A Real Right to Litigate: Dismantling Mandatory Arbitration and the Restoring Justice for Workers Act

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I. INTRODUCTION

Arbitration is a private alternative dispute resolution method where the parties submit their dispute to one or more independent third-party arbitrators who make a binding decision.[1] Arbitration has several attractive qualities, such as more lenient pleading standards,

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[1] *What is Arbitration?*, WORLD INTELL. PROP. ORG., https://www.wipo.int/amc/en/arbitration/what-is-arb.html (last visited Feb. 4, 2023) [hereinafter *What is Arbitration?*].

expedited discovery, reduced motion practice and hearings, as well as limited appeals, which result in faster final judgments.[2] These benefits tend to make arbitration cheaper and faster than litigation.[3]

But, deciding to participate in arbitration is not always voluntary. Arbitration becomes mandatory for employees when corporations include an arbitration provision in their employment contracts, prohibiting employees from bringing any future claim in court.[4] These provisions also regularly include class action waivers.[5] Mandatory (or forced) arbitration has come under public scrutiny in recent years. In 2009, then-Senator Al Franken brought legislation after a KBR-Halliburton employee could not bring a sexual assault-related suit in court because of an arbitration agreement.[6] Similarly, at the beginning of the #MeToo Movement, Gretchen Carlson could not sue Fox News in court for then-CEO Rodger Ailes' sexual harassment.[7] Again, a mandatory arbitration clause in her contract directly prevented a lawsuit.[8] After these events, Senator Kirsten Gillibrand said of arbitration that "[t]he goal, at the time [the FAA was passed], was to help two companies resolve disputes between themselves, it wasn't meant to be used against employees[.]"[9]

There have been some small victories for ending mandatory arbitration. In response to the KBR-Halliburton employee's claim, Congress amended the Defense Department spending bill to ban the Pentagon from using companies that required employees to arbitrate sexual assault claims.[10] More recently, on March 3, 2022, President Biden signed into law a bill that ended mandatory arbitration in

2 Julia M. Jordans & Antonia Stamenova-Dancheva, *AAA Arbitration for Employment Lawyers,* LEXIS (Mar. 30, 2022), https://plus.lexis.com/api/permalink/f0940c9c-9b1d-4306-a052-2abe7d115d05/?context=1530671.

3 *Id.*

4 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, at 3.

5 *Id.* at 16.

6 Stephanie Mencimer, *The War of Rape: What Happened to Jamie Leigh Jones in Iraq?*, THE WASH. MONTHLY, (Oct. 16, 2013), https://washingtonmonthly.com/2013/10/16/the-war-of-rape/.

7 Kathryn R. Meyer, *Why Victims Deserve the Right to Choose How to Resolve Their Sexual Harassment Claims,* 10 ARB. L. REV. 164, 173 (2018).

8 *Id.* (describing how Carlson was eventually able to circumvent the arbitration agreement by suing Ailes as an individual).

9 Amanda Becker, *#MeToo Exposed How Forced Arbitration Protects Harassers. A Bipartisan Group of Lawmakers Wants to Ban It*, (July 14, 2021, 5:00 AM), THE 19TH NEWS, https://19thnews.org/2021/07/forced-arbitration-congress-gretchen-carlson/.

10 Mencimer, *supra* note 6.

workplace sexual assault and harassment cases.[11] These victories are impactful but do very little to change the overall landscape of mandatory arbitration for workers.

Introduced by Representative Jerrold Nadler on July 29, 2021, the Restoring Justice for Workers Act[12] intends to create larger change by moving "[t]o prohibit forced arbitration in work disputes[.]"[13] If passed, the Act would invalidate all pre-dispute arbitration agreements for employment disputes and create strict requirements for post-dispute arbitration agreements.[14] Moreover, the Act would establish a civil action so that any person injured by a violation of the Act may bring a lawsuit against the violator.[15] These provisions are necessary for workers to have a real right to litigate disputes, but they do not go far enough. While the bill provides steadfast protection in employment forced arbitration, it is important to note that the scope of the Act is narrow compared to the expansiveness of mandatory arbitration clauses. The Act only targets mandatory arbitration in the employment context; however, mandatory arbitration agreements prohibit litigation in countless other disputes, including consumer contracts.[16] The various areas of law impacted by the proliferation of pre-dispute mandatory arbitration agreements are not discussed in depth in this Comment. Further, the bill does nothing for individuals who waive their rights and end up in the inequitable arbitration system.[17]

This Comment argues that the Restoring Justice for Workers Act is necessary to return a substantive right to litigate to workers. The Act, however, is insufficient to deal with the full breadth of issues that mandatory arbitration presents for workers. The Restoring Justice for Workers Act must become law because federal law preempts states from bringing their own legislation. Part II of this Comment gives background on mandatory arbitration, explaining the Supreme Court's jurisprudence strengthening the Federal Arbitration Act ("FAA") and how the FAA preempts states from regulating arbitration agreements. This section also establishes the prevalence and inequity of mandatory arbitration agreements. Part III of this Comment examines the

11 Amy B Wang & Eugene Scott, *Biden Signs Bill Ending Forced Arbitration in Sexual Assault, Harassment Cases*, WASH. POST, (Mar. 3, 2022, 1:38 PM), https://www.washingtonpost.com/politics/2022/03/03/biden-signs-new-law-ending-forced-arbitration-sex-assault-harassment/.

12 Restoring Justice for Workers Act, H.R. 4841, 117th Cong. (2021).

13 *Id.*

14 *See id*. at § 402(a).

15 *Id.* at § 402(c).

16 Stone, *supra* note 4.

17 *See* discussion *infra* Part III.C.

Restoring Justice for Workers Act and describes its purpose, protections, and limitations. Part IV of this Comment discusses why the bill is necessary, why it may not become law, and how future legislation could build on its foundation. To conclude, this Comment argues that to go further, the FAA must be amended to allow states to experiment with their own statutory schemes.

II. BACKGROUND/OVERVIEW OF MANDATORY ARBITRATION

A. FAA Supreme Court Jurisprudence

Arbitration became a cornerstone of alternative dispute resolution with the passage of the FAA in 1925.[18] Section two of the FAA provides that "[a] written provision . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . or an agreement in writing to submit to arbitration an existing controversy . . . shall be valid, irrevocable, and enforceable[.]"[19] The United States Supreme Court has held that the FAA is expansive in nature.

The United States Supreme Court's history of favoring arbitration provisions began in the 1980s with *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*[20] and has continued over the last forty years. *Moses* stands for the proposition that when there is doubt concerning the scope of arbitrable issues, that doubt should be resolved in favor of arbitration.[21] In coming to this decision, the Court explained that it sought to respect the federal policy of favoring arbitration.[22] One year after *Moses*, the Court decided *Southland Corp. v. Keating*,[23] which established that the FAA applies in state as well as federal courts.[24] *Southland* involved a California statute, and according to the California Supreme Court, the claims brought under the statute in state court could not be arbitrated, although those same claims could have been arbitrated if the dispute had been brought as a diversity action in federal court.[25] The California Supreme Court reasoned that the FAA only applied in federal courts.[26] The United States Supreme Court rejected the California Supreme Court's interpretation of the FAA, citing

