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# Leaving "Sex" Out of It: Amending the Federal Arbitration Act to Ensure *Bostock*'s Victory for LGBTQ Employee Rights

**Sheya Rivard***

## INTRODUCTION

After reading the news that the Supreme Court had ruled in his favor, Gerald Bostock screamed and hugged his partner Andy: "The long, seven-year journey I've had, it's well worth every ache and pain. I didn't ask for this, but it needed to be done."[1] Like Gerald Bostock, other LGBTQ[2] employees from across the nation described being overcome with "sheer joy," "optimism," "relief," and a

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1. Samantha Schmidt, *Fired after joining a gay softball league, Gerald Bostock wins landmark Supreme Court case,* SEATTLE TIMES (June 15, 2020, 3:02 PM), https://www.seattletimes.com/nation-world/fired-after-joining-a-gay-softball-league-gerald-bostock-wins-landmark-supreme-court-case/ [https://perma.cc/RB73-QQ9E].

2. This comment will use the acronym "LGBTQ" for lesbian, gay, bisexual, transgender, and queer. For the purposes of this comment, the acronym is intended to encompass all sexual orientations and gender identities. *Glossary of Terms,* HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/glossary-of-terms [https://perma.cc/P6CA-3VAW] (last visited Mar. 3, 2021).

sense of long-overdue "validation"[3] upon seeing the Court's decision in *Bostock v. Clayton County, Georgia* on June 15, 2020.[4] Prior to *Bostock*, approximately half of the country's estimated 8.1 million LGBTQ employees lived in states where they were not protected by local workplace discrimination laws, and in some states could be fired outright for their LGBTQ status.[5] The *Bostock* decision ensured protections for all LGBTQ employees in holding that federal law,[6] which prohibits discrimination "on the basis of sex,"[7] includes people who claim discrimination based on their gender identity or sexual orientation.[8] Understandably, *Bostock* was seen as a hard-fought victory for LGBTQ employee rights and well worth celebrating.

However, a dark cloud looms over the ability of LGBTQ employees to fully exercise their rights under *Bostock*: mandatory arbitration agreements (MAAs). An MAA in the employment contract of an LGBTQ employee could contain the common provision that all disputes arising out of or related to the employment shall be subject to arbitration.[9] The use of MAAs in employment contracts is widespread and has become increasingly prevalent over the last thirty years[10] because of the Federal Arbitration Act (FAA) and the Supreme Court's broad interpretation of the FAA as favoring the enforceability of MAAs.[11] Therefore, even though LGBTQ employees

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3. *See* Amber Jamieson & Julia Reinstein, *The Supreme Court's LGBTQ Decision Will Have Huge Impacts for Those in States with no Prior Protections*, BUZZFEED (June 15, 2020, 6:50 PM), https://www.buzzfeednews.com/article/juliareinstein/supreme-court-lgbtq-gay-transgender-lesbian-decision?bfsource=relatedmanual [https://perma.cc/E9MY-U7EK].

4. *See generally* Bostock v. Clayton County, Ga., 140 S. Ct. 1731 (2020).

5. *See* Dawn Ennis, *Analysis Shows Most States Lack Legal Protections for LGBTQ Workers*, FORBES (Oct. 25, 2019, 7:00 AM), https://www.forbes.com/sites/dawnstaceyennis/2019/10/25/analysis-shows-most-states-lack-legal-protections-for-lgbtq-workers/?sh=3af4ad2d2d07 [https://perma.cc/2KFY-95JB].

6. *See* 42 U.S.C. § 2000e-2(a)(1).

7. *Id.*

8. *See Bostock*, 140 S. Ct. at 1754.

9. *See* KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE ARBITRATION EPIDEMIC 3 (2015).

10. *See* Jared Odessky, *LGBTQ+ Workers Are Winning Their Rights. But Because of Their Forced Arbitration, They Can't Use Them.,* NAT'L EMP'T L. PROJECT (June 15, 2018), https://www.nelp.org/blog/LGBTQ+-workers-winning-rights-forced-arbitration-cant-use/ [https://perma.cc/Y6XX-P6KZ].

11. *See infra* Part I.C.

have federal workplace protections from sex discrimination after *Bostock*, with an MAA in place an LGBTQ employee's only feasible avenue to bring a workplace sex discrimination claim is arbitration. LGBTQ employees generally do not have the ability to turn down a job because of an MAA, as LGBTQ employees often wield much less negotiating and bargaining power than the average employee due their increased likelihood to endure unemployment, poverty, homelessness, and other socioeconomic hardships.[12] Additionally, the lack of diversity in the arbitration profession deters LGBTQ employees from pursuing discrimination claims and/or fully engaging in private, closed-door arbitration, as is required under MAAs.[13] These issues faced by LGBTQ employees are exacerbated in the arbitration process through various ways, which typically favor the employer, such as removing an employee's right to a jury trial, insufficient discovery to make a viable claim, and the employer's choosing of the arbitrator.[14]

MAAs not only give employers the upper hand by eradicating the ability of LGBTQ employees to litigate sex discrimination claims, but they also threaten to undercut the *Bostock* victory for LGBTQ workplace protections altogether. As such, the FAA should be amended to exempt sex discrimination claims from MAAs because mandatory arbitration provides advantages to the employer to the detriment of employees, and LGBTQ employees—specifically transgender employees—experience significant socioeconomic disadvantages that other vulnerable employees do not.[15] Further, after previous failed attempts,[16] current social movements and political support for victims of sex discrimination create a unique timing opportunity to limit the FAA's expansive power through an amendment that is narrow in scope.[17]

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12. *LGBT Data & Demographics,* WILLIAMS INST., https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#density [https://perma.cc/GP9Y-74S9] (last visited Mar. 7, 2021).

13. *See infra* Part II.B.

14. Devon M. Loerch, *The Man Behind the Curtain: How Mandatory Arbitration Impedes the Advancement of LGBTQ+ Rights*, 2020 J. DISP. RESOL. 151, 166 (2020).

15. *Id.*

16. *See infra* Part III.

17. *Id.*

Part I of this comment provides background on the protections granted to LGBTQ employees through the *Bostock* case, MAAs in the employment context, and the effects of the FAA and its interpretation by the Supreme Court regarding binding arbitration agreements in the American workplace. Part II discusses the unique socioeconomic challenges LGBTQ employees face and the ways in which mandatory arbitration provides advantages to the employer, which hurt the employee and do not promote the policy goals of anti-discrimination legislation. Part III provides a solution for how LGBTQ employees can address the far reach of mandatory arbitration and fully exercise their *Bostock* rights by capitalizing on current political support and social movements to push for federal legislation amending the FAA to exempt sex discrimination claims from MAAs.

