Case No. 20-55076

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROSETTE PAMBAKIAN,

Plaintiff-Appellant,

v.

GREGORY BLATT et al.,

Defendants-Appellees.

BRIEF OF *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER, AMERICAN ASSOCIATION FOR JUSTICE, AND 46 ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

Filed with the Consent of All Parties

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American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME)
American Federation of Teachers, AFL-CIO
Black Women's Roundtable
Bold Futures
California Women Lawyers
Clearinghouse on Women's Issues
Coalition of Labor Union Women
Desiree Alliance
Disability Rights Advocates
End Rape On Campus
Feminist Majority Foundation
Gender Justice
Impact Fund
In the Public Interest
Kentucky Association of Sexual Assault Programs
KWH Law Center for Social Justice and Change
Legal Aid at Work
Legal Momentum
Legal Voice
National Alliance to End Sexual Violence
National Asian Pacific American Women's Forum (NAPAWF)
National Association of Social Workers (NASW)
National Coalition Against Domestic Violence
National Crittenton
National Employment Lawyers Association
National Network to End Domestic Violence
National Organization for Women Foundation
National Partnership for Women & Families
Oklahoma Call for Reproductive Justice
Partnership for Working Families
Religious Coalition for Reproductive Choice
Shriver Center on Poverty Law
The Employee Rights Advocacy Institute For Law & Policy
The Women's Law Center of Maryland
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Women With A Vision, Inc.
Women's Bar Association of the District of Columbia
Women's Bar Association of the State of New York
Women's Institute for Freedom of the Press
Women's Law Project
Women's Media Center
Women's All Points Bulletin, WAPB

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, the undersigned counsel of record certifies that none of the *Amici Curiae* is a nongovernmental entity with a parent corporation or a publicly held corporation that owns 10% or more of its stock.

Dated: July 6, 2020

/s/ Michelle A. Lamy
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IDENTITY AND INTEREST OF *AMICI CURIAE*

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and the rights of all people to be free from sex discrimination. Since 1972, NWLC has worked to secure equal opportunity for women and has advocated to ensure that women can live free of sex discrimination. NWLC focuses on issues of key importance to women and their families, including economic security, employment, education, and health, with particular attention to the needs of low-income women and those who face multiple and intersecting forms of discrimination. NWLC has participated as counsel or amicus curiae in a range of cases before the Supreme Court and federal Courts of Appeals to secure the equal treatment of women under the law, including in the workplace. The NWLC Fund houses and administers the TIME'S UP Legal Defense Fund, which helps people facing sexual discrimination and harassment at work, in education, and in health care find attorneys and funds selected cases of workplace sexual harassment.

The American Association for Justice (AAJ) is a national, voluntary bar association founded in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent

plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its more than 70-year history, AAJ has served as a leading advocate of the right of all individuals to seek legal recourse for wrongful conduct. AAJ frequently participates in both the legislative and judicial context to preserve that right against abusive forced arbitration.

We submit the brief on behalf of 46 additional organizations committed to advancing workplace equality and the enforcement of workplace rights, particularly for women, people of color, and others harmed by the policies and practices at issue in this case.

All parties consented to the filing of this brief. Accordingly, a motion for leave to file is unnecessary. Fed. R. App. P. 29(a)(2). No party or party's counsel authored this brief in whole or in part, and no party or person contributed money towards its preparation and submission. Fed. R. App. P. 29(a)(4).

BACKGROUND AND SUMMARY OF ARGUMENT

Plaintiff-Appellant Rosette Pambakian ("Plaintiff") was a Senior Executive at the online dating application "Tinder"—which is owned and operated by Defendants IAC InterActiveCorp. and Match Group, Inc.—when she was verbally sexually harassed and sexually assaulted by the company's CEO, Defendant-Appellee Gregory Blatt, at the company's holiday party in December 2016. After

a cursory investigation into the assault, Match offered to increase Plaintiff's compensation in exchange for her signature on a non-disclosure agreement regarding the incident, which she declined. Match then surreptitiously introduced a new, company-wide arbitration agreement via email, which Plaintiff unknowingly signed as part of a broader acceptance of Match's "corporate policies." Plaintiff was terminated several months later and brought this lawsuit in August 2019. The District Court granted a motion by Defendants-Appellees Gregory Blatt, IAC InterActiveCorp., and Match Group, Inc. ("Defendants") to compel all of Plaintiff's December 2016 claims—including those against Blatt, individually—to arbitration based on the January 2018 "agreement" to arbitrate her employment claims. Plaintiff appealed.

Amici submit this brief in support of Plaintiff's appeal because this case highlights some of the unique problems of mandatory arbitration for sexual harassment claims.[1] To be sure, the increased use of forced arbitration has resulted in fewer claims, a far lower chance of prevailing, and lower recoveries for employees asserting all varieties of civil rights and other employment law claims.

