings also warranted the entry of a default judgment against it in federal court. This was error.”<sup>54</sup> For that reason, the case was remanded.<sup>55</sup> But, the court noted:

On remand, the District Court may well find that Acosta acted in bad faith in choosing not to pay its arbitration fees. After all, Acosta acknowledges it quit paying after the arbitrator failed to consolidate Mr. Hernandez’s case with the other cases brought by other Acosta employees, and because it thought the arbitrator had allowed too much discovery. Acosta also noted that arbitration was set to cost more than Mr. Hernandez’s claim was worth. A calculated choice to abandon arbitration after getting adverse rulings from the arbitrator certainly looks like forum shopping.<sup>56</sup>

In other words, Acosta was bound to the benefit of its bargain – through its own arbitration language it had opened

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[otc-epic/from-the-11th-circuit-a-cautionary-tale-for-employers-imposing-arbitration-on-workers-idUSKBN1KU2GF](#).

52. *Id.*

53. *Hernandez v. Acosta Tractors, Inc.*, 898 F.3d 1301, 1303 (11<sup>th</sup> Cir. 2018).

54. *Id.* at 1305.

55. *Id.* at 1306.

56. *Id.*

the door to these consequences. Arbitration could be a double-edged sword – upon unsheathing it, one must live or die by it. As Frankel noted:

After Epic, smart employment lawyers on both sides of the bar have been saying quietly that case-by-case wage-and-hour arbitration could end up being a more expensive proposition for corporate defendants than class actions resolving allegations in one swoop – assuming, of course, that employees actually bring arbitration claims and find lawyers to prosecute their cases.<sup>57</sup>

Frankel may prove to be too sanguine. But arbitration is not without its risks for employers. As one employment law attorney, Ron Chapman, was quoted stating:

“Arbitrators will frequently try to ‘split the baby’ and please all sides,” he said. “The upside is that all claims have to be arbitrated individually, so you avoid the big class actions and the exposure that comes with them, but the downside is that you run the risk of compromised rewards from the arbitrator.”<sup>58</sup>

In *Risk Management*, another attorney writes:

As for its disadvantages, some experts point out that arbitration is often just as expensive and time-consuming as litigation. These critics cite the increasing complexity of arbitration disputes and the fact that counsel sometimes treats arbitration no differently than it does litigation.

Beyond this, others see the lack of judicial review or appellate mechanisms as a disadvantage since it leaves an aggrieved party with little recourse in the event of a decision with which they disagree.<sup>59</sup>

This lesson – that arbitration does not always lead to business happiness – was built upon by another Eleventh Circuit ruling, in September 2018. In *JPAY, Inc. v. Kobel*,<sup>60</sup> “Cynthia Kobel and Shalanda Houston sought to compel

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57. Frankel, *supra* note 51.

58. Hamstra, *supra* note 30.

59. Peter A. Halprin, *Determining the Arbitration Obligation*, RISK MGMT. (Apr. 3, 2017), <http://www.rmmagazine.com/2017/04/03/determining-the-arbitration-obligation/>.

60. *JPay, Inc. v. Kobel*, 904 F.3d 923 (11<sup>th</sup> Cir. 2018).

arbitration on a class basis with JPay, Inc., a Miami-based company that provides fee-for-service amenities in prisons in more than thirty states.”<sup>61</sup> JPay successfully sought a summary judgment compelling Kobel and Houston “to arbitrate only their own claims.”<sup>62</sup> The Eleventh Circuit Court of Appeals reversed, making clear the stakes:

In class arbitration, like in a class action, representative plaintiffs make their case before the adjudicator on behalf of a host of similarly situated plaintiffs who will have the opportunity to collect damages if the class wins. Procedures like notice requirements and opt-out opportunities protect the interests of these absent class members, but, nonetheless, allowing a class proceeding means determining the rights of many parties who are not actively involved, not represented by their own counsel, and, in all likelihood, not paying attention. Class availability opens a “gateway” to the arbitration proceedings, through which thousands of these absent class members might pass if a class is available.<sup>63</sup>

In contrast, where “a class is not available, the representative plaintiffs, here, Kobel and Houston, will argue only for themselves.”<sup>64</sup> As the court noted:

Many, if not most, putative class proceedings, are for relatively small-dollar claims. If claimants must act on an individual basis, the cost of arbitrating any single claim would certainly outweigh their expected recovery. No single bilateral arbitration would be rational. Only by joining together as a class do they make arbitration efficient.<sup>65</sup>

The court found:

a clear and unmistakable intent to delegate questions of arbitrability to the arbitrator throughout the arbitration provision in JPay’s Terms of Service. First, it references AAA rules three times . . . Second, and quite independently, the parties expressly agreed that “[t]he ability to arbitrate the dispute, claim or controversy shall likewise be determined in the arbitration.”