## I. THE RELATIONSHIP BETWEEN *BOSTOCK*, MANDATORY ARBITRATION, AND THE FEDERAL ARBITRATION ACT

### A. Bostock *and LGBTQ Rights*

The *Bostock* decision was rendered in a trio of cases, all of which, an employer fired a long-time employee shortly after the employee revealed that he or she was homosexual or transgender.[18] The employees in each of these cases brought suit under Title VII of the Civil Rights Act alleging unlawful discrimination on the basis of sex.[19] However, given that the Supreme Court had never considered the issue of whether discrimination based on sex under Title VII encompassed gay and transgender employees, the circuits that decided the three *Bostock* cases were at odds in their holdings.[20]

The Supreme Court settled the circuit split in *Bostock*.[21] Title VII of the Civil Rights Act states that an employer is prohibited from, "refus[ing] to hire or . . . discharg[ing] any individual, or otherwise . . . discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national

18. Bostock v. Clayton County, Georgia, 140 S. Ct. 1731, 1737 (2020).
19. *See id.*; 42 U.S.C. § 2000e-2(a)(1).
20. *Bostock*, 140 S. Ct. at 1738; Loerch, *supra* note 14, at 156.
21. *See Bostock,* 140 S. Ct. at 1737.

origin."[22] Justice Gorsuch, writing for the majority and employing a textualist mode of statutory interpretation, reasoned that employment decisions based on sexual orientation or gender identity necessarily involve reference to sex: "If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague."[23] Similarly, he reasoned that discrimination against transgender employees was discrimination on the basis of sex. For example, discharging a transgender female employee and retaining "an otherwise identical employee who was identified as female at birth" is penalizing "a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth."[24] Accordingly, the Supreme Court concluded that discrimination because of an employee's gay or transgender status is discrimination on the basis of sex, and as such, gay and transgender employees are protected from sex discrimination under Title VII of the Civil Rights Act.[25]

Prior to *Bostock*, LGBTQ employees only had a patchwork of workplace protections varying from state to state, with thirty-three states providing some degree of protection for LGBTQ employees.[26] After *Bostock*, in every state, federal protections apply to LGBTQ employees, giving LGBTQ employees the ability to bring a Title VII claim against their employer for sex discrimination.[27] While *Bostock* will have a tremendous impact on LBGTQ employees, the pervasive use of forced/mandatory arbitration agreements in employment contracts threatens to limit the rights won by LGBTQ employees under *Bostock*.[28]

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22. 42 U.S.C. § 2000e-2(a).

23. *Bostock,* 140 S. Ct. at 1741.

24. *Id.*

25. *See id.* at 1737.

26. Loerch, *supra* note 14, at 156–58; *see* Adam Liptak, *Civil Rights Law Protects Gay and Transgender Workers, Supreme Court Rules*, N.Y. TIMES (June 15, 2020, 10:44 AM), https://www.nytimes.com/2020/06/15/us/gay-transgender-workers-supreme-court.html?searchResultPosition=1 [https://perma.cc/8SCA-N3E3].

27. 42 U.S.C. § 2000e-2(a); *see Bostock,* 140 S. Ct. 1731 at 1754; *see also* Loerch, *supra* note 14, at 156–58.

28. *See Bostock,* 140 S. Ct. 1731 at 1754; *see also* Loerch, *supra* note 14, at 163.

B. *The Operation and Pervasiveness of MAAs*

Before exploring the federal statute that upholds the use of MAAs in the employment context, it is important to understand what mandatory arbitration entails and just how prevalent these agreements have become in the employment context.[29] Generally, employers use arbitration agreements in employment contracts to control the dispute resolution forum by restricting an employee's ability to sue the employer in court. This is because when employees agree to binding arbitration agreements, they give up their ability to pursue any future claims in court arising from employment disputes, often termed predispute arbitration agreements.[30] Further, such agreements frequently contain clauses requiring employees to waive their right to a jury trial and class action suits.[31] Importantly, MAAs are often required as a condition of hire and if a potential employee does not sign the agreement, he or she does not get the job.[32]

If an employment contract contains an MAA, all claims against the employer must be dealt with through arbitration, which is an informal proceeding wherein, unless otherwise specified in the agreement, normal rules of evidence and civil procedure do not apply.[33] In the context of employment contracts, the employer, as the creator of the MAA, is generally the one who designs and determines the terms of arbitration.[34] Typically, the parties designate an arbitrator who hears the parties' arguments, witnesses

29. *See* Loerch, *supra* note 14, at 165; ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION 5 (2017); Kathleen McCullough, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo and Times up-Inspired Action Against the Federal Arbitration Act*, 87 FORDHAM L. REV. 2653, 2657 (2019).

30. COLVIN, *supra* note 29, at 1.

31. Vail Kohnert-Yount, Jared Odessky, & Sejal Singh, *No, Companies That Force Workers to Sign Away Their Right to Sue Are Not LGBTQ-Friendly,* SLATE (Jan. 23, 2019, 4:26 PM), https://slate.com/news-and-politics/2019/01/human-rights-campaign-corporate-equality-index-arbitration-lgbtq.html [https://perma.cc/V8ML-4UVB].

32. IMRE S. SZALAI, EMP. RTS. ADVOC. INST. FOR L. & POL'Y, THE WIDESPREAD USE OF WORKPLACE ARBITRATION AMONG AMERICA'S TOP 100 COMPANIES 8 (2018).