[1] This brief concerns mandatory arbitration in contexts without labor unions. Amici offer this brief to highlight the reasons why arbitration is generally unfavorable to employees in a non-union context and why forcing workers into arbitration is generally harmful and unjust. While workplaces with unions regularly engage in arbitration of collective bargaining agreement grievances, that context is not addressed in this brief.

Additionally, however, forced arbitration poses particular challenges and deterrents for survivors of sexual harassment. The secret nature of arbitration proceedings—coupled with the confidentiality requirements that often accompany them—operate to both silence survivors and protect harassers from accountability for their actions. The concealment of arbitration records and rulings also limits the efficacy of litigation as a tool for social change, because it limits the development of sexual harassment jurisprudence during a critical moment when public and judicial perceptions of sexual harassment are evolving in the context of #MeToo going viral in recent years.

Courts should therefore be wary of attempts by employers—like those by Match here—to conceal incidents of workplace sexual harassment through the use of forced arbitration. This case is particularly egregious given that Plaintiff's vocal rejection of a non-disclosure agreement (under which she would have received compensation) was followed by a campaign to secretly force her into arbitration (for which she received no additional compensation), that this agreement was applied to force Plaintiff to arbitrate harms that took place *before* she unknowingly signed any such agreement, and that the agreement has been extended to claims by and against a non-signatory: Plaintiff's harasser.

ARGUMENT

I. A Sharp Increase in Mandatory Arbitration Has Reduced Enforcement of Workplace Rights.

As the portion of the United States workforce subject to mandatory arbitration has grown over the last two decades, studies show a corresponding decline in the filing of employment claims. This is a reflection of the reality that, due to certain procedural advantages for employers, employees fare far worse and receive far less in damages through arbitration than through litigation of their claims in court.

A. The Share of Workers Subject to Arbitration More than Doubled in Recent Years, and Now Exceeds Half of the Workforce.

The use of arbitration clauses in employment agreements has dramatically increased in the last twenty years. While only two percent of workers were subject to mandatory arbitration provisions in the early 1990s, this number grew to almost 25 percent by the early 2000s.[2] This share doubled again over the next two decades, and now covers more than half of the workforce in this country: as of 2018, 56.2 percent of non-union private-sector employees were subject to

[2] Alexander J.S. Colvin, Economic Policy Institute, *The Growing Use of Mandatory Arbitration* 1, 3-4 (2018). The initial increase of the 1990s followed shortly after the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), where the Court upheld—for the first time—mandatory arbitration of an employment dispute.

mandatory arbitration provisions.[3] And, alarmingly, this number is projected to reach more than 80 percent of employees by 2024.[4] Applying this information to current labor statistics suggests that at least 65.5 million workers in this country are currently subject to mandatory arbitration of their workplace rights.[5]

Women and African-American workers are most affected by this dramatic shift because arbitration agreements are more common in industries disproportionately composed of these workers.[6] For example, construction—a predominantly male workforce—has the lowest rate of mandatory arbitration at 37.7 percent, whereas education and health—predominantly female workforces—have the highest rate at 62.1 percent.[7] Workers in low-wage jobs are also disproportionality impacted: 64.5 percent of workers making less than $13.00 per hour are subject to mandatory arbitration, as compared to only 52.9 percent of workers making between $13.00 and $16.99 per hour, 47.7 percent of workers

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[3] *Id.* at 2.

[4] Kate Hamaji, Economic Policy Institute, *Unchecked Corporate Power* (2019).

[5] This estimate is based on Bureau of Labor Statistics data (*available at* https://www.bls.gov/web/cewbd/table_f.txt), reporting an overall private-sector workforce of 124.157 million in 2019, and a Bureau of Labor Statistics report (*available at* https://www.bls.gov/news.release/pdf/union2.pdf), stating that only 6.2 percent of the private-sector workforce is unionized (resulting in 116.459 million non-union private-sector employees in 2019).

[6] *The Growing Use of Mandatory Arbitration*, *supra* n.2, at 8.

[7] *Id.* at 8-9, Tbl. 3.

making between $17.00 and $22.49 per hour, and 54.1 percent of workers making $22.50 per hour and greater.[8] Thus, while forced arbitration and decreased access to the courts is of concern for an increasing number of workers in this country, these harms are landing with even greater force on certain groups based on sex, based on race, and based on whether they are in a low-wage job.

B. Arbitration Results in Less Reporting, Lower Success Rates, and Smaller Recoveries for Employees.

The rapid adoption of mandatory employment arbitration has already substantially reduced reporting of employment law violations. Only 0.02 percent of employees subject to mandatory arbitration actually file an arbitration demand.[9] As a result, researchers estimate that as many as 34,000 employment claims go unfiled every year due to mandatory arbitration.[10]

It is unsurprising that employees do not see arbitration as a viable option. Research shows that employees win less often and receive lower damages in arbitration as compared to litigation,[11] rendering arbitration a less meaningful

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[8] *Id*. at 9, Tbl. 4. These percentages are based on Bureau of Labor Statistics data for 2016 and measure the portion of workers within each demographic subject to mandatory arbitration. *Id*.