18 Stone, *supra* note 4, at 6.
19 9 U.S.C. § 2.
20 Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).
21 *Id*. at 24–25.
22 *Id.*
23 Southland Corp. v. Keating, 465 U.S. 1 (1984).
24 *Id.* at 15–16.
25 *Id.* at 15.
26 *Id.*

concerns over forum shopping and frustrating the purpose of the FAA.[27] The Court held that the FAA's rule favoring arbitration was a substantive rule which Congress intended to be applicable in state as well as federal courts.[28] The Court further explained that Congress intended to prevent state governments from undercutting arbitration agreements.[29]

The Court considered mandatory arbitration in the employment context in *Gilmer v. Interstate/Johnson Lane Corp.*,[30] where the Court decided whether an employee could be forced to arbitrate an Age Discrimination in Employment Act claim pursuant to an arbitration agreement in the employee's securities registration application.[31] Deciding that Gilmer could be forced to arbitrate, the Court affirmed that statutory claims, in addition to contractual claims, are enforceable under the FAA.[32] The Court also noted that simply by agreeing to arbitrate statutory claims, parties do not lose any substantive rights under that statute; rather, they are merely required to submit their claim in an arbitral forum.[33] Justice Stevens wrote the dissent, explaining that the Court should not enforce arbitration contracts for employment issues.[34] Stevens pointed to Section One of the FAA, which states that, "[n]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[35] Stevens claimed that by ignoring this provision, the majority had essentially rewritten the statute and dismissed the inequity in bargaining power between employers and employees that Congress considered when writing the statute.[36]

In coming to a 5–4 decision in *Circuit City Stores v. Adams*,[37] the Court considered Section One of the FAA more directly, resolving a circuit split.[38] The Ninth Circuit held that the exception in section one applied to all employment contracts, while other circuits held that the exception only applied to employment contracts for transportation

27 *Id.*
28 *Id.* at 16.
29 *Keating*, 465 U.S. at 16.
30 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
31 *Id.* at 23.
32 *Id.* at 26.
33 *Id.*
34 *Id.* at 36 (Stevens, J., dissenting).
35 *Id.* (Stevens, J., dissenting) (quoting 9 U.S.C.S. § 1).
36 *Gilmer*, 500 U.S. at 42–43 (Stevens, J., dissenting).
37 Cir. City Stores v. Adams, 532 U.S. 105 (2001).
38 *Id.* at 109.

workers.[39] The Court ruled in alignment with the majority of circuits, reasoning that the exception could not be for all employment contracts as such interpretation would render the specific language excluding seamen and railroad employees meaningless.[40] Writing for the dissent, Justice Stevens pointed to the legislative history of the FAA and explained why the exception should be applied universally to employment contracts.[41] Stevens reasoned that when the bill was introduced, it only mentioned commercial contracts, not employment contracts, yet organized labor nevertheless opposed the bill.[42] In response to that opposition, Secretary of Commerce Herbert Hoover suggested the exclusionary language, which was added when the bill was reintroduced in the next session of Congress.[43] The dissenting justices also noted that a plain reading of the statute expressed a broad exception due to the "any other class of worker[]" language.[44]

In *AT&T Mobility LLC v. Concepcion*,[45] the Court considered whether the FAA preempts states from making the enforcement of arbitration agreements conditional on the availability of class action arbitration procedures.[46] The arbitration agreement in dispute required that all disputes be brought in arbitration and only in the party's individual capacity.[47] The Ninth Circuit found this provision unconscionable in accordance with the California court's *Discover Bank* Rule.[48] The *Discover Bank* Rule is as follows:

> [W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' Under these circumstances, such waivers are

39 *Id*.
40 *Id.* at 113–14.
41 *Id.* at 125 (Stevens, J., dissenting).
42 *Id.* at 125–26 (Stevens, J., dissenting).
43 *Adams*, 532 U.S. at 127 (Stevens, J., dissenting).
44 *Id.* at 128 (Stevens, J., dissenting).
45 AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).
46 *Id.* at 336.
47 *Id.*
48 *Id.* at 336–38.

> unconscionable under California law and should not be enforced.[49]

The Court found the rule to be problematic.[50] Section two of the FAA states that the pertinent agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[51] But still, the Court determined that requiring the availability of class action arbitration would interfere with the fundamental purpose of the FAA.[52] The majority further found that class arbitration is inconsistent with the nature of bilateral arbitration, so it could not stand.[53] The majority reasoned that class disputes would end the informality of arbitration and thus eliminate the elements of arbitration that make it attractive.[54] Specifically, class disputes would disrupt arbitration's low prices and quick decision-making because arbitrators would have to go through the process of determining: (1) if the class may be certified; (2) if the named parties are representative and typical of the class; and (3) what procedures for discovery would be used for the class.[55] According to the majority, this necessary formality makes class action arbitration inconsistent with the principles of bilateral arbitration.[56]

Writing for the dissent, Justice Breyer reasoned that because California law restricted the enforcement of certain class action waivers for all contracts, regardless of whether it involved an arbitration agreement, the *Discovery Bank* Rule did not obstruct the enforcement of the FAA.[57] The dissent further expounded that nothing about class arbitration is incompatible with the overall practice of arbitration, meaning that class arbitration and the overall practice of arbitration can coexist without conflict.[58]

In *Epic Sys. Corp. v. Lewis*,[59] the Court considered whether the National Labor Relations Act ("NLRA") allows employees to bring class action disputes regardless of whether employees were bound by forced arbitration class action waivers.[60] Employees argued that class action

49 *Id.* at 340 (quoting Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (2005)).
50 *Id.* at 348.
51 *Concepcion*, 563 U.S. at 339 (quoting 9 U.S.C. § 2).
52 *Id.* at 344.
53 *Id.* at 348.
54 *Id.*
55 *Id.* at 348.
56 *Id*.
57 *Concepcion*, 563 U.S. at 357 (Breyer, J., dissenting).
58 *Id.* at 362 (Breyer, J., dissenting).
59 Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).
60 *Id.* at 1619.

waivers violated the NLRA's prohibition on barring employees from engaging in concerted activities.[61] As a result, the Ninth Circuit held that the savings clause of the FAA meant that forced arbitration class action waivers were unenforceable.[62] The Supreme Court disagreed with the Ninth Circuit, stating that when possible, it was the Court's duty to read legislation as harmonious rather than conflicting.[63] Accordingly, the Court held that the FAA and NLRA were not in conflict, but rather hold separate spheres of influence, meaning that the arbitration class action waiver was enforceable.[64]

Writing for the dissent, Justice Ginsburg stated that the majority overlooked the employee-employer power inequity that Congress sought to correct with the NLRA.[65] In Justice Ginsburg's view, the majority did not interpret the FAA and NLRA as harmonious, but instead made the employee-protective NLRA "subordinate to" the FAA.[66] Justice Ginsburg and the other dissenters would have held that bringing collective claims falls under the umbrella of other "concerted activities[.]"[67]

There is a vast collection of academic literature criticizing this line of case law.[68] One scholar, Maria Glover, expressed her concern that the

61 *Id.* at 1620.

62 *Id.*

63 *Id.* at 1619.

64 *Id.*

65 *Epic Sys. Corp*., 138 S. Ct. at 1633 (Ginsburg, J., dissenting).

66 *Id.*

67 *Id.* at 1637 (Ginsburg, J., dissenting).