33. STONE & COLVIN, *supra* note 9, at 5.

34. *See id.* ("The employee…has no real choice or ability to negotiate the terms of the arbitration clause.").

testimony, and reviews evidence submitted by the parties.[35] After the hearing, the arbitrator issues a binding award that leaves "no realistic possibility for appeal."[36]

Employers' use of MAAs in employment contracts has grown increasingly prevalent over the last thirty years.[37] Today, it is estimated that over fifty percent of Fortune 100 companies require their employees to sign MAAs in regard to any employment dispute, and smaller entities have followed suit.[38] As of 2017, 50.4% of non-union, private-sector employers have MAAs in place for resolution of disputes with employees.[39] Among companies with 1,000 or more employees, 65.1% have mandatory arbitration procedures.[40] Even if MAAs are not signed upon hire, employers can and do require current employees to agree to amendments to their existing contracts or to sign separate MAAs.[41] MAAs have taken hold of employment contracts in the American workforce and it is estimated that over half of all employment disputes in the last decade have been mandatorily arbitrated.[42] All this to say, MAAs have an enormous influence in the employment context, as "over half of the American workforce has signed away their ability to vindicate their rights in court."[43]

### C. *A Strong Foundation for MAA Enforceability—the FAA and its Interpretation by the Supreme Courtmnk*

Congress enacted the FAA[44] in 1925 and intended for the legislation to reach only parties with similar bargaining power who voluntarily agreed to arbitrate, and as such, was largely applied to commerce transactions.[45] Following its enactment, however,

35. *Id.*
36. *Id.*
37. *See* Odessky, *supra* note 10.
38. SZALAI, *supra* note 32, at 11.
39. COLVIN, *supra* note 29, at 4–5.
40. *Id.* at 5.
41. Loerch, *supra* note 14, at 166.
42. *Id.*
43. *Id*. at 165.
44. 9 U.S.C. §§ 1–15.
45. *See* Loerch, *supra* note 14, at 163; Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?,* 57 STAN. L. REV. 1631, 1636 (2005) (discussing the passage of the FAA in 1925, "[T]he use of arbitration was [intended to be]

American businesses broadly embraced arbitration as a cheaper, more efficient method of resolving disputes as compared to civil litigation, so that today it has, "[infiltrated] the realm of the private citizen."[46] While the language of the FAA is fairly brief,[47] the Supreme Court has interpreted it expansively, rendering decisions that have enforced MAAs in the employment context, limited an employee's ability to challenge them, and preempted the ability of states to regulate MAAs.[48] Through the Court's broad interpretation of the FAA, and by operation of the Supremacy Clause of the Constitution,[49] MAAs in employment contracts are now binding on millions of American employees, preventing them from seeking justice through civil litigation.[50]

Initially, Title VII claims enjoyed protection from the FAA's reach in compelling arbitration. Decided in 1974, *Alexander v. Gardner-Denver Co.* was one of the first and most significant cases regarding MAAs and statutory claims in the employment context.[51] In *Alexander*, a drill operator whose union contract contained an arbitration clause attempted to bring a race discrimination claim in

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limited to business-to-business or management/union contexts…when one Senator voiced a concern that arbitration contracts might be 'offered on a take-it-or-leave-it basis to captive customers or employees,' the Senator was reassured by the bill's supporters that they did not intend for the bill to cover such situations.").

46. Michael L. Rustad et al., *An Empirical Study of Predispute Mandatory Arbitration Clauses in Social Media Terms of Service Agreements,* 34 U. ARK. LITTLE ROCK L. REV. 643, 676 (2012).

47. 9 U.S.C. § 2 ("[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

48. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25, (1983) ("Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements . . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."); Southland Corp. v. Keating, 465 U.S. 1, 10–11 (1984); Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 640 (1985); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26–27 (1991).

49. U.S. CONST. art. VI, cl. 2.

50. STONE & COLVIN, *supra* note 9, at 3–4.

51. *See generally* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

district court, even though the issue had already been decided adversely against the employee in arbitration.[52] The lower court granted the employer's summary judgement motion, in which the employer argued that the race discrimination claim had already been decided by the arbitrator and as such, the employee was not then able to bring the claim in court.[53] The case made its way up to the Supreme Court which held that, at least in regard to arbitration conducted under the union's collective bargaining agreement, an employee could bring a discrimination claim in court, even if he or she had already lost on that claim in arbitration.[54] The Court reasoned that because the labor arbitrators in *Alexander* only had authority to decide contractual rights and not individual statutory rights,[55] that Congress intended for the "final responsibility for enforcement of Title VII [to be] vested with federal courts."[56] Further, Title VII's policy goal of preventing and remedying discrimination in the workplace would be best served by allowing "an employee to pursue fully both his remedy under the . . . arbitration clause" and in the courts.[57] After *Alexander*, all indications pointed to statutory claims, like Title VII claims, being exempt from MAAs in employee contracts.[58]

Then, in 1991, the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.* effectively erased this exemption.[59] In *Gilmer*, the Supreme Court held that the FAA controlled and compelled arbitration in a dispute in which an employee sued his employer in court for age discrimination under the Age Discrimination in Employment Act (ADEA).[60] In a seeming about-face from *Alexander*, the Court concluded that mandatory arbitration in employment disputes involving an alleged violation of federal anti-discrimination statutes was not inconsistent with the "framework and

52. *Id.* at 43.
53. *Id.*
54. *See id.* at 59–60.
55. *See id.* at 53–54.
56. *Id.* at 44.
57. *Id.* at 59–60; Taylor J. Freeman Peshehonoff, *Title VII's Deficiencies Affect #MeToo: A Look at Three Ways Title VII Continues to Fail America's Workforce*, 72 OKLA. L. REV. 479, 510 (2020).
58. Freeman Peshehonoff, *supra* note 57, at 511.
59. *See* McCullough, *supra* note 29, at 2666.
60. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

purposes" of the statutes.[61] The Court distinguished *Alexander* in several ways,[62] but notably by pointing out that the outcome of *Alexander* turned on the employee's rights under the particular terms of his union's collective bargaining agreement, but in *Gilmer*, no such union collective bargaining agreement was present.[63] Further, in addressing the policy concerns of statutory claims laid out in *Alexander*[64] the Court in *Gilmer* reasoned that, an agreement to arbitrate a statutory claim, such as an ADEA claim, is "not a waiver of substantive rights, but merely an agreement to resolve claims arising from those rights in an arbitral, rather than a judicial, forum"[65] and "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[66] The Court in *Gilmer* also explained that, given the relatively infrequent use of arbitration agreements in the workplace at the time, "it [was] unlikely that all or even most ADEA claimants [would] be subject to arbitration agreements."[67] After *Gilmer*,

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61. *Id.* at 27.

62. *Id.* at 35. The Supreme Court noted the differences between *Gilmer* and *Alexander* when it stated:

> There are several important distinctions between the Gardner-Denver line of cases and the case before us. First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings.

*Id.*

63. *Id.* ("An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case.").

64. Alexander v. Gardner-Denver Co., 415 U.S. 36, 59–60 (1974).

65. Marsha Levinson, *Mandatory Arbitration: How the Current System Perpetuates Sexual Harassment Cultures in the Workplace*, 59 SANTA CLARA L. REV. 485, 498 (2020) (quoting *Gilmer*, 500 U.S. at 26).

66. *Gilmer*, 500 U.S. at 28 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)).