[9] American Association for Justice, *The Truth About Forced Arbitration* 28 (2019).

[10] Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679, 691 (2018).

[11] Katherine V.W. Stone & Alexander J.S. Colvin, Economic Policy Institute, *The*

vehicle for the enforcement of workplace rights. One study suggests that employees in mandatory arbitration win only 59 percent as often as in federal courts and 38 percent as often as in state courts, and that mean damages awards are on average 6.1 times better in federal court and 13.9 times better in state court than in arbitration.[12] Indeed, a recent study of arbitrations conducted between 2014 and 2018 by the American Arbitration Association (AAA) and JAMS—two of the nation's primary arbitration providers—revealed that employees prevail in less than 2.5 percent of filed arbitrations.[13] Additionally, fear of retaliation operates as yet another deterrent, making it even less likely that employees[14] will seek to enforce their workplace rights.[15]

Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights 3 (2015).

[12] *Id*. at 19-20, Tbl. 1. Though these estimates are based on 2011 data, more recent data suggests they have not meaningfully changed. *Id*. Mandatory arbitration of employment disputes is distinct in this respect from labor arbitration, which "has a long track record of success in unionized workplaces and is widely accepted as fair and effective by organized labor and employers." *Id*. at 18.

[13] *The Truth About Forced Arbitration*, *supra* n.9, at 28.

[14] While this brief uses the term "employees," the use of forced arbitration can be a barrier to justice for all types of workers, including those who are not classified as employees (including, for example, independent contractors). In jurisdictions where non-employees have a cause of action for workplace rights violations, those workers also should not be forced to arbitrate those disputes.

[15] *See generally* Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18 (2005) (noting that fear of retaliation and the social costs of claiming discrimination are the primary reasons employees decline to report); Deborah L. Brake & Joanna L.

This reduction in reporting and outcomes is driven by several predictable factors. Because the arbitration agreement often dictates both the forum and the rules of any ultimate arbitration, and because employers draft these agreements, employers effectively write the rules through which an employment dispute will be heard before the dispute even occurs.[16] Individual employees are not involved in the negotiation of this contract.[17] This means that employees (and legislatures, and courts) are eliminated from the rule-setting process, which frees employers to adopt rules beneficial to their own interests.

Repeat players also fare better in arbitration than do newcomers, which inures to the benefit of the employer. One study of employment arbitrations found that 54.6 percent of employers were represented by a law firm that handled multiple cases in the study population, as compared to only 10.7 percent of employees.[18] The example of Darden Restaurants—the employer with the most

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Grossman, *The Failure of Title VII As A Rights-Claiming System*, 86 N.C. L. Rev. 859 (2008) (detailing the weak protections available to employees who complain of discrimination).

[16] Stone & Colvin, *supra* n.11, at 17. *See also* Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 Berkeley J. Emp. & Lab. L. 71, 78 (2014) ("[T]he procedures . . . are the product of the calculations and decisions of individual employers as to how they wish to resolve conflict with their employees.").

[17] *Id.*

[18] Alexander J.S. Colvin & Kelly Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed*, 29 Ohio St. J. Disp. Resol.

arbitration cases at AAA between 2014 and 2018—is particularly illustrative. Darden has admitted to pervasive wage and hour violations and paid out almost $4 million to settle such lawsuits.[19] Despite this record, and despite the fact that Darden appeared in 329 employment arbitrations before AAA during this time period—which collectively claimed more than $20 million in wages and damages—employees won awards in *only eight* of those cases, for a total of only $73,961.[20]

II. Forced Arbitration of Sexual Harassment Claims Silences Survivors, Protects Serial Predators, and Stymies Social Change.

Sexual harassment remains a persistent problem for workers in this country. The Equal Employment Opportunity Commission (EEOC)'s "Select Task Force on the Study of Harassment in the Workplace" found that sexual harassment constituted approximately one-third of all charges filed in 2015,[21] and these

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59, 70 (2014); *see also generally* Alexander J.S. Colvin & Mark Gough, *Individual Employment Right Arbitration in the United States: Actors and Outcomes*, 68 Indus. & Lab. Rel. Rev. 1019 (2015) (studying eleven years of employment arbitrations by AAA; concluding that larger-scale employers involved in more arbitrations see higher win rates and lower damage awards); *The Truth About Forced Arbitration*, *supra* n.9, at 28 (concluding that nearly half of all employment arbitrations, 46.7 percent, conducted by AAA or JAMS between 2014 and 2018 involved an employer with at least 10 prior arbitrations).

[19] *The Truth About Forced Arbitration*, *supra* n.9, at 28-29.