68 *See* Samuel R. Bagenstos, *Consent, Coercion, and Employment Law*, 55 HARV. C.R.-C.L. L. REV. 409, 414 (2020) (criticizing the inconsistent conceptions of employer and employee choice in these cases compared to other areas of the law); Stephanie Greene & Christine Neylon O'Brien, *Epic Backslide: The Supreme Court Endorses Mandatory Individual Arbitration Agreements - #TimesUp on Workers' Rights*, 15 STAN. J. C.R. & C.L. 43, 47 (2019) (detailing the few options remaining for workers to redress wage and hour disputes in the wake of *Epic Systems*); Brian Farkas, *Arbitration at the Supreme Court: The FAA from RBG to ACB*, 42 CARDOZO L. REV. 2927 (2021) (exploring the merits of Justice Ginsburg's important dissents in this area and explaining the likely trajectory of the Court with the substitution of Justice Ginsburg for Justice Barret); Martin H. Malin, *The Three Phases of the Supreme Court's Arbitration Jurisprudence: Empowering the Already-Empowered*, 17 NEV. L. J. 23, 27 (2016) (arguing that the line of Supreme Court arbitration cases only considers concerns of businesses imposing arbitration agreements but disregards the needs of the weaker party in the transaction); Judith Resnik, *Arbitration, Transparency, and Privatization: Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L. J. 2804, 2808 (2015) (explaining how the Supreme Court jurisprudence led to an increase in pre-dispute arbitration agreements but not an increase in actual arbitration); Charles A. Sullivan & Timothy P. Glynn, *Satire: The FAA Triumphal: A Modest Opinion*, 19 EMP. RTS. & EMP. POL'Y J. 103, 104 (2015) (criticizing the interpretive methodology of the Court and forecasting how the FAA could supplant the traditional court resolution process);

landscape of recent Supreme Court jurisprudence in this area "creates an incentive for entities to self-deregulate through private contract."[69] Her claim is that the jurisprudence allows corporations to self-deregulate, thus eliminating every check on corporations other than the parties who enter into these contracts.[70] But, the consumers and employees who enter into these contracts are uneducated about the law in this area, and even if they were aware, mandatory arbitration provisions are so pervasive that they cannot be effectively boycotted.[71] Glover's concerns about this line of case law, however, are not universal, with some believing that the Court decided these cases exactly right.[72] These scholars argue that the FAA jurisprudence simply adheres to the traditional foundations of the freedom to contact, party autonomy, and party accountability.[73] Even when those scholars admit that many arbitration agreements favor the drafter, they deem this unimportant since the freedom to contract and bargain exists for both parties.[74] Under either interpretation, the Court repeatedly strengthened the FAA.

B. Recent State Law Struck Down by Federal Courts

In *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*,[75] the United States Supreme Court considered a Kentucky Supreme Court ruling that undermined mandatory arbitration agreements.[76] The Kentucky Supreme Court determined that individuals holding power of attorney for another cannot enter into mandatory arbitration agreements.[77] Because the Kentucky Supreme Court singled out arbitration contracts,

Chaudry, M. Isabelle, *An Analysis of Legislative Attempts to Amend the Federal Arbitration Act: What Policy Changes Need to Be Implemented for #MeToo Victims*, 43 SETON HALL LEGIS. J. 215, 219 (2019) (exploring how policy changes to resolving workplace sexual harassment disputes should be legislated given the state of FAA jurisprudence).

69 J. Maria Glover, *Arbitration, Transparency, and Privatization: Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L. J. 3052, 3091 (2015).

70 *Id.*

71 *Id.* at 3091–92.

72 *See* Steven W. Feldman, *Italian Colors and Freedom of Contract Under the Federal Arbitration Act: Has the Supreme Court Enabled Disappearing Claims And the Erosion Of Substantive Law?*, 2016 MICH. ST. L. REV. 109, 167 (2016); *see also* Zev J. Eigen & David Sherwyn, *Deferring for Justice: How Administrative Agencies Can Solve the Employment Dispute Quagmire by Endorsing an Improved Arbitration System*, 26 CORNELL J. L. & PUB. POL'Y 217, 272–73 (2016) (arguing that arbitration is the best way to resolve employment disputes and that any shortfalls can be fixed by regulating the system, rather than limiting arbitration agreements).

73 Feldman, *supra* note 72.

74 Feldman, *supra* note 72.

75 Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421 (2017).

76 *Id.* at 1424–25.

77 *Id.* at 1425.

the United States Supreme Court reasoned that the decision conflicted with the FAA and thus could not stand.[78] Since the rule allowed individuals holding power of attorney to enter into contracts generally, but not arbitration contracts, it put arbitration contracts on a different footing than contracts generally.[79] The Supreme Court confirmed that the FAA "preempts any state rule discriminating on its face against arbitration[.]"[80] Accordingly, when a state enacts a rule, statutorily or judicially, that disfavors arbitration, or challenges the bilateral nature of arbitration, the FAA will preempt its enforcement.[81]

States have tested these principles. On March 18, 2019, New Jersey passed N.J. Stat. § 10:5-12.7.[82] This statute invalidated provisions in employment contracts that limited substantive or procedural rights or remedies in discrimination, retaliation, or harassment suits.[83] The statute also nullified some arbitration agreements.[84] In 2021, the Federal District Court of New Jersey held that N.J. Stat. § 10:5-12.7 conflicted with the FAA and therefore could not stand under preemption law.[85]

On July 11, 2018, New York State enacted N.Y. C.P.L.R. § 7515.[86] This statute prohibited the enforcement of contracts requiring parties to arbitrate claims of sexual harassment.[87] In 2019, the Southern District Court of New York held that N.Y. C.P.L.R. § 7515(a)(2) conflicted with the FAA and must be displaced due to preemption.[88]

On October 10, 2019, California Governor Gavin Newsom signed into law California Assembly Bill 51, 2019 Cal. Stats. Ch. 711.[89] This bill imposed civil and criminal sanctions on employers for executing arbitration agreements.[90] In 2021, the Court of Appeals for the Ninth

78 *Id.*

79 *See id.* at 1429.

80 *Id.* at 1426.

81 *Id.*; *see* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 343 (2011).

82 N.J. Civ. Just. Inst. v. Grewal, No. CV 19-17518, 2021 WL 1138144, at *1 (D.N.J. Mar. 25, 2021).

83 *Id.*

84 *Id.* at *2.

85 *Id.* at *8.

86 Latif v. Morgan Stanley & Co. LLC, No. 18CV11528 (DLC), 2019 WL 2610985, at *3 (S.D.N.Y. June 26, 2019).

87 *Id.*

88 *Id.*

89 Chamber of Com. of U.S. v. Bonta, 13 F.4th 766, 771 (9th Cir. 2021).

90 *Id.* at 772.

Circuit found that even though the bill did not directly conflict with the FAA, it frustrated the purpose of the FAA and was thus preempted.[91]

Given the sweeping nature of the FAA, the federal government effectively took away the states' ability to legislate arbitration agreements. Scholars agree that the Court's jurisprudence eliminated states' ability to regulate arbitration agreements, regardless of the public policy a state might be trying to protect.[92] This approach is heavily criticized, with some scholars arguing that individual states should be able to regulate in this area.[93] This regulation could be either exclusively by states or collaborative with the federal government; however, completely preventing states from acting in this area is impermissible.[94] These agreements must be regulated, but every time a state attempts to limit arbitration or make the process more fair for less powerful entities like individual workers, the FAA stands in the way.