67. *Id.* at 32.

lower courts began compelling arbitration in cases involving alleged employer violations of federal anti-discrimination statutes.[68] Encouraged by the Supreme Court's decision in *Gilmer*, the percentage of American workers forced to sign employment contracts with MAAs grew from under three percent in 1992 to nearly twenty-five percent in the early 2000s.[69]

In holding that the FAA manifests a "liberal federal policy favoring arbitration agreements"[70] which preempts conflicting state statutes, *Gilmer* also paved the way for later cases that build on this precedent and strengthen the force of the FAA.[71] Following *Gilmer*, the Supreme Court explicitly ruled in *Circuit City v. Adams* that the FAA applied to MAAs in employment contracts.[72] In 2011, the Supreme Court strengthened the FAA's power to preempt state laws regarding arbitration provisions in contracts in *AT&T Mobility LLC v. Concepcion*.[73] In *Concepcion,* the Court held that the FAA preempted a California law and state court ruling that attempted to apply the contract defense of unconscionability to a class action waiver in an arbitration agreement.[74] The Court held that the state law was invalid because it "interfered with the fundamental attributes of arbitration."[75] In writing for the majority, Justice Scalia affirmed that, "[s]tates cannot require a procedure that is inconsistent with the FAA."[76]

More recently, in 2018, the Supreme Court in *Epic Sys. Corp. v. Lewis* continued to expand the scope of the FAA, holding that because the FAA requires arbitration agreements to be enforced according to their terms, a class action waiver included in an MAA precluded employees from seeking judicial relief as a generally

68. *See, e.g.,* Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991); Williams v. Katten, Muchin & Zavis, 837 F. Supp. 1430, 1443 (N.D. Ill. 1993).

69. Odessky, *supra* note 10.

70. *Gilmer,* 500 U.S. at 25 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

71. *Id.* at 24–25; Levinson, *supra* note 65, at 498.

72. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001).

73. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 343 (2011).

74. *Id.* at 352.

75. *Id.* at 344 ("The overarching purpose of the FAA…is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.").

76. *Id.* at 351.

applicable contract defense did not apply.[77] In concert with cases like *Concepcion*, the Court in *Epic Systems* gave the go-ahead for employers to use class action waivers in MAAs, furthering the FAA onslaught on employee rights by diminishing employees' ability to band together to protect their rights.[78]

In short, because of the expansive interpretation of the FAA by the Supreme Court, even with post-*Bostock* Title VII protections, an LGBTQ employee who has signed an MAA with their employer may never get to fully vindicate their rights by having "their day in court." As such, federal legislative action is needed on the FAA to ensure that *Bostock* is not a hollow victory.

## II. MANDATORY ARBITRATION PROVIDES ADVANTAGES FOR THE EMPLOYER TO THE DETRIMENT OF THE VULNERABLE EMPLOYEES TITLE VII IS INTENDED TO PROTECT

Arbitration is not without its benefits, and proponents of mandatory arbitration clauses argue that these provisions result in more cost-efficient and expeditious resolution of employment disputes than civil litigation.[79] Civil litigation is an arduous process that is often delayed by overloaded dockets, protracted discovery,

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77. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624–1625 (2018). The Court rejected employees' argument that the class action waivers at issue were illegal and thus unenforceable under the FAA as they violated employee rights under the National Labor Relations Act. *See id.* The Court reasoned that the class action waivers were not illegal under the NLRA and were therefore enforceable because "[The NLRA] does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand." *Id.* at 1264.

78. *See id.* at 1633, 1640, 1646 (Ginsburg, J., dissenting) ("The Court today subordinates employee-protective labor legislation to the Arbitration Act. In so doing, the Court . . . ignores the destructive consequences of diminishing the right of employees to band together in confronting an employer. . . . Forced to face their employers without company, employees ordinarily are no match for the enterprise that hires them. Employees gain strength, however, if they can deal with their employers in numbers . . . . The inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."); *see also* Odessky, *supra* note 10.

79. *See* Charles B. Craver, *The Use of Non-Judicial Procedures to Resolve Employment Discrimination Claims*, 11 KAN. J.L. & PUB. POL'Y 141, 158 (2001); *see also* Brian Farkas, *The Continuing Voice of Dissent: Justice Thomas and the Federal Arbitration Act*, 22 HARV. NEGOT. L. REV. 33, 37 (2016).

sophisticated rules of evidence and procedure, and time-intensive jury trials.[80] Proponents of arbitration argue that the speed and informality of arbitration as opposed to litigation decreases the cost to parties.[81] Additionally, parties may prefer arbitration over litigation because arbitration is more private, as hearings do not take place in an open courtroom and are not open to the public.[82] Therefore, the privacy provided by arbitration allows both employers and employees to keep damaging, sensitive, or valuable information out of the public eye.[83]

However, the employer is the primary beneficiary of these advantages, especially when arbitration is used as the exclusive forum for anti-discrimination claims brought by vulnerable parties with relatively little bargaining power, such as LGBTQ employees.[84] Because of the advantages the employer receives through mandatory arbitration of discrimination claims, and the fact that LGBTQ employees experience unique and significant socioeconomic disadvantages in employment, in order to allow LGBTQ employees to fully vindicate their rights won under *Bostock*, the FAA should be amended to exempt sex discrimination claims from mandatory arbitration.

### A. *LGBTQ Employees Already Face Significant Disadvantages in the Employment Context, Calling into Question the Balance of Power and Voluntariness of MAAs*

Currently, nearly sixteen percent of Generation Z, individuals aged eighteen to twenty-three in 2020, identifies as LGBTQ.[85] This means that more of the American population, and current or potential members of the workforce, identify as LGBTQ than ever

80. *See* Farkas, *supra* note 79, at 37.

81. *See Concepcion*, 563 U.S. at 345.

82. *See* Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1211 (2006).

83. *See generally id*. at 1223–25 (discussing merchant groups' and other organizations' preference for arbitration to keep matters private and tailored to a specific industry).

84. *See infra* Part II.A.