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61. *Id.* at 926.

62. *Id.*

63. *Id.* at 931-932.

64. *Id.* at 932.

65. *Id.*

Finally, the agreement is written in unmistakably broad terms, as the parties agreed “to arbitrate *any and all* such disputes, claims and controversies.”<sup>66</sup>

Sitting by designation, retired Judge James Graham, a district court judge from the Southern District of Ohio, disagreed: “I believe that a general delegation to arbitrate issues of arbitrability is not enough and that without a specific reference to class arbitration the court should presume that the parties did not intend to delegate to an arbitrator an issue of such great consequence.”<sup>67</sup>

As *Vox* had reported:

If you ask employers why they require workers to use arbitration, they often say it’s a faster and less expensive process than the courts. They’re not wrong. But legal research, surveys, and employment attorneys point to the largest incentive of all: keeping employment claims from reaching a jury. Juries are considered more sympathetic to workers’ claims, and more willing to award millions of dollars in damages to workers in these cases. The threat of a high jury award also gives workers leverage in negotiating larger settlements because businesses want to avoid trial.<sup>68</sup>

Even prior to *Epic*, Professor Jean Sterlight had written, “[t]oday employers, with substantial assistance from the Supreme Court, are using mandatory arbitration clauses to ‘disarm’ employees, effectively preventing them from bringing most individual or class claims and thereby obtaining access to justice.”<sup>69</sup>

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66. *Id.* at 936 (alteration in original) (emphasis added).

67. *Id.* at 944 (Graham, J., dissenting in part, concurring in part).

68. Campbell & Chang, *supra* note 1.

69. Jean R. Sterlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1310 (2015) (footnote omitted). Professor Cynthia Estlund raises an interesting point, however:

Judith Resnik and others have shown that the presumed contrast to litigation was in some ways overstated as litigation itself has dramatically receded from the public stage. Public trials in civil cases have become nearly extinct, as the overwhelming majority of cases are resolved either on dispositive motions (usually in unpublished opinions) or out-of-court settlements. Settlements between

Yet the Eleventh Circuit decisions make one wonder: will businesses complaining of runaway juries someday have occasion to complain of runaway arbitrators?<sup>70</sup>

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private parties often include non-disclosure provisions barring parties from discussing anything about the case or its resolution.

Estlund, *supra* note 9, at 679-80. She states: “While it is important not to overstate the contrast between arbitration and litigation, there is no doubt that much more of the arbitral process is shielded from public view.” *Id.* at 680.

70. In one piece, a law firm warns of

the “runaway arbitrator,” guided only by a sense of fairness, who makes a massive award against the party he or she believes is in the wrong. Unlike a jury verdict, an excessive arbitral award is nearly impossible to overturn on appeal. Because of its unpredictable and unreviewable nature, arbitration may sometimes be a more risky choice than litigation.

Mike Gaddis et al., *Arbitration Risks: Why Arbitration is Not Necessarily Better, Faster, or Cheaper Than Litigation*, LEXOLOGY (Nov. 30, 2016), <https://www.lexology.com/library/detail.aspx?g=d09fdf94-5789-47bf-b728-c6316a7c35da>. This article notes that “[a]rbitrated cases are rarely resolved by dispositive motions, and are less likely to reach early settlement than litigated cases. In contrast to many judges, who want to clear their busy dockets as quickly as possible, arbitrators are often paid by the hour.” *Id.* Though, as Professor Sternlight maintains, “Even assuming for the sake of argument that employees did quite well in arbitration (which is not the case), mandatory arbitration would still be quite harmful if it prevented large numbers of employees from filing claims at all.” Sternlight, *supra* note 69, at 1322. As Professor Estlund states:

It now appears that the great bulk of disputes that are subject to mandatory arbitration agreements (“MAAs”)—that is, a large share of all legal disputes between individuals (consumers and employees) and corporations—simply evaporate before they are even filed. It is one thing to know that mandatory arbitration draws a thick veil of secrecy over cases that are subject to that process. It is quite another to find that almost nothing lies behind that veil. Mandatory arbitration is less of an “alternative dispute resolution” mechanism than it is a magician’s disappearing trick or a mirage.