[20] *Id.*

[21] Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace* (2016), *available at* https://bit.ly/2AyfgQQ.

numbers have only increased in the years since publication. Fiscal year 2018, for example, saw a 12 percent increase in charges of sexual harassment over 2017,[22] and in 2019 the EEOC received an additional 7,514 charges of sexual harassment.[23]

Though these numbers are high, they most certainly underestimate the true incidence of workplace sexual harassment. The EEOC estimates that three out of every four individuals who experience sexual harassment never even mention it to a supervisor, opting instead to just avoid the harasser (33 to 75 percent of incidents), deny or downplay the gravity of the situation (54 to 73 percent), or attempt to ignore, forget, or endure the behavior (44 to 70 percent).[24]

Women, and in particular women of color, are most likely to experience sexual harassment in the workplace. In 2019, 83.2 percent of EEOC charges alleging sexual harassment were filed by women, and this number has been

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[22] EEOC, *EEOC Releases Preliminary FY 2018 Sexual Harassment Data* (Oct. 4, 2018), *available at* https://www.eeoc.gov/newsroom/eeoc-releases-preliminary-fy-2018-sexual-harassment-data.

[23] EEOC, *EEOC Releases Fiscal Year 2019 Enforcement and Litigation Data* (Jan. 24, 2020), *available at* https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2019-enforcement-and-litigation-data.

[24] Feldblum & Lipnic, *supra* n.21. *See also* Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment,* J. of Social Issues, Vol. 51. No.1, 117, 120 (1995) (noting that the most common response to sexual harassment is avoidance, appeasement, delaying, and seeking social support, and the least common is notifying a supervisor, bringing a formal complaint, or filing a lawsuit).

consistent over time.[25] An analysis by NWLC of EEOC data shows that women of color—particularly Black women—file a disproportionate number of these charges: between 2012 and 2016, 56 percent of charges filed by women were filed by women of color, despite the fact that women of color represent only 37 percent of women in the workforce.[26] And in every industry analyzed, Black women were disproportionately represented among women who filed sexual harassment charges.[27]

The reality is that most women will, at some point in their careers, experience sexual harassment. According to the Sexual Experiences Questionnaire (SEQ), almost 60% of women reported having experienced sex-based harassment at work,[28] and the EEOC estimates that the number may be even higher—up to 85 percent of women.[29] It is therefore vital that individuals who are willing to come forward with allegations of sexual harassment not be discouraged by a system that

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[25] EEOC, *Charges Alleging Sexual Harassment FY 2010 - FY 2019, available at* https://www.eeoc.gov/enforcement/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2019.

[26] Amanda Rossie et al., NWLC, *Out of the Shadows: An Analysis of Sexual Harassment Charges Filed by Working Women* 4 (2018).

[27] *Id.* at 5.

[28] Remus Ilies et al., *Reported Incidence Rates of Work-Related Sexual Harassment in the United States: Using Meta-Analysis to Explain Reported Rate Disparities*, 56 Personnel Psychol. 607, 607 (2003).

[29] Feldblum & Lipnic, *supra* n.21.

is stacked against them and operates in favor of their employers. Forced arbitration, however, operates to silence survivors of sexual assault and harassment, protect their harassers and employers from liability, and prevent further development of the relevant legal standards in these critical times.

A. Forced Arbitration Prevents Survivors from Sharing their Stories.

On top of the suppression of employment claims, generally, forced arbitration of sexual harassment claims creates an additional problem: the silencing of survivors. Many arbitration agreements require that the proceedings in arbitration, and in some instances, the fact that the dispute was resolved through arbitration itself, be kept confidential.[30] For example, hundreds of employees of Sterling Jewelers, the multibillion-dollar conglomerate behind Jared the Galleria of Jewelry and Kay Jewelers, were prevented for years from sharing statements regarding the sexual harassment and assaults they suffered because their case was proceeding in a confidential arbitration.[31]

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[30] Kathleen McCullough, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo- and Time's Up-Inspired Action Against the Federal Arbitration Act*, 87 Fordham L. Rev. 2653, 2656, 2959 (2019). *See also, generally,* Michelle Dean, *Contracts of Silence,* Colum. Journalism Rev. (2018).

[31] Drew Harwell, *Hundreds Allege Sex Harassment, Discrimination at Kay and Jared Jewelry Company*, Washington Post (Feb. 27, 2017), *available at* https://www.washingtonpost.com/business/economy/hundreds-allege-sex-harassment-discrimination-at-kay-and-jared-jewelry-company/2017/02/27/8dcc9574-f6b7-11e6-bf01-d47f8cf9b643_story.html; *see*

The silencing of survivors also reduces reporting of sexual harassment and assault,[32] because public allegations can be a source of courage for survivors to come forward.[33] Indeed, in the nearly three years since #MeToo went viral, thousands of individuals have come forward to demand justice and share their experiences of assault, harassment, and other forms of discrimination—many several years after the fact—and in so doing, inspired others to come forward, too.