85. Jeffrey M. Jones, *LGBT Identification Rises to 5.6% in Latest U.S. Estimate*, GALLUP (Feb. 24, 2021), https://news.gallup.com/poll/329708/lgbt-identification-rises-latest-estimate.aspx [https://perma.cc/PH4T-5MMW].

before.[86] However, LGBTQ employees, especially transgender employees, experience discrimination in the workplace at a startlingly high rate.[87] A 2014 study estimated that between eight and seventeen percent of lesbian, gay, and bisexual workers were denied employment or unfairly fired on the basis of their sexual orientation.[88] For transgender employees, that number is even higher. The National Center for Transgender Equality (NCTE) estimates that more than one in four transgender people have lost a job due to bias, and more than three-fourths have experienced some form of workplace discrimination.[89] Gillian Branstetter, a spokesperson for the NCTE, said this workplace discrimination has a ripple effect that "contributes to a crisis of homelessness, poverty and violence faced by too many in our community."[90] Further, the LGBTQ community as a whole experiences unemployment, poverty, food insecurity, and homelessness at higher rates than the national average.[91] Because of these socioeconomic factors, LGBTQ employees have even less negotiating power than the average employee when it comes to turning down a job or refusing to sign an MAA, and brings into

86. *Id.* This study also found that 9.1% of Millennials (born 1981–1996) identify as LGBTQ, 3.8% of Generation X (born 1965–1980), 2% of Baby Boomers (born 1946–1964), and only 1.3% of Traditionalists (born before 1946).

87. *See* Sharita Gruberg, *Beyond Bostock: The Future for LGBTQ Rights,* CTR. FOR AM. PROGRESS 1, 2 (Aug. 26, 2020, 9:01 AM), https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/08/26/489772/beyond-bostock-future-lgbtq-civil-rights/ [https://perma.cc/U989-JXEB].

88. *Id.*

89. *Issues | Employment*, NAT'L CTR. FOR TRANSGENDER EQUAL., https://transequality.org/issues/employment [https://perma.cc/4ABF-VTSH] (last visited Feb. 28, 2021).

90. Julie Moreau, *'Laughed out of interviews': Trans workers discuss job discrimination*, NBC NEWS (Oct. 6, 2019, 2:22 PM), https://www.nbcnews.com/feature/nbc-out/laughed-out-interviews-trans-workers-discuss-job-discrimination-n1063041 [https://perma.cc/EE9C-WEWM].

91. *LGBT Data & Demographics,* WILLIAMS INST., https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#density [https://perma.cc/V7LQ-BM7H] (last visited Sep. 9, 2021). The COVID-19 pandemic exacerbated these numbers to reveal more disparity in healthcare coverage and poverty levels. *See* Elliott Kozuch, *HRC Releases Research Brief on the Vulnerabilities of the LGBTQ Community During the COVID-19 Crisis,* HUM. RTS. CAMPAIGN (Mar. 20, 2020), https://www.hrc.org/news/hrc-releases-research-brief-on-lgbtq-community-during-covid-19-crisis [https://perma.cc/3GY9-RTJ3].

question just how voluntarily employees enter into these agreements.[92]

Further, due to the Supreme Court's interpretation of the FAA, and the practical restrictions of administrative agencies, LGBTQ employees have extremely limited options to address disadvantages due to poverty or power imbalances once they have signed an MAA. For example, if an LGBTQ employee experiencing poverty wanted to bring a class action with other employees against an employer for alleged sex discrimination, the Supreme Court has effectively taken away this cost-sharing option for employees, as class action waivers are enforceable in mandatory arbitration clauses.[93] Bringing a discrimination claim through the Equal Employment Opportunity Commission (EEOC) is also a way an LGBTQ employee with few resources could navigate around an MAA and save significant monetary costs.[94] Ideally, the EEOC, which can and does litigate discrimination claims on behalf of some employees, would serve as a cost-effective option for LGBTQ employees.[95] The Court in *Gilmer* even responded to critiques of mandatory arbitration by pointing to the EEOC as a viable option for an employee wanting to pursue a discrimination claim through litigation.[96] However, the EEOC like many other government agencies, is "overburdened and underfunded."[97] Consequently, most employees who file a

92. *See* Loerch, *supra* note 14, at 167 ("A ruling recently handed down by the National Labor Relations Board (NLRB) has also allowed employers to rescind job offers or terminate an existing job if an individual fails to accept the terms laid out in an employment contract.").

93. *Id.* at 168.

94. *See Filing a Charge of Discrimination*, EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/filing-charge-discrimination [perma.cc/US2G-SK2Z] (last visited Sep. 8, 2021).

95. *See* Equal Emp. Opportunity Comm'n v. Waffle House, Inc., 534 U.S. 279, 297–98 (2002) (holding that the EEOC was not prohibited from pursuing discrimination claim even though employee signed an arbitration agreement as the FAA does not mention enforcement by public agencies or place restrictions on a nonparty to the agreement's choice to pursue a claim).

96. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) ("We also are unpersuaded by the argument that arbitration will undermine the role of the EEOC in enforcing the ADEA. An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action.").

97. Meagan Glynn, Note, *#TimesUp for Confidential Employment Arbitration of Sexual Harassment Claims*, 88 GEO. WASH. L. REV. 1042, 1055 (2020);

discrimination claim with the EEOC do not receive representation or resolution through the EEOC.[98] Due to socioeconomic factors, many LGBTQ employees have little to no negotiating power when it comes to refusing a job because of an MAA, and other methods such as class actions or EEOC resolution are not always viable options. As such, the FAA needs to be amended to ensure that LGBTQ employees can enforce their rights, without being forced into arbitration.

### B. *Mandatory Arbitration Favors the Employer and Disadvantages the Discriminated Against Employee, Going Against the Purposes of Anti-Discrimination Legislation*

The challenges that LGBTQ employees face—significant socioeconomic hardships, little bargaining power, and the lack of options to avoid arbitration after having signed an MAA—are exacerbated during the arbitration process, which overall hurts vulnerable employees.[99] While arbitration certainly has time and cost benefits, mandatory arbitration, especially in regard to discrimination claims, has significant shortcomings that ultimately favor the employer and not the party alleging discrimination. Additionally, the purpose of employment discrimination statutes, which is to "achieve the public goal of eliminating discrimination in the workplace,"[100] is not achieved through an arbitration process that disproportionately favors the employer.[101] As such, litigation is a

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*see also* Stacy A. Hickox & Michelle Kaminski, *Measuring Arbitration's Effectiveness in Addressing Workplace Harassment*, 36 HOFSTRA LAB. & EMP. L.J. 293, 301–02 (2019) (providing statistics showing that the EEOC can take on very few claims and is overworked).

98. Glynn, *supra* note 97, at 1055. It is also possible that post-*Bostock*, the EEOC may receive even more sex discrimination claims from LGBTQ employees as some of these employees are now empowered to make these claims after the Supreme Court's decision. *See* McCullough, *supra* note 29, at 2667–68 (showing an increase in sex discrimination claims by 13.6% to the EEOC the year after the #MeToo movement took off in 2017).