C. The Right to Contract

A robust right to contract further solidifies the validity of arbitration agreements. The purpose of the FAA was, in part, to ensure that people lived up to their agreements.[95] The passing of the FAA guaranteed that arbitration contracts would be on equal footing with every other contract.[96] The right to contract is important, but states can typically enact economic regulations as long as they are justified by a rational basis.[97] These regulations in the employment context include prohibiting work contracts for less than the minimum wage,[98] and prohibiting contracts to commit a crime.[99]

In typical state law systems, there are various restrictions that make an otherwise valid contract unenforceable. A contract could be defective for lack of a proper offer, acceptance, or consideration.[100] A contract that is unconscionable or is the product of fraud or duress may

91 *See id*. at 791; *but see* Chamber of Com. of U.S. v. Bonta, 45 F.4th 1113 (9th Cir. 2022) (explaining that on August 22, 2022, a majority of the panel voted to withdraw both the opinion and the dissent and to resubmit the case).

92 E. Gary Spitko, *Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*, 20 HARV. NEGOT. L. REV. 1, 59 (2015).

93 See *id.* at 3–4.

94 *Id.* at 59–60.

95 *Bonta*, 13 F.4th at 771 (citing H.R. Rep. No. 68-96, at 1 (1924)).

96 *Id.*

97 *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 398 (1937).

98 *Id.* at 399.

99 Bowyer v. Burgess, 351 P.2d 793, 794 (Cal. 1960).

100 *See* Trauma Serv. Grp. v. U.S., 104 F.3d 1321, 1325 (Fed. Cir. 1997).

also be unenforceable.[101] A contract is traditionally considered unconscionable if there is an absence of choice by one party, and the terms of the contract unreasonably favor the other party.[102] In theory, an arbitration contract could be deemed unconscionable for reasons outside of the nature of arbitration; however, mandatory arbitration contracts cannot be considered per se unconscionable because of the protection they receive from the FAA.[103] If a state were to legislate that forced arbitration contracts are per se unconscionable and therefore unenforceable, the federal courts would almost certainly deem that law precluded. Some states, like California, have attempted this move by categorizing forced arbitration agreements as unconscionable due to the power inequities between companies and individuals.[104] However, the Supreme Court held that said statute conflicted with the scheme of the FAA.[105]

The Government typically allows individuals to contract away their rights as they please. This is no different for an individual's right to bring claims in court, as that right can be contracted away as well. A dilemma occurs when a contract is enforced that a party is not fully aware of and has no ability to negotiate. Arbitration contracts are protected even under those circumstances, creating a system of large-scale unfair treatment.

D. Class Action Waivers

Arbitration provisions regularly include class action waivers, and since there is a cost to arbitration, bringing a single claim can be detrimental.[106] Even if one claim is successful in arbitration, the damages could easily be less than the cost of arbitration.[107] Costs associated with arbitration include a filing fee, hearing fee, room rentals, and more.[108] The filing fee for an employee bringing a claim against an employer is typically 300 dollars.[109] Arbitration providers try to be

101 *See* Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 68 (2010).

102 Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449–50 (D.C. Cir. 1965).

103 *See* Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1426 (2017).

104 *State Courts and the Federalization of Arbitration Law*, 134 HARV. L. REV. 1184, 1187 (2021).

105 *Id.*; *see* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011).

106 J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1737 (2006).

107 *Id.*

108 *Employment/Workplace Fee Schedule: Costs of Arbitration*, AM. ARBITRATION ASS'N, 1, 2 (Nov. 1, 2019), https://www.adr.org/sites/default/files/Employment_Fee_Schedule1Nov19_0.pdf.

109 *Id.* at 1.

sympathetic towards employees of lower means by granting them lower filing fees than employers, whose typical filing fee is 2,200 dollars.[110] But that is merely one of the many fees associated with arbitration.[111] If the filing fees and other prospective costs of arbitration amount to more than what could be gained with a favorable judgment, then a claim will almost certainly not be brought.

This phenomenon happens in court as well, where people refrain from bringing a suit because the likely damages are less than it would cost to litigate. In such an instance, however, individuals may be able to join with other similarly harmed individuals to bring a class action suit. This option. However, it is not available when there is a class action waiver. The impossibility of combining claims into a class action would effectively revoke the ability of people subject to those agreements to correct those wrongs done against them.[112] This is not uncommon either; a Consumer Financial Protection Bureau report released in 2015 indicated that ninety percent of mandatory arbitration agreements include a class action waiver.[113]

E. Prevalence of Mandatory Arbitration Agreements

Since the 1990s, mandatory arbitration has transitioned from a provision often collectively bargained for by unions into a commonplace provision in individuals' employment contracts.[114] About one-quarter of nonunion workers' employers require them to sign mandatory arbitration agreements, and about eleven percent of union workers are subject to such agreements after being collectively bargained for.[115]

In recent decades, mandatory arbitration has grown significantly in consumer contracts. The Consumer Financial Protection Bureau ("CFPB") released a report in 2015 indicating that many major consumer finance industries, like credit card companies and payday loan lenders, use arbitration clauses in the majority of their contracts.[116] That CFPB report indicated that credit card companies accounting for fifty-three percent of the market share use arbitration provisions in their contracts.[117] Additionally, the CFPB found that arbitration

110 *Id.*

111 *Id.* at 1–4 (listing hearing fees, administration fees, case management fees, hearing room rentals, and arbitrator/mediator fees as some of the other costs to arbitration).

112 Glover, *supra* note 106, at 1736–37.

113 Stone, *supra* note 4, at 16.

114 Stone, *supra* note 4, at 14–15.

115 Stone, *supra* note 4, at 15.

116 Stone, *supra* note 4, at 16.

117 Stone, *supra* note 4, at 16.

agreements appeared in contracts for ninety-two percent of prepaid cards and that eighty-six percent of the largest private student loan lenders use arbitration provisions in their contracts.[118] The CFPB also concluded that a staggering over ninety-nine percent of payday lenders in California and Texas use arbitration provisions.[119] Furthermore, a 2009 study conducted by Katherine Stone found that "all four of the largest cell phone companies, five of the eight largest cable companies, six of the nine major credit card companies, and three of four large national retail banks," required an arbitration term in their consumer contracts.[120]

When nearly every company in a market uses the same practice, majority acceptance forces the remainder of the market to accept that practice as well. This is the case no matter what the market is, so long as it is important enough that people cannot walk away. People can leave a specific job, but they generally cannot abandon the employment market as a whole.

F. History of Inequitable Outcomes

In a congressional hearing of the Health, Employment, Labor, and Pensions Subcommittee on November 4, 2021, a witness named Glenda Perez detailed her experience in forced arbitration.[121] Perez explained certain decisions by the arbitrator that she felt were unfair, such as denying a discovery request for her employee personal file and demanding that she withdraw her Equal Employment Opportunity Commission complaint.[122] After the arbitrator found against Perez, she discovered that the arbitrator used to work for the firm that represented her employer and that the arbitrator even listed her employer's counsel as a reference.[123] While this is just one anecdote of unfair predisposition towards one party, it demonstrates that there are undisclosed factors at play in an arbitrator's decisions. One of the most common undisclosed factors is that arbitration providers depend on repeat customers, like employers.

Arbitration providers tend to favor repeat customers in outcomes, which creates a disparity for workers going through the process. Large

118 Stone, *supra* note 4, at 16.

119 Stone, *supra* note 4, at 16.

120 Stone, *supra* note 4, at 17.

121 *Closing the Courthouse Doors: The Injustice of Forced Arbitration Agreements: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions*, 117th Cong. 2 (2021) (testimony of Glenda Perez).

122 *Id*.