B. The Secrecy of Forced Arbitration Shields Harassers from Accountability.

Because arbitration occurs in private, outside the judicial system (and the public eye), it also permits serial sexual predators to continue their harassment—sometimes for decades—without facing accountability.[34] As one survivor recently put it: "Forced arbitration is a sexual harasser's best friend: It keeps proceedings

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also Emily Martin, NWLC, *Forced Arbitration Protects Sexual Predators and Corporate Wrongdoing* (Oct. 23, 2017), *available at* https://nwlc.org/blog/forced-arbitration-protects-sexual-predators-and-corporate-wrongdoing/.

[32] Maya Raghu & Joanna Suriani, NWLC, *#Metoowhatnext: Strengthening Workplace Sexual Harassment Protections and Accountability* (Dec. 2017) *available at* https://nwlc.org/wp-content/uploads/2017/12/MeToo-Strengthening-Workplace-Sexual-Harassment-Protections.pdf.

[33] Center for Popular Democracy & NWLC, *Forced Arbitration Clauses in the #MeToo Movement* (Dec. 2018) *available at* https://populardemocracy.org/news/publications/forced-arbitration-clauses-metoo-movement.

[34] *See generally* McCullough, *supra* n.30; Dean, *supra* n.30.

secret, findings sealed, and victims silent."[35] This is in stark contrast to litigation, where courts routinely recognize a "strong presumption" in favor of the public right of access to judicial records.[36]

When survivors are forced into arbitration, that secretive process allows companies to hide the true extent of illegal conduct from workers and the public, and helps wrongdoers evade accountability.[37] This secrecy is precisely what permitted now-convicted serial rapist Harvey Weinstein to prey upon women in his employ and industry for decades with impunity.[38] And though #MeToo going viral

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[35] Gretchen Carlson, *The Supreme Court Tried to End #MeToo. Here's How We're Fighting Back.*, Fortune (May 31, 2018), *available at* http://fortune.com/2018/05/31/gretchen-carlson-supreme-court-ruling-arbitration-metoo/.

[36] *See, e.g.*, *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) ("A party seeking to seal a judicial record then bears the burden of overcoming this strong presumption.").

[37] NWLC, et al., *Pass the Forced Arbitration Injustice Repeal Act (FAIR Act), H.R. 1423* (Sept. 17, 2019), *available at* https://nwlc.org/wp-content/uploads/2019/09/FAIR-Act-Womens-Groups-letter-of-support-to-House-9.17.19.pdf.

[38] Over a three-decade period, Weinstein reached at least eight confidential settlements with his victims, which prevented them from sharing their stories. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, New York Times (Oct. 5, 2017), *available at* https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?_r=0. After several women bravely came forward in late 2017, despite being bound by non-disclosure agreements, dozens of others followed suit with similar allegations. In the years since, more than 70 women have accused Weinstein of sexual misconduct. Bryan Logan, *The Weinstein Company Just Canceled Every Nondisclosure Agreement Between Harvey Weinstein and the*

brought sexual harassment to the forefront of our social conscience,[39] the opportunity for others to say "me, too" is undermined when victims are denied a day in court and the opportunity to hold their wrongdoers publicly accountable.

The fact that arbitration occurs behind closed doors has prompted multiple attempts at both the federal and state levels to limit or eliminate mandatory arbitration of sexual harassment claims.[40] Indeed, this is what originally motivated a measure to prohibit the federal government from providing more than $1 million in funding to any defense contractor that mandates arbitration of Title VII claims or tort claims related to or arising out of sexual harassment or assault.[41] Similar

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Women Who Accused Him of Sexual Misconduct, Business Insider (Mar. 19, 2018), *available at* https://www.businessinsider.com/harvey-weinstein-non-disclosure-agreements-with-victims-canceled-2018-3.

[39] In 2006, gender justice activist Tarana Burke coined the phrase "Me Too" and launched a movement for survivors of sexual violence to find healing and strength in solidarity. In October 2017, following media reports of serial sexual harassment and assault by producer Harvey Weinstein, the actress and activist Alyssa Milano invited survivors to share their experiences of harassment and violence on social media using the hashtag #MeToo. The hashtag quickly went viral worldwide as individuals shared their stories and demanded accountability.

[40] Additionally, in a 2019 decision, a National Labor Relations Board Administrative Law Judge found that an employer requiring employees to keep information about arbitration confidential violated the employees' rights to discuss and publicly disclose the terms and conditions of employment under Section 8(a)(1) of the National Labor Relations Act. *See Pfizer, Inc. & Rebecca Lynn Olvey Martin, an Individual & Jeffrey J. Rebenstorf, an Individual*, No. 10-CA-175850, 2019 WL 1314927 (Mar. 21, 2019).