99. *See infra* Part II.A.

100. Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 399 (1999).

101. Employees also experience disadvantages in arbitration in a very tangible way: they win less in damages. *See* STONE & COLVIN, *supra* note 9, at 19–20 (detailing a study showing that on average, employee plaintiffs' overall damages awarded in mandatory arbitration are $23,548 and the average overall damages for employment discrimination claims awarded in federal court

more effective process for eliminating discrimination in the workplace because it deters employers from violating the law, educates the public, and creates precedent for future discrimination cases.[102]

LGBTQ employees are prevented from meaningfully asserting their post-*Bostock* rights when they are forced to arbitrate discrimination claims through a process that does not guarantee an extensive discovery process. Because arbitration is an informal process, as compared to litigation, it often lacks the discovery tools that allow employees to access enough evidence for a viable claim.[103] Lack of discovery is particularly difficult on employees bringing employment discrimination claims because proving these claims requires evidence of disparate treatment, which in a post-*Bostock* claim means an LGBTQ employee would have to show that an employee who is of a different sex is being treated more favorably than they are and that the LGBTQ employee's membership in the protected class is the reason for the unfavorable treatment.[104] Because discrimination claims require evidence of disparate treatment, "it is practically impossible to win without the right to use extensive discovery to find out how others have been treated."[105] Further, since the employer sets the terms of the MAA,[106] it will often impose provisions that "shorten statutes of limitations, alter the burdens of proof, limit the amount of time a party has to present his or her case, or otherwise impose constrictive procedural rules."[107] Because the discovery process is imperative to obtain sufficient evidence in a discrimination claim to show disparate treatment, litigation is needed to allow the employee the time and ability to carry out full discovery in order to build the evidence for a viable claim.

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are $143,497. *Id.* at 20. In terms of win rates, the employee win rate in arbitration is nearly 36% lower than the employee win rate in federal court). *See id.*

102. *See generally* Szott Moohr, *supra* note 100, at 426–39.

103. Odessky, *supra* note 10.

104. Jennifer Isaacs, *Proving Title VII Discrimination in 2019*, AM. BAR ASS'N, https://www.americanbar.org/groups/young_lawyers/projects/no-limits/proving-title-vii-discrimination-in-2019/ [https://perma.cc/ZU58-Q6K5] (last visited Oct. 5, 2021).

105. STONE & COLVIN, *supra* note 9, at 4.

106. *See id.*

107. *Id.*

Additionally, while privacy is cited as an advantage of arbitration, it arguably undercuts the policy goals of anti-discrimination statutes by funneling discrimination claims into private forums, away from the public eye. Unlike arbitration, civil litigation can deter employers who engage in serial discrimination by drawing attention to their misconduct; it also builds a public record of employer misconduct, allowing employees to access such information and more easily assist in identifying repeat patterns of discriminatory conduct.[108] Further, litigating discrimination claims would help set favorable precedent, "produc[ing] published opinions that courts [would] infuse into public law."[109] Since LGBTQ sex discrimination claims are "new" in the sense that there was only a patchwork of state workplace protections before, litigation is needed to establish precedent in this area. Not only does the private nature of arbitration hurt employees in being able to establish patterns of conduct and reliable precedent,[110] but discrimination claims specifically require a level of publicity to address policy concerns. Discrimination claims are fundamentally different from other disputes because:

> [P]rivacy causes greater concern when the subjects handled in arbitration affect public interests. That is, we care more when federal statutory claims such as employment discrimination are taken away from the public eye than when a dispute over the quality of soybeans shipped from Missouri to Nevada is handled privately.[111]

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108. Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 487–88 (2006) ("The confidentiality of the arbitral forum prevents other similarly situated claimants from learning of the existence or substance of a dispute. Arbitral privacy can thus deprive existing and potential claimants in litigation or arbitration of information and documents relevant to their claims, and it can impede them from proving a pattern or practice or intentional misconduct.").

109. Schmitz, *supra* note 82, at 1211.

110. Levinson, *supra* note 65, at 495 ("While arbitration often results in a private award, litigation of discrimination claims develops and refines legal precedent and educates the public about the legality of certain employment practices. This developed law not only governs future disputes, but also provides employers with guidelines for appropriate conduct and reinforces cultural norms that disavow invidious discrimination.").

111. Sternlight, *supra* note 45, at 1664–65.

Accordingly, the risks associated with the private arbitration of anti-discrimination claims are far greater than when, for example, commercial disputes are arbitrated.

In addition to privacy and discovery concerns, the fairness and impartiality of the arbitration process is called into question by the lack of diversity in the arbitration profession. Typically, arbitrators are former lawyers or judges, a pool that generally tends to be white males.[112] Just 26% of members of the prestigious American Arbitration Association are "women and minorities," and the Association does not even provide data regarding race or LGBTQ status of its arbitrators.[113] Further, because of issues such as the repeat player advantage,[114] which shows that employers win more in arbitration because of the incentive of the arbitrator to rule in favor of the party who hired them,[115] employers may intentionally avoid certain arbitrators or request from the arbitration organization a list of arbitrators with certain qualities such as experience as a judge or law firm partner, which are positions typically held by white men.[116] LGBTQ employees may be hesitant to bring a claim,

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112. Paige Smith, *Lack of Arbitrator Diversity is an Issue of Supply and Demand*, BLOOMBERG L. (May 15, 2019, 6:04 AM), https://news.bloomberglaw.com/daily-labor-report/lack-of-arbitrator-diversity-is-an-issue-of-supply-and-demand [https://perma.cc/EBV4-HHTS].

113. *Diversity and Inclusion Initiatives*, AM. ARB. ASS'N, https://www.adr.org/diversityinitiatives [https://perma.cc/6N24-DF7J] (last visited Sep. 9, 2021).