123 *Id*.

companies use arbitration services regularly, whereas individual consumers or employees likely will never use an arbitration service again. Intuition tells us that arbitration providers would implicitly favor the repeat customer. That intuition is difficult to study due to the combination of ethical issues preventing unbiased blind studies for real parties and innumerable factors that make it difficult to compare real-life arbitration outcomes to real-life litigation outcomes.[124] Yet, the available numbers indicate that the intuitive favoritism is real. The available data indicates that employees win in arbitration at only fifty-nine percent of the rate they do in federal courts and only thirty-eight percent as often in state courts.[125] Some who have served as arbitrators agree that there is an implicit, unintentional bias toward repeat customers. In the same Health, Employment, Labor, and Pensions Subcommittee hearing where Perez was a witness, Representative Susan Wild spoke about her experience in employment law as a lawyer for plaintiff employees, as a lawyer for defendant employers, and as an arbitrator.[126] Wild explained that in her experience, arbitrators depended on large institutions to be repeat customers if they wanted to maintain arbitration as their primary employment.[127] As a result, Representative Wild felt that arbitrators had an inherent, though unintentional, bias in favor of those potential repeat customers like employers, and against one-time plaintiff employees.[128]

One potential explanation for the unequal outcomes is that employees often do not have legal representation, and representation substantially increases the chances of success. At the Health, Employment, Labor, and Pensions Subcommittee hearing on November 4, 2021, Alexander Colvin, a Cornell University professor, spoke about this phenomenon: he found that an employee's chances of success are reduced by forty-six percent when they are not represented in arbitration.[129] Colvin states that because many Americans cannot afford an attorney's high hourly fee, they often compensate attorneys with a

124 Stone, *supra* note 4, at 19; David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1283 (2009).

125 Stone, *supra* note 4, at 19.

126 *Closing the Courthouse Doors: The Injustice of Forced Arbitration Agreements: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions*, 117th Cong., YOUTUBE (Nov. 4, 2021), https://www.youtube.com/watch?v=0LBCk-dr6rU&t=3498s (statement of Representative Susan Wild starting at 57:50 and ending at 102:48).

127 *Id.*

128 *Id.*

129 *Closing the Courthouse Doors: The Injustice of Forced Arbitration Agreements: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions*, 117th Cong. 9 (2021) (testimony of Alexander Colvin, Dean and Professor of Conflict Resolution at Cornell University).

contingency fee if the claim is successful.[130] But, it does not necessarily make fiscal sense for attorneys to take contingent fee cases in arbitration because, on average, successfully arbitrated claims result in far less compensation than successfully litigated claims in federal and state courts.[131] When you consider the chance of winning and the likely damages, the mean of damages for an arbitrated claim is $25,929.[132] This is substantially less compared to $143,497 for such claims in federal court and $328,008 for such claims in state court.[133] This lower payout is not only unfair on its face but also hurts employees' chances of retaining representation and succeeding.[134] This is particularly distressing because a lack of representation statistically decreases damages by 47 percent.[135] As a result, this becomes a devastating cycle where employees struggle to retain representation because of low payouts in arbitration, and employees get lower payouts in arbitration because they are unrepresented.

Between a reduced chance of winning a case and substantially smaller average rewards, there is a disparate outcome between litigated cases and forcibly arbitrated cases. This inequity yearns for a remedy, hence the introduction of the Restoring Justice for Workers Act. If passed, the Restoring Justice for Workers Act would effectively stop the enforcement of pre-dispute mandatory arbitration agreements in the employment setting, allowing employees to litigate their claims in a court of law and resulting in more justice.

III. THE RESTORING JUSTICE FOR WORKERS ACT

A. Purpose of the Act

The bill states that its purpose is to "prohibit forced arbitration in work disputes[.]"[136] Sponsors of the bill described their intent when introducing the bill, and at the 117th Congress, Congressman Bobby Scott stated:

> Workers should not be coerced into signing away their rights as a condition of their employment. Unfortunately, that is the reality for millions of workers across the country. Employers are increasingly using mandatory arbitration agreements to

130 Testimony of Alexander Colvin, *supra* note 129.
131 Testimony of Alexander Colvin, *supra* note 129.
132 Testimony of Alexander Colvin, *supra* note 129.
133 Testimony of Alexander Colvin, *supra* note 129.
134 Testimony of Alexander Colvin, *supra* note 129.
135 Testimony of Alexander Colvin, *supra* note 129.
136 Restoring Justice for Workers Act, H.R. 4841, 117th Cong. (2021).

> deny employees a fair venue to seek recourse for wage theft, discrimination, or harassment. The Supreme Court's decision in *Epic Systems v. Lewis* went further by undermining workers' rights to file joint, class, or collective legal actions. The Restoring Justice for Workers Act would help restore employees' fundamental rights to have their day in court and join with their co-workers to hold employers accountable for unlawful conduct.[137]

Congressman Jerrold Nadler also discussed the purpose of the Restoring Justice for Workers Act, stating that:

> For far too long, corporations have used mandatory arbitration clauses—which are often buried in the fine print of employment contracts—to tie the hands of American workers and strip them of their right to take employers to court when their rights are violated . . . [v]ictims of wage theft, discrimination, harassment, and other forms of corporate abuse and misconduct deserve their day in court. I'm proud to join Chairman Scott to introduce the Restoring Justice for Workers Act to finally put an end to this exploitation of workers and ensure they have equal protection under the law.[138]

The Act's direct language and its proponents' explanations demonstrate its intent: to ensure that workers have the option of litigating their claims in a court of law and are not relegated to seeking justice in an inequitable forum.

B. Protection Under the Act

The Restoring Justice for Workers Act deals with covered entities and workers. Covered entities include employers as defined by the Fair Labor Standards Act of 1938.[139] The basic definition of employer under the Fair Labor Standards Act is: "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization[.]"[140] The bill's drafters understood that not every worker works for a traditional employer and extended coverage to non-employers who engage in worker's services.[141] Under this theory, if a private individual pays a

137 Press Release, House Educ. & Lab. Comm., Scott & Nadler Reintroduce the Restoring Justice for Workers Act (July 29, 2021).

138 *Id.*

139 H.R. 4841, 117th Cong. § 401(1).

140 29 U.S.C. 203(d).

141 H.R. 4841, 117th Cong. § 401(2).

worker to clean his or her home, that private individual is considered a covered entity under this bill.

For the purposes of the bill, the term "[w]orker" refers to employees and anyone engaged by covered entities to perform services, including independent contractors.[142] This avoids litigation over whether a worker hired by a covered entity is an independent contractor, employee, or of some other status. Companies like Uber and Lyft spend hundreds of millions of dollars to categorize their workers as contractors rather than employees.[143] One reason for this categorization is that arbitration contracts can make a huge difference in dispute resolution between gig workers and the companies that employ them.[144] Arbitration for gig workers diminishes workers' abilities to practically resolve disputes, forgoes the possibility that any resolution is precedent-setting, and reduces the cost to employers for misclassifying workers.[145] Since the Restoring Justice for Workers Act treats gig workers, independent contractors, and employees the same, any argument about worker classification becomes moot for the purpose of arbitration contract enforceability.

The bill distinguishes between pre-dispute arbitration agreements and post-dispute arbitration agreements. The former mandates arbitration as the source of resolution before any incident occurs, while the latter mandates arbitration of a specific claim after an incident occurs.[146] The bill strictly prohibits the enforcement of any pre-dispute arbitration agreement that requires the arbitration of a work dispute.[147] There is, however, more flexibility for post-dispute agreements. Post-dispute agreements may be valid if they meet the following conditions:[148] (1) the agreement must not have been required by the covered entity,[149] (2) the worker(s) entering the agreement must have been notified in writing that they can reject the agreement without retaliation and that they have certain other rights under the National Labor Relations Act,[150] (3) the worker(s) must wait at least forty-five

142 *Id.* at § 401(5).