[41] McCullough, *supra* n.30, at 2669-70 (citing Department of Defense Appropriation Act, 2010, Pub. L. No. 111-118, § 8116, 123 Stat. 3409, 3454-55

concerns prompted the attorneys general of all fifty states to support proposed legislation in 2017 that would have completely ended forced arbitration of sexual harassment claims.[42] The Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination (BE HEARD) in the Workplace Act is currently being considered by federal lawmakers, and proposes (among other reforms) a ban on forced arbitration of work-related disputes.[43] And in September 2019, the United States House of Representatives passed the Forced Arbitration Injustice Repeal (FAIR) Act, which would ban companies from requiring workers and consumers to resolve *any* legal dispute through private arbitration.[44]

Several states have also passed legislation either explicitly or impliedly barring mandatory arbitration of sexual harassment claims, though these efforts

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(2009)). Similarly, the Fair Pay and Safe Workplaces Executive Order, Exec. Order No. 13673, Sec. 6 (July 31, 2014), 79 Fed. Reg. 45309-15 (Aug. 5, 2014), prohibited federal contractors from imposing mandatory arbitration for Title VII claims and tort claims related to or arising out of sexual assault or harassment until it was repealed by Pub. L. No. 115-11, Mar. 27, 2017, 131 Stat. 75, on grounds largely unrelated to the mandatory arbitration provision. *See* 163 Cong. Rec. H907-16 (Feb. 2, 2017).

[42] McCullough, *supra* n.30, at 2675-76.

[43] H.R. 2148, 116th Cong. (2019). *See also* NWLC, *The BE HEARD in the Workplace Act: Addressing Harassment to Achieve Equality, Safety, and Dignity on the Job* (Apr. 2019), *available at* https://nwlc.org/resources/the-be-heard-in-the-workplace-act-addressing-harrassment/.

[44] H.R. 1423, 116th Cong. (2019). The measure is still under consideration by the Senate.

have at times faced legal challenges.[45] Nevertheless, the legislative history and findings connected to these efforts across the country reflect a broad-based recognition that the need to eliminate mandatory arbitration is particularly acute in the case of sexual harassment. For example, when the California legislature passed Assembly Bill 3080—banning mandatory arbitration of claims brought under California's Fair Employment and Housing Act, including sexual harassment—the Senate's analysis included the observation that, when used in the context of sexual harassment, arbitration can be a "powerful weapon[] to silence victims and foster an environment of impunity."[46]

C. Resolution of Legal Claims through Arbitration Slows the Evolution of Law.

Despite these legislative efforts, forced arbitration of sexual harassment claims—including through agreements like the one at issue in this appeal—

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[45] McCullough, *supra* n.30, at 2677-83 (detailing state laws in Washington, New York, California, and Massachusetts). In 2018 alone, over one hundred bills were introduced in state legislatures to enhance protections against workplace sexual harassment. Andrea Johnson et al., NWLC, *Progress in Advancing Me Too Workplace Reforms In #20StatesBy2020* 2 (2019). *See also, e.g.*, *Latif v. Morgan Stanley & Co. LLC*, No. 18CV11528 (DLC), 2019 WL 2610985, at *4 (S.D.N.Y. June 26, 2019) (holding that New York's state law prohibiting mandatory arbitration of sexual harassment claims was preempted by the Federal Arbitration Act).

[46] AB-3080 Senate Floor Analyses (Aug. 20, 2018) at 4, *available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180AB3080. The bill was later vetoed by then-Governor Jerry Brown. McCullough, *supra* n.30, at 2680.

remains common and limits the development of sexual harassment jurisprudence. Specifically, mandatory arbitration of sexual harassment claims keeps these cases out of courts, away from juries, and out of the public's awareness, and therefore prevents "the progressive legal changes one might otherwise have expected" to accompany the significant shift in recent years toward recognition of the prevalence and harm of sexual harassment.[47]

As one example, keeping sexual harassment claims out of courts prevents judicial interpretation of what constitutes legally actionable harassment during a period of growing public recognition of the severe harm caused by conduct that would have previously been minimized as harmless.[48] Absent a body of well-developed caselaw on this issue, individuals must negotiate settlements with an inaccurate sense of a claim's value or the risks of trial, which operates to the detriment of plaintiffs who, unlike employers, are rarely repeat players in the arbitration or negotiation context and therefore operate at an information disadvantage.[49] This vacuum in the caselaw also leaves less guidance for judges

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[47] Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?*, 54 Harv. C.R.-C.L. L. Rev. 155, 160 (2019).

[48] *Id*. at 197.