114. "Repeat player advantage" refers to the phenomenon wherein employers win more in arbitration because it is the employer who is essentially hiring the arbitrator, and as such, arbitrators are incentivized to rule in favor of the employer, a potential repeat customer, in order to increase their chances of being chosen to arbitrate for that organization again in the future. *See* STONE & COLVIN, *supra* note 9, at 20–23 (detailing a study of 2,802 mandatory employment arbitration cases decided between 2003 and 2014). This study showed that when an employer appears before an arbitrator the first time, the employee's chance of winning that case is 17.9%, which is still less than federal and state court win rates. *Id.* at 23. But, after the employer has appeared before the same arbitrator four times, the employee's chance of winning drops to 15.3%, and after an employer appears before the same arbitrator twenty-five times, the employee's chance of winning is just 4.5%. *Id.*

115. *Id.*

116. Smith, *supra* note 112. Because of the overall lack of diversity in the arbitration profession and requests by the employer of certain qualifications of arbitrators from the arbitration organization, the process of selecting an arbitrator "more often than not results in the selection of a white, male mediator." *Id.*

or view arbitration as fair, if they are not likely to see themselves reflected in the process, or if they feel as though they may face discrimination from the arbitrator.[117] Studies have shown that LGBTQ individuals are hesitant to engage in services such as healthcare due to fear of discrimination, lack of diversity, and absence of LGBTQ specific training in the medical profession.[118] The lack of diversity in the arbitration field, and any field providing services to a diverse group of people boils down to trust. When it comes to addressing issues such as sex discrimination allegations, "it is important that parties feel that they can trust the neutral third party conducting their [arbitration] process, especially since many [arbitration] processes bring participants together behind closed doors and the discussions involve matters of crucial importance to the livelihood or identity of the parties involved."[119]

In addition, because LGBTQ employee protections varied so widely prior to *Bostock*, it is reasonable to surmise that a transgender employee in Alabama,[120] where there were no protections for LGBTQ employees prior to *Bostock*, may be hesitant to bring a post *Bostock* sex discrimination claim against their employer in mandatory arbitration if the arbitrator (typically familiar with the employer) will likely be a white male who may have no prior experience arbitrating LGBTQ sex discrimination claims. This lack of diversity among arbitrators and the lack of experience in arbitrating *Bostock* sex discrimination claims, could further discourage vulnerable LGBTQ employees from pursuing discrimination claims if they know their only option for a "neutral" fact finder

117. *See* Sopan Deb, *Jay-Z Criticizes Lack of Black Arbitrators in a Battle Over a Logo*, N.Y. TIMES (Nov. 28, 2018), https://www.nytimes.com/2018/11/28/arts/music/jay-z-roc-nation-arbitrators.html [perma.cc/52P7-K6V4]. Rapper Jay-Z halted arbitration over a dispute with his clothing line after he was only able to find two qualified Black arbitrators out of a list of 100 provided by the American Arbitration Association. *Id.* Jay-Z's lawyer said this lack of diversity, "deprives litigants of color of a meaningful opportunity to have their claims heard by a panel of arbitrators reflecting their backgrounds and life experience." *Id.*

118. RYAN THORESON, HUM. RTS. WATCH, "YOU DON'T WANT SECOND BEST": ANTI-LGBT DISCRIMINATION IN US HEALTH CARE 13–14, 21, 25, 26 (Graeme Reid et al. eds., 2018).

119. Maria R. Volpe et al., *Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing the ADR Field*, 35 FORDHAM URB. L.J. 119, 121 (2008).

120. *See* Loerch, *supra* note 14, app. at 172.

is an arbitrator hired by their employer who will likely not reflect the background of the employee.

In summary, mandatory arbitration creates the upper hand for the employer by removing procedural safeguards such as discovery,[121] as well as imposing privacy restrictions that prevent establishing precedent[122] and identifying repeat discriminatory behavior by the employer.[123] These advantages to the employer contradict the remedial and preventative goals of anti-discrimination legislation like Title VII in eliminating discrimination in the workplace.[124] Further, the lack of diversity in the arbitration profession[125] creates a lack of trust in the arbitrator and arbitration process when minority employees, such as LGBTQ employees, do not see themselves reflected in the arbitrators that decide their claims. Due to the advantages mandatory arbitration gives to the employer to the detriment of the employee, this practice, especially in regard to arbitrating discrimination claims, needs to be eliminated.

## III. THE FAA NEEDS TO BE AMENDED TO EXEMPT SEX DISCRIMINATION CLAIMS, AND THE TIME IS NOW TO TAKE ADVANTAGE OF POLITICAL AND SOCIAL SUPPORT

As previously discussed, the Supreme Court has continued to broadly interpret the FAA as enforcing arbitration agreements in the employment context,[126] and as largely preempting state laws regarding arbitration.[127] However, even Justice Gorsuch in *Epic Systems* expressed concern regarding consequences of rigid adherence to a law enacted nearly a hundred years ago saying, "[y]ou

121. *See* Odessky, *supra* note 10.
122. Levinson, *supra* note 65, at 495.
123. Kratky Doré, *supra* note 108, at 487–88.
124. Szott Moohr, *supra* note 100, at 399.
125. Smith, *supra* note 112.
126. *See supra* Part I.
127. *See id. See generally* McCullough, *supra* note 29, at 2667–83 (detailing the likely preemption of state legislation in 2017–2018 in Washington, New York, California, and Massachusetts seeking to limit the scope of the FAA through various approaches); Erin Mulvaney, *Federal Arbitration Law Poses Barrier to #MeToo State Laws*, BLOOMBERG LAW (Aug. 7, 2019, 11:48 AM), https://news.bloomberglaw.com/daily-labor-report/federal-arbitration-law-poses-barrier-to-metoo-era-state-laws [https://perma.cc/G63L-NGPB] ("Absent a federal law change, arbitration is likely to prevail in court, despite states jumping in to help. . . .").

might wonder if the balance Congress struck in 1925 between arbitration and litigation should be revisited in light of more contemporary developments."[128] The Supreme Court, however, constrained by decades of precedent favoring arbitration, is not the forum where change addressing the contemporary issues created by the application of the FAA can be made. As Ruth Bader Ginsburg stated in her dissent in *Epic Systems*, "[c]ongressional correction of the Court's elevation of the FAA over workers' rights . . . is urgently in order."[129] Accordingly, Congress is the only entity able to loosen the decades-long grip the FAA has imposed on some of America's most vulnerable workers.[130]

Similar to LGBTQ employees, members of other Title VII protected classes[131] also experience socioeconomic hardships that affect bargaining power in the employment context as well as face practical and procedural disadvantages in the arbitration forum.[132] As such, ideally, all Title VII discrimination claims would be exempt from MAAs in order to prevent employers from contracting around Title VII protections, to better serve the purposes of anti-discrimination legislation, and to put vulnerable employees on more equal footing with their employer when claims arise.[133] However, this broader approach to amending the FAA was attempted most recently in 2019[134] with the Forced Arbitration Injustice Repeal (FAIR) Act. The FAIR Act attempted to amend the FAA to

128. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621–22 (2018).

129. *Id.* at 1633 (Ginsburg, J., dissenting).