143 Noam Scheiber, *Uber and Lyft Ramp Up Legislative Efforts to Shield Business Model*, N.Y. TIMES, https://www.nytimes.com/2021/06/09/business/economy/uber-lyft-gig-workers-new-york.html, (Oct. 21, 2021).

144 Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. LEGAL F. 205, 205 (2017).

145 *Id.* at 205–06.

146 H.R. 4841, § 401(3–4).

147 *Id.* at § 402(a)(1).

148 *Id.* at § 402(a)(2).

149 *Id.* at § 402(a)(2)(A).

150 *Id.* at § 402(a)(2)(B).

days between being notified of their rights and entering into the agreement,[151] and (4) the worker(s) must consent to the agreement in writing.[152]

The Act also deals specifically with class action waivers. Pre-dispute class action waivers are prohibited.[153] Post-dispute class action waivers may be valid so long as they follow the same requirements as post-dispute arbitration agreements.[154] Like post-dispute arbitration agreements, post-dispute class action waivers must not be a prerequisite of continued employment and include a written notice, a forty-five-day waiting period, and written consent.[155]

Covered entities are strictly prohibited from retaliating against workers who refuse to enter into an arbitration agreement or class action waiver.[156] The bill provides that if a covered entity attempts retaliation against a worker, that worker can bring a civil action for relief under 42 U.S.C. § 2000e–5(g) or 42 U.S.C. § 1981a(b) as well as attorney's fees and other costs associated with maintaining the action.[157] For example, this protection would prevent retaliation against an employee who refuses to enter into a post-dispute arbitration agreement after the requisite conditions were met. Alternatively, if an employee were forced into signing a post-dispute arbitration agreement before one of the conditions was met, the employee could bring a claim. Importantly, as a practical matter under this statutory scheme, employees do not require civil actions to protect themselves against pre-dispute arbitration agreements. If a worker signed a pre-dispute arbitration agreement, and then later brought a dispute in court, there would be no action available for the employer to pursue. Arguing that the arbitration agreement exists would be useless because under this bill it would be unenforceable.

The bill avoids detrimentally impacting unions by carving out an exception for arbitration agreements reached in collective bargaining.[158] The rationale here is twofold: (1) unions have more bargaining power than individual workers, so their arbitration agreements should be fairer, and (2) unions typically represent union

151 *Id.* at § 402(a)(2)(C).
152 H.R. 4841, § 402(a)(2)(D).
153 *Id.* at § 402(a)(1).
154 *Id.* at § 402(a)(4).
155 *Id.* at § 402(a)(2).
156 *Id.* at § 402(a)(2)(B)(i).
157 *Id.* at § 402(c).
158 H.R. 4841, § 402(d)(2).

members, thus, they are not necessarily at a disadvantage when arbitrating against larger employers.

C. Limitations of the Bill

Passing the Resorting Justice for Workers Act will help remedy the issue of mandatory arbitration, but the bill still has significant limitations. For one, the bill only focuses on remedying the issue of mandatory arbitration in the employment sector, but mandatory arbitration is just as prevalent in other areas. The bill also affords no protection to employees who are already in the arbitration process. Furthermore, the bill does not change the fact that states are preempted from legislating arbitration agreements themselves.

The bill does not incorporate protections for workers in the arbitration process. The bill only reduces the enforcement of arbitration, but it does not seek to remedy any inequity that occurs when individuals arbitrate against large companies. As discussed earlier, there exists a disparate outcome for workers in arbitration versus workers in litigation. If the bill's drafters wanted to afford protections in the arbitration process itself, then Congress could have legislated similarly to the World Intellectual Privacy Organization's ("WIPIO") guidelines for arbitration, which allow each party to choose an arbitrator and then have those two arbitrators choose a third to complete the board.[159]

The bill's impact is similarly limited by the way that the drafters chose to present it. The Restoring Justice for Workers Act would work as an amendment to the National Labor Relations Act.[160] Including these provisions as part of the National Labor Relations Act limits their impact when you consider the wider effect that similar provisions could have if added as an amendment to the FAA itself. If this bill were to amend the FAA, then perhaps the FAA would not be as sweeping in nature and would not preempt state laws on the issue. If the bill intended instead to prevent future preemption, it could have more significant effects. It would allow states to experiment with legislative schemes and determine what is fair for themselves.

159 *What is Arbitration?*, *supra* note 1.

160 H.R. 4841, Sec. 2(4).

IV. ANALYSIS

A. Necessity of the Act

Pre-dispute mandatory arbitration for workers is fundamentally unfair.[161] It forces employees into an arbitration system with inequitable outcomes,[162] and prevents class action lawsuits.[163] Moreover, mandatory arbitration is virtually unavoidable because of how commonplace it is.[164] Even those who acknowledge that there is limited social science to support the claim that forced arbitration is unfair to say that it is still a well-founded belief.[165] There are ways we can see that mandatory arbitration is unfair beyond looking at studies. For instance, actors both for and against mandatory arbitration acknowledge that employers and corporations are given an unfair edge.[166] Forced arbitration "changes the landscape of employment dispute resolution" in inequitable ways for employees.[167] Mandatory arbitration changes the rules that enforce employment rights, changes the relative bargaining power between the employer and the employee, and lowers the potential payoffs for employees to bring claims.[168] The inequities and problems with mandatory arbitration are too substantial to allow them to persist.

The legal reality is that the injustice of mandatory arbitration cannot be remedied with state intervention, thus, modification of current federal legislation is necessary to create change in this area. Because the FAA preempts any state legislation restricting arbitration, a federal scheme like the Restoring Justice for Workers Act is required to enact change.[169]

The way said federal legislation arises is significant for both political and legal reasons. Lawmakers can stomach small changes more easily than they can large ones, so the more limited a bill is, the more politically practical it is. Sweeping change in how the law treats arbitration is welcome, but sweeping change is often dismissed by

161 Schwartz, *supra* note 124, at 1340–41.

162 Stone, *supra* note 4, at 19.

163 Glover, *supra* note 106, at 1736–37.

164 Stone, *supra* note 4, at 15.

165 Schwartz, *supra* note 124, at 1341.

166 Schwartz, *supra* note 124, at 1340–41.

167 Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 89 (2014).

168 *Id*. at 89–90.

169 *See Kindred Nursing Ctrs. Ltd. P'ship*, 137 S. Ct. at 1426.

legislatures as hasty and without regard for historical precedent.[170] Conversely, incremental change is much more palatable for legislatures due to the risk-averse nature of slower change.[171]

If there was political motivation to pass the Restoring Justice for Workers Act, it would likely achieve its goal. The structure of the Restoring Justice for Workers Act, prohibiting pre-dispute arbitration resolutions and imposing strict requirements on post-dispute arbitration agreements, along with creating a civil action for failure to follow those requirements, should be effective in diminishing unwanted arbitration in employment disputes. Prohibiting these provisions and adding a private right of action should effectively negate the growth of forced arbitration in the employment context.

The Restoring Justice for Workers Act gets a number of things exactly correct. It covers not only per se employees, but also independent contractors and gig workers, eliminating any litigation regarding a worker's status. It allows for arbitration contracts to be agreed to after the fact, but only when certain protective conditions are met, ensuring that workers are not coerced into arbitration after the fact. The bill creates a private right of action, allowing individuals affected, not just the government, to seek justice. That private right of action should not be taken for granted. Many federal laws do not include private rights of action, meaning only the government could bring suit.[172] When only the government can bring a claim, this limits how many claims can be prosecuted, inevitably leaving some claims unresolved. Whereas allowing affected individuals to bring suit directly enables more claims and allows more workers to achieve justice. This bill would substantially increase workers' ability to litigate employment disputes.