[49] Robert D. Friedman, Comment, *Confusing the Means for the Ends: How a Pro-Settlement Policy Risks Undermining the Aims of Title VII*, 161 U. Pa. L. Rev. 1361, 1366 (2013) ("Without being able to point to previous prevailing plaintiffs,

and arbitrators alike, contributing to inconsistent results inside and outside of the courtroom.[50]

Insufficiently developed caselaw does not merely impact potential litigants, however. The effects of concealing workplace harassment claims behind arbitration rebound to policymakers, the media, and society as a whole.[51] Data about the frequency and content of sexual harassment claims provides legislators with important information about the need (or lack thereof) for important policy changes, and even a single well-publicized trial may galvanize public support for future reform. Indeed, studies of civil society groups engaged in strategic litigation indicate that one of the key ways they measure the success of their litigation efforts

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an employee loses significant leverage when bargaining with her employer. Similarly . . . an employee reviewing a largely undeveloped caselaw will find it harder to assess the degree of risk involved when deciding whether to reject a settlement."); *see also* Marc Galanter, *A World Without Trials?*, 2006 J. Disp. Resol. 7, 31 (2006) ("Trial activity is diminishing . . . [and] [w]e have no reason to think there is a corresponding decline in the need for signals and markers to guide actors in making, conceding, defending and resolving claims, or in modulating the underlying activity.").

[50] Galanter, *supra* n.49, at 31 ("The diminishing role of trials and the greater indeterminacy of doctrine provide more space for the play of enlarged judicial discretion and the stratagems of intensified lawyering.").

[51] Friedman, *supra* n.49, at 1366 ("[T]he prevalence of secret settlements skews public perception and hampers the ability of legislatures and courts to react to the current state of Title VII compliance."); *see also* Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. Rev. 927, 961 (2006) ("Because of invisible settlements, no one knows – or has the capacity to determine – what really is going on with employment discrimination litigation.").

is by determining whether a particular case generated public conversations,[52] attracted media attention,[53] and generally contributed to political mobilization.[54] When claims are not resolved in public, however, society is robbed of the opportunity to have these necessary conversations.[55]

Therefore, as further detailed below, as long as employers are permitted to mandate arbitration of sexual harassment claims, it is vital that courts not read arbitration provisions any more broadly than is warranted by the factual circumstances of each specific case.

III. The District Court Ignored Facts that Render Arbitration of Plaintiff's Sexual Harassment Claims Particularly Inappropriate.

The Federal Arbitration Act (FAA) was only ever intended to address arbitration of voluntary commercial agreements "between two merchants of

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[52] Open Justice Society Initiative, *Strategic Litigation Impacts: Insights from Global Experience* 44 (2018).

[53] Canadian HIV/AIDS Legal Network, *Advocacy and Social Justice: Measuring Impact* 20 (2016).

[54] Susan D. Phillips, *Legal as Political Strategies in the Canadian Women's Movement: Who's Speaking? Who's Listening?* in Women's Legal Strategies in Canada 379, 399 (2002). *See also, generally*, Kaitlin Owens, Women's Legal Education and Action Fund, *This Case Is About Feminism: Assessing the Effectiveness of Feminist Strategic Litigation* (2020) (identifying metrics used to determine whether a case has had the desired impact, based upon interviews with activists engaged in feminist strategic litigation).

[55] *Id.*

roughly equal bargaining power."[56] One of the Senators to consider the original 1925 Act specifically identified employment contracts as an area of concern, stating that arbitration may be "offered on a take-it-or-leave-it basis to . . . employees," but he "was emphatically assured by the supporters of the bill that it was not their intention to cover such cases."[57] Though the Supreme Court has since read the FAA to cover (and favor) arbitration agreements in employment contracts,[58] it remains true that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[59] Indeed, the Supreme Court has cautioned that "[a]rbitration is . . . a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration."[60]

When assessing whether an arbitration agreement is enforceable, courts must consider: "(1) whether a valid agreement to arbitrate exists and, if it does,

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[56] Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637, 647 (1996).

[57] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967) (Black, J., dissenting).

[58] *See generally Gilmer*, 500 U.S. 20; *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

[59] *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

[60] *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 299 (2010) (emphasis in original; quotation marks and citations omitted).

(2) whether the agreement encompasses the dispute at issue."[61] The first prong of this analysis is governed by state contract law,[62] and "[g]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]."[63] In assessing the second prong, courts look to "whether the party seeking arbitration is making a claim which on its face is governed by the contract."[64]

Here, the District Court ignored several facts demonstrating that neither prong of this analysis is satisfied. Moreover, the egregious nature of the employer's conduct in this case—and the District Court's decision to nevertheless condone that conduct—throw the unique ills of mandatory arbitration for sexual harassment claims into stark relief.

A. Plaintiff Rejected Defendants' Initial Attempt to Conceal Her Allegations.

Plaintiff did not voluntarily submit to arbitration of her sexual harassment claims. To the contrary, Plaintiff *explicitly rejected* Match's attempt to silence her by refusing to sign a non-disclosure agreement following her sexual assault and harassment, an agreement for which she would have received increased

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[61] *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008).

[62] *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31 (2009).

[63] *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 682 (1996).

[64] *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 568 (1960).

compensation. Match responded by surreptitiously releasing a new, company-wide arbitration agreement to all employees, which it would later use—successfully—in a second attempt to conceal Plaintiff's allegations. Of course, Plaintiff received no additional compensation for this "agreement." This is contrary to the FAA, Ninth Circuit precedent, and public policy, and must be rejected.