Estlund, *supra* note 9, at 682.

## V. CONCLUSION

In conclusion, Congress should enact legislation to exclude employment law violations from mandatory arbitration, although, despite the topical primacy of the #MeToo movement, this exclusion should not be confined to sexual harassment claims alone.<sup>71</sup> As noted earlier, there would seem to be no policy reason to distinguish the insidiousness of sexual harassment from racial discrimination or wage theft. Indeed, one can easily imagine the existence of all three claims for a single claimant. Although states are limited in directly taking on *Epic* due to the FAA's preemption clause, an approach taken in the state of Washington would seem to pass muster, and could be replicated elsewhere.

Under this Washington law, enacted in 2018 and characterized as “encouraging the disclosure and discussion of sexual harassment and sexual assault in the workplace”:

[A]n employer may not require an employee, as a condition of employment, to sign a nondisclosure agreement, waiver, or other document that prevents the employee from *disclosing* sexual harassment or sexual assault occurring in the workplace, at work-related events coordinated by or through the employer, or between employees, or between an employer and an employee, off the employment premises.<sup>72</sup>

Note that this does not purport to speak to procedural rights, such as the ability to use arbitration agreements.

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71. This would not be a cure-all. One commentator notes that even if:

companies stop using forced arbitration, their workers will still have plenty of reasons not to speak up: fear of retaliation (even though it's illegal), fear of being blacklisted, difficulty finding a lawyer to take the case. And with President Trump remaking the judiciary in his image, federal court may soon not be such a great option, either. But at the very least, working people should have the chance to have their day, together, in court.

Terri Gerstein, *End Forced Arbitration for Sexual Harassment. Then Do More.*, N.Y. TIMES (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/opinion/arbitration-google-facebook-employment.html>.

72. 2018 Wash. Sess. Laws ch. 117 §1(1) (emphasis added).

Similarly, in California in 2018, “outgoing Gov. Jerry Brown signed into law a bill that would ban nondisclosure provisions in settlements involving claims of sexual assault, harassment or discrimination based on sex.”<sup>73</sup> The Supreme Court would be hard-pressed to claim that the FAA can preempt even the *disclosure* of sexual harassment or assault – disclosure that authorities can then act upon, as they are not parties to the contract.<sup>74</sup> To this approach I would add other employment law violations.

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73. Stacy Perman, *#MeToo law restricts use of nondisclosure agreements in sexual misconduct cases*, L.A. TIMES (Dec. 31, 2018), <https://www.latimes.com/business/hollywood/la-fi-ct-nda-hollywood-20181231-story.html>. Maryland’s Disclosing Sexual Harassment in the Workplace Act of 2018, in a component that does not purport to ban arbitration, also requires that employers of 50 or more employees *report* to the Maryland Commission on Civil Rights sexual harassment settlements (on its own terms this does not apply to either arbitral awards or arbitrations that do not result in award). *See* MD. CODE ANN., LAB. & EMPL. § 3-715(2)(a)(3) (West 2018).

74. Surely the conservative justices must subscribe to the words of the Good Book: “And ye shall know the truth, and the truth shall make you free.” *John* 8:32 (King James). Two of the justices – Kavanaugh and Clarence Thomas – have faced serious allegations of sexual misconduct, with those involving Thomas featuring a past work subordinate. *See, e.g.*, Ron Elving, *Anita Hill’s Challenge To Clarence Thomas: A Tale Of 2 Lives And 3 Elections*, NPR (Sept. 20, 2018), <https://www.npr.org/2018/09/20/649721806/anita-hills-challenge-to-clarence-thomas-a-tale-of-2-lives-and-3-elections>.