B. Obstacles to Passage

Despite the effective and legislatively friendly structure of this bill, there are reasons to doubt it will become law. The foremost reason for doubt is because this has been tried before. In 2018, a similar bill under

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170 Saul Levmore, *Interest Groups and the Problem with Incrementalism*, (Uni. of Chi. L. Sch. John M. Olin L. & Econ. Working Paper No. 501, 2009), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1274&context=law_and_economics.

171 *Id.*

172 *See* Hubbard v. Google LLC, 546 F. Supp. 3d 986, 991 (N.D. Cal. 2021) (stating that the Children's Online Privacy Protection Act does not include a private right of action); Olds v. Bank of Am., N.A., 2013 U.S. Dist. LEXIS 130576, at *4 (D. Colo. June 20, 2013) (acknowledging that Section 5 of the FTC, prohibiting deceptive acts effecting commerce, does not include a private right of action).

the same name was introduced to the 115th Congress.[173] That iteration of the bill never saw a Senate vote and died in committee.[174] In 2019, the bill was introduced again to the 116th Congress; that bill also never saw a vote.[175] There is no reason to believe this iteration will avoid a similar fate.

Additionally, the bill is fairly partisan. At the time of this Comment, there are thirty-nine cosponsors of the bill.[176] Each of them is a Democrat.[177] This is particularly alarming because other bills seeking to diminish mandatory arbitration, like the Forced Arbitration Injustice Repeal ("FAIR") Act, have at least some bipartisan support.[178] With the current composition of Congress, it is unlikely that democratic partisan policies will pass without serious compromise. Data supports that when the controlling party brings purely partisan federal legislation, it might pass through the House of Representatives, but stands almost no chance of passing the Senate and becoming law.[179] Further, any political will among Democrats for diminishing mandatory arbitration might be drawn to competing acts that get more attention. The FAIR Act[180] is a more sweeping bill that would prohibit mandatory arbitration and class action waivers in consumer, antitrust, and civil rights disputes, in addition to employment disputes.[181] Because of the sweeping nature of the FAIR Act, it gets more attention than the narrowly tailored Restoring Justice for Workers Act. This is demonstrated by the greater number of cosponsors for the FAIR Act, with 200 cosponsors, including one

173 John Andrew Schaffer & Marla N. Presley, *In the Crosshairs: U.S. Congress Again Takes Aim at Arbitration Agreements in Employment Context*, THE NAT'L L. R. (August 20, 2021), https://www.natlawreview.com/article/crosshairs-us-congress-again-takes-aim-arbitration-agreements-employment-context.

174 *Id.*

175 *Actions Overview H.R.2749—116th Congress (2019–2020)*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/2749/actions (last visited Oct. 2, 2022).

176 *Cosponsors: H.R.4841—117th Congress (2021-2022): Restoring Justice for Workers Act, H.R.4841, 117th Cong. (2021),* CONGRESS.GOV https://www.congress.gov/bill/117th-congress/house-bill/4841/cosponsors (last visited Feb. 10, 2022).

177 *Id*.

178 FAIR Act of 2022, H.R. 963, 117th Cong. (2022).

179 *See* Daniel Lipinski*, The House of Representatives is Failing American Democracy*, THE ATLANTIC (Oct. 11, 2021), https://www.theatlantic.com/ideas/archive/2021/10/house-representatives-congress-filibuster-democracy/620275/.

180 FAIR Act of 2022, *supra* note 178.

181 Benjamin Goldstein, *Congress Considers Ban on Mandatory Predispute Arbitration and Class Action Waivers*, A.B.A., (June 3, 2021), https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/winter-spring-2021-issue/congress-considers-ban/.

Republican.[182] However, the FAIR Act's far-reaching nature will also likely result in it facing more opposition than that of the Restoring Justice for Workers Act.

Like the FAIR Act, the Restoring Justice for Workers Act gives its opposition ammunition to say it is too broad. This is particularly true regarding the many hindrances imposed on the post-dispute arbitration agreements. The bill requires: (1) that the agreement cannot be a prerequisite for continued employment, (2) that the employee receives written notice of their rights, (3) that there is a forty-five-day waiting period between the notice and entering into the agreement, and (4) written consent.[183]

The requirement of two written documents, as well as a 45-day waiting period, could make an otherwise simple process overly complicated. Yes, it is important for employees to be aware of their rights. And yes, it is important that employees not be immediately pressured into signing away their rights. But, a forty-five-day period where the employee cannot make progress towards a resolution could create unwarranted stress after an incident. This is especially true considering that this bill does not just cover large-scale sophisticated companies. Individuals are implicated in this statutory scheme if they engage the work services of just one person, even outside the business context.[184] Requiring written notice, a forty-five-day waiting period, and then written consent for someone who is not a traditional employer is too extreme of a measure. While it is important that mandatory arbitration is ended for all workers, a one-size-fits-all statutory scheme might not work for all entities covered under this bill. There should be lesser requirements for an individual who happens to engage the services of one worker than for a large corporation that employs thousands. Oversteps like this might make the bill harder to pass than it needs to be.

Some legislatures and interest groups oppose acts seeking to dismantle mandatory arbitration. Opponents of the Act argue that its passage would lead to increased litigation in an already inundated court system.[185] This point has some validity; the ability to bring additional claims will likely slow down the courts. Nevertheless, legitimate claims should not be discouraged when there are viable alternatives, such as

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182 *Cosponsors: H.R.963—117th Congress (2021-2022): Fair Act of 2022, H.R.963, 117th Cong. (2022),* CONGRESS.GOV https://www.congress.gov/bill/117th-congress/house-bill/963/cosponsors (last visited Feb. 10, 2022).

183 Restoring Justice for Workers Act, H.R. 4841, 117th Cong. § 402 (2021).

184 *Id*. at § 401(5).

185 Schaffer, *supra* note 173.

hiring more judges.[186] Opponents of the Act also claim that the bill stands to benefit attorneys who would be litigating large class actions more than the workers that the bill claims to protect.[187] Again, there is a seed of truth in this misled attack. While it is true that attorneys make money from claims that would not otherwise be brought, it is not the case that attorneys are uninvolved in the arbitration process.[188] Attorneys already get paid for representing people and businesses in arbitration actions. Furthermore, the individuals with the injury in these purported class action suits would benefit in a way not possible under the current arbitration class action waiver paradigm.

During the Health, Employment, Labor, and Pensions subcommittee hearing on November 4, 2021, the primary witness who spoke against the Restoring Justice for Workers Act was Roger King, a senior labor and employment attorney at the HR Policy Association.[189] King made several attacks against the Restoring Justice for Workers Act, but primarily, King emphasized that the current system is not as bad as H.R. 4841 proponents claim that it is, making the bill a huge overcorrection.

King pointed out several benefits to arbitration that Justice Breyer has described, including speedy resolution of claims, less expense, and more attention to individuals' particular circumstances. [190] King also explained that, in his opinion, the difference between the resolution of claims litigated and the resolution of claims arbitrated is easily explained. King argued that the nature of arbitrated claims is fundamentally different from the nature of litigated claims.[191] King stated that most claims arbitrated are "standard workplace issues," such as whether an employee was given the proper raise, received the correct amount of time off, or was disciplined in the correct manner.[192] As a

186 *See* Justin Weinstein-Tull, *The Structures of Local Cts.*, 106 VA. L. REV. 1031, 1046–48 (describing the nationwide shortage of local court staff, including judges, as well as the problems that stem from those shortages).