Plaintiff was well into a successful career at Match when she was sexually assaulted by Defendant Blatt in December 2016. ER2. Though Plaintiff reported the assault to her supervisor within a few days, ER104 at ¶25, the supervisor did not report the assault to Human Resources, *id*. ¶¶26-27. It was not until April 2017 that other members of Match's executive team and Human Resources Department became aware of the assault and launched an investigation. *Id*. ¶¶28-29. Plaintiff cooperated with this investigation until it became clear that it was merely a "sham" and that information was being leaked back to Defendant Blatt. ER106-107 at ¶¶37-43. In May 2017, Defendant Blatt approached Plaintiff in an attempt to silence her regarding the investigation and assault, but Plaintiff refused to engage with him. *Id*. Plaintiff was not contacted again about the investigation until October 2017, when Match asked Plaintiff to sign a non-disclosure agreement regarding the incident in exchange for increased compensation. ER107-108 at ¶¶43, 48; ER3. Plaintiff declined to sign the agreement or accept this compensation in exchange for her silence. *Id*. Three months later, Match emailed

all employees a link to a DocuSign file with multiple company policies, including a new "Alternative Dispute Program." ER173 at ¶¶3-4. Match never explained that these new policies contained an arbitration agreement, but indicated that employees were required to sign the new policies as a condition of continued employment. *Id*. Plaintiff signed these documents electronically in January 2018, ER5, and was terminated several months later, ER3.

The District Court's decision to enforce the arbitration agreement under these circumstances runs far afield of the FAA's original mandate and contrary to Ninth Circuit precedent. Given Plaintiff's unambiguous prior refusal to remain silent regarding her allegations and Match's underhanded efforts to nevertheless conceal her allegations through an after-the-fact, click-wrap arbitration agreement, it was error for the District Court to conclude that "a valid agreement to arbitrate" exists in this case.[65] Even the District Court acknowledged that "there is some degree of procedural unconscionability" here, including because the "Agreement is a contract of adhesion, which was provided to Plaintiff as a standardized form document with no opportunity for her to negotiate." ER14. However, the District Court incorrectly discounted the extent to which Match's conduct—*i.e.*, securing the arbitration agreement *only after* Plaintiff refused to sign a non-disclosure

[65] *Cox*, 533 F.3d at 1119.

agreement and then attempting to apply it retroactively—bears upon the degree of procedural unconscionability. ER15.

Match's rollout of the agreement at issue here encapsulates the problem with mandatory arbitration of sexual harassment claims: Match used the agreement to bury the allegations of a sexual assault survivor after she declined to silence herself in exchange for monetary compensation. Permitting the District Court's order to stand would therefore permit the most pernicious effect of forced arbitration—the silencing of victims—to continue spreading unchecked. Letting the order stand would also reward Match's particularly egregious conduct by granting it access to a forum that is already rigged in favor of employers and not workers.[66]

B. The Arbitration Agreement Cannot Extend Forced Arbitration to Claims By and Against Plaintiff's Harasser.

Even if Plaintiff had voluntarily entered into an agreement to arbitrate employment disputes with Match, that agreement cannot and should not be read to cover disputes between Plaintiff and Defendant Blatt in his personal capacity.

Claims by and against Blatt (Plaintiff's assailant) are not "on [their] face . . . governed by the contract."[67] Blatt is not a signatory to the contract, and is not

[66] *See supra* Sections I, II.

[67] *United Steelworkers*, 363 U.S. 564 at 568.

entitled to enforce it.[68] Indeed, neither Match nor Blatt even argue that the agreement states it will apply to *personal claims* just because they implicate employees of the company. The District Court's extension of the agreement to these claims is therefore contrary to law. The District Court's reasoning is also contrary to public policy because it forecloses any opportunity for Plaintiff to hold Blatt publicly accountable for his conduct, which is precisely why employers (and harassers) prefer the arbitral forum.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully submit that the decision below should be reversed.

[68] *See, e.g.*, *Soto v. Am. Honda Motor Co.*, 946 F. Supp. 2d 949 (N.D. Cal. 2012) (holding that non-signatory to contract could not compel arbitration under theory of equitable estoppel); *E&E Co., Ltd. v. Light in the Box Ltd.*, No. 15-cv-000690, 2015 WL 5915432 (N.D. Cal. Oct. 9, 2015) (same); *Rajagopalan v. Noteworld, LLC*, 718 F.3d 844 (9th Cir. 2013) (same).

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure ("FRAP") 32(a), the undersigned counsel certifies that this Brief complies with: (1) the type-volume limitation of FRAP 29(a)(5) and FRAP 32(a)(7)(B) because this brief contains 6,325 words, excluding the parts of the brief exempted by FRAP 32(f); and (2) the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman type style, 14-point font.

Dated: July 6, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 6, 2020. All participants in this case are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: July 6, 2020

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