187 Schaffer, *supra* note 173.

188 *Costs of Arbitration*, *supra* note 108 (acknowledging that attorney's fees are a common cost to arbitration).

189 *Closing the Courthouse Doors: The Injustice of Forced Arb. Agreements: Hearing Before the Subcomm. on Health, Emp., Lab., and Pensions*, 117th Cong. 1 (2021) (testimony of Roger King).

190 *Id.* at 8–9.

191 *Closing the Courthouse Doors: The Injustice of Forced Arbitration Agreements: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions*, 117th Cong., YOUTUBE (Nov. 4, 2021), https://www.youtube.com/watch?v=0LBCk-dr6rU&t=3498s (statement of Roger King at 36:45).

192 *Id.*

result, King characterized the comparison between litigating and arbitrating employment cases as unfair.[193]

Since King believes in the fairness of the current arbitration system, he sees no reason that pre-dispute arbitration agreements should be banned. King asserts that an employee could hire an attorney to negotiate a fair pre-dispute arbitration agreement with an employer.[194] Additionally, King believes that the current working environment with the worker shortage gives employees the power to negotiate better pre-dispute arbitration agreements, and if employers are treating employees unfairly with forced arbitration, people would simply leave the company.[195] King agreed that the subcommittee should examine solutions to instances of procedural coercion in arbitration but concluded that the call to prohibit mandatory arbitration was troubling.[196] Lobbyists arguing against arbitration reform, like King, could be an obstacle to the Restoring Justice for Workers Act.

C. Further Possible Legislation

There are several ways to bring additional legislation after the Restoring Justice for Workers Act to continue to diminish mandatory arbitration, correct the mistakes of the Act, and create broader change.

Legislators could fill in the holes of the Restoring Justice for Workers Act by creating protection for employees who are in the arbitration process. Despite this bill effectively foreclosing the possibility that an employee will be forced to enter into a pre-dispute arbitration agreement, some employees will waive their rights and enter into post-dispute arbitration agreements. In this scenario, employers are typically favored, leading to inequitable outcomes.[197] To maintain fairness when an employee waives their rights and agrees to arbitrate, legislators should regulate the process itself. Arbitration can traditionally be accomplished with one or multiple arbitrators.[198] Mandating either that the employee gets an equal choice in the arbitrator or the WIPO rules for picking multiple arbitrators be used would ensure that the decision maker is not necessarily unduly in favor of the employer. WIPO's rules for selecting multiple arbitrators require that each party pick an arbitrator, and then those two selected

193 *See id.* (statement of Roger King at 39:21).
194 *See id.* (statement of Roger King at 35:32).
195 *See id.* (statement of Roger King at 1:29:00).
196 Testimony of Roger King, *supra* note 189, at 12–13.
197 *See* Stone, *supra* note 4, at 19.
198 *See What is Arbitration?*, *supra* note 1.

arbitrators choose a third for their panel.[199] This method of choosing multiple arbitrators ensures neutrality in a way that having a single arbitrator does not.[200] This process, as well as others, could help guarantee fairer outcomes in arbitration.

Sometimes, legislation is ignored because the penalties are not harsh enough. It is possible that this could happen with a statute like the Restoring Justice for Workers Act. Employers may decide that most employees are unaware of their rights under the statute, and even if they bring an action, the price of the occasional settlement is well worth ensuring more of their disputes are settled in arbitration. If this proves the case, harsher penalties could be instated. The Health Insurance Portability and Accounting Act of 1996 ("HIPAA") provides a structure for such harsher penalties.[201] Under certain circumstances, HIPAA allows for the application of criminal penalties.[202] These penalties are tiered such that different levels of violations could result in up to one, five, or ten years of incarceration.[203] While this type of criminal punishment is fairly unique to HIPAA, the blueprint could be utilized in further legislation to enact harsher penalties if necessary.

The Restoring Justice for Workers Act could also be built upon, perhaps with legislation aimed at dismantling mandatory arbitration in sectors outside of employment. If the Restoring Justice for Workers Act becomes law, then incremental change towards fairness in arbitration might even invigorate the political will for sweeping change in something like the FAIR Act. A major area that would benefit from targeted legislation is mandatory arbitration clauses in consumer contracts. Consumer contracts include arbitration clauses at an even greater rate than employment contracts.[204]

The most effective way to build on the work of the Restoring Justice for Workers Act is to end the preemption of state statutes. Congress could amend the FAA such that it no longer preempts state statutes singling out arbitration. Under this solution, states would be free to experiment with arbitration law and potentially derive new equitable solutions.

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199 *What is Arbitration?*, *supra* note 1.

200 *See What is Arbitration?*, *supra* note 1.

201 *See* Steve Adler, *What are the Penalties for HIPAA Violations?*, HIPAA J. (Jan. 1, 2023), https://www.hipaajournal.com/what-are-the-penalties-for-hipaa-violations-7096/.

202 *Id.*

203 *Id.*

204 Stone, *supra* note 4, at 16.

V. CONCLUSION

This Comment argues that the Restoring Justice for Workers Act provides a meaningful first step in addressing the injustice that mandatory arbitration presents in employment disputes. However, additional steps must be taken to ensure fairness in arbitration. The Restoring Justice for Workers Act addresses an important issue: the injustice of mandatory arbitration provisions in employment contracts.[205] Mandatory arbitration prevents individuals from seeking justice and favors employers.[206]

In general, the Restoring Justice for Workers Act provides effective measures to rectify the injustice that mandatory arbitration presents: it prohibits pre-dispute arbitration agreements and pre-dispute class action waivers; it creates strict requirements for post-dispute arbitration agreements and post-dispute class action waivers; it provides for a civil action if the requirements for the post-dispute agreements are not met.[207] The bill, by explicitly stating that it protects independent contractors and those providing services to covered entities in addition to traditional employees, does a fairly good job of ensuring coverage for everyone it claims to protect.[208]

This is not to say that the bill is perfect: there is no protection for workers after the arbitration process commences; the bill only applies to employment contracts;[209] and the bill does not take the opportunity to amend the FAA such that it no longer preempts state arbitration laws. However, such limitations could be beneficial. The limited scope of this bill indicates that it likely requires less political will to pass than something more sweeping like the FAIR Act.[210] If the Restoring Justice for Workers Act were to become law, further action would still be required to make sure fair dispute resolution is achieved for all. The most important thing Congress could do to help stop unfair arbitration would be to amend the FAA such that it no longer preempts state laws in this field. This would allow the states to experiment and determine what is fair and effective. Until then, it is doubtful that workers will regain a real right to litigate against their employers. That next step will

205 *See generally* Press Release, House Committee on Education & Labor, Scott & Nadler Reintroduce the Restoring Justice for Workers Act (July 29, 2021).

206 *See* Stone, *supra* note 4, at 19.

207 *See* Restoring Justice for Workers Act, H.R. 4841, 117th Cong. Sec. 2 (2021).

208 *Id.* at § 401.

209 *See id*.

210 *Cf*. Levmore, *supra* note 170, at 1 (acknowledging that incremental change is often more popular with legislatures).

not be possible unless something akin to the Restoring Justice for Workers Act becomes law.