130. *See id.*

131. 42 U.S.C. § 2000e-2(a) ("[R]ace, color, religion, sex, or national origin . . . .").

132. *See supra* Part II.

133. Freeman Peshehonoff, *supra* note 57, at 516 ("Title VII claims, as a whole, should not be subject to arbitration provisions. Such claims should be treated as they were under the *Alexander* rationale—separate. An exemption that prevents employers from contracting around Title VII protections would once again protect employees from harassment and discrimination and shine a light on the companies that perpetuate discriminatory behavior. Without this change, companies will continue to hide misconduct and employees will continue to suffer behind closed doors.").

134. Similar laws have been proposed in the past and also have received little support due to the broad nature of the amendment. *See The Arbitration Fairness Act of 2007: Hearing on S. 1782 Before the Subcomm. on the Const. of the S. Comm. on the Judiciary,* 110th Cong. 3 (2007) (statement of Sam Brownback, Member, S. Comm. on the Judiciary).

"prohibit predispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights [Title VII] disputes . . . ."[135] While this sweeping legislation passed in the Democrat-controlled House of Representatives,[136] the bill did not even come up for debate on the Senate floor because of its broad approach and lack of bipartisan support.[137] Therefore, a more limited amendment to the FAA has a better chance of coming to fruition. Because LGBTQ discrimination claims are sex discrimination claims under *Bostock*, LGBTQ employees have a unique opportunity to capitalize on current political and social support to push for a narrow amendment to the FAA that would exempt only sex discrimination claims from mandatory arbitration.

Amending the FAA to exempt sex discrimination claims has had bipartisan political support in the past,[138] but bolstered by current Democratic majorities in the House and Senate, as well as Democratic control of the presidency, the time to seize on political support to amend the FAA is now.[139] The Ending Forced Arbitration of Sexual Harassment Act (EFASHA),[140] originally introduced by Senator Kirsten Gillibrand in 2017, provides the necessary language: "[N]o predispute arbitration agreement shall be valid or

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135. *See* Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. § 2(1) (2019).

136. Alexia Fernandez Campbell, *The House just passed a bill that would give millions of workers the right to sue their boss*, VOX (Sep. 20, 2019, 11:30 AM), https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act [https://perma.cc/P9MA-XZ4S].

137. *Id.*

138. McCullough, *supra* note 29, at 2675 ("House and Senate sponsorship for [EFASHA] did not follow strict party lines, indicating stronger bipartisan support").

139. *Congress Profiles*, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Congressional-Overview/Profiles/111th/ [https://perma.cc/E84T-CVR4] (last visited Sep. 11, 2021) (the last time Democrats controlled the House, Senate, and Presidency was 2009–2011); Jacob Jarvis, *Democrats Set Sights on Holding Congress in 2022 as Fundraising Push Launched*, NEWSWEEK (Jan. 28, 2021, 8:30 AM), https://www.newsweek.com/democrats-set-sights-holding-congress-2022-fundraising-push-launched-1565097 [https://perma.cc/4JN3-8UUL] (the loss of even one Democratic seat in the 2022 election would erase Democratic control in the Senate and perhaps take away the opportunity to pass EFASHA).

140. Ending Forced Arbitration of Sexual Harassment Act, S. 2203, 115th Cong. (2017).

enforceable if it requires arbitration of a sex discrimination dispute."[141] The EFASHA further defines "sex discrimination dispute" to mean "a dispute between an employer and employee arising out of conduct that would form the basis of a claim based on sex under Title VII of the Civil Rights Act of 1964 . . . ."[142]

This bill garnered a fair amount of bipartisan support, including Republican Senator Lindsey Graham.[143] However, the effort floundered because it lacked support from the White House and likely drew subtle pushback from the business community, although "business leaders were hesitant to publicly denounce [the bill] for fear of criticism that they were silencing victims of sexual harassment."[144] However, currently, with Democratic control of the Legislative and Executive branches of government, the EFASHA could come to fruition. Additionally, with the narrow scope of an FAA amendment, like the EFASHA, bipartisan[145] support is more likely and would fend off procedural hurdles and legislative non-starters such as the dreaded Senate filibuster,[146] which stands as an impediment to broader legislation, such as the FAIR Act.

Further bolstering the chances of passing narrow legislation exempting sex discrimination claims from the FAA is the growing

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141. *Id.* at § 402(a).

142. *Id.* at § 401(2).

143. *S. 2342 (IS) - Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*, GOVINFO, https://www.govinfo.gov/app/details/BILLS-117s2342is [https://perma.cc/3J77-234P] (last visited Oct. 5, 2021).

144. McCullough, *supra* note 29, at 2677.

145. Erik Encarnacion, *Discrimination, Mandatory Arbitration, and Courts*, 108 GEO. L.J. 855, 903 (2020) ("More recent bills [EFASHA] are far more likely to gain traction due to their bipartisan support and, not unrelatedly, their narrower scope . . . . To the extent that existing bipartisanship can be leveraged to reform the FAA, this piecemeal legislative reform looks more promising in the near term . . . .").

146. *See* Astead W. Herndon & Lisa Lerer, *Biden Won't Budge on the Senate Filibuster. Why Aren't Progressives Pushing Him?,* N.Y. TIMES (Jan. 27, 2021, 6:28 PM), https://www.nytimes.com/2021/01/27/us/politics/biden-filibuster.html [https://perma.cc/WA7C-BALV] ("[T]he [Senate's] sixty-vote threshold that has for years stymied expansive legislation . . . ."). *See generally* Alex Tausanovitch and Sam Berger, *The Impact of the Federal Filibuster on Policymaking*, CTR. FOR AM. PROGRESS (Dec. 5, 2019, 9:02 AM), https://www.americanprogress.org/issues/democracy/reports/2019/12/05/478199/impact-filibuster-federal-policymaking/ [https://perma.cc/AAN4-SK77].

social support from movements like #MeToo and Time's Up.[147] LGBTQ employees share many of the concerns addressed by these movements, including the conviction that mandatory arbitration protects perpetrators of sexual harassment and leaves victims with no recourse aside from stifling arbitration procedures.[148] The pressure from these social movements in creating awareness, support, and change around the injustices that result from the mandatory arbitration of sex discrimination claims is evidenced by corporate responses to the movement.[149] In just the past several years[150] corporate giants like Google, Lyft, Uber, Facebook, and Airbnb have all, in varying forms, waived mandatory arbitration for employees bringing sexual harassment and/or discrimination claims.[151] Notably, when the EFASHA was introduced in 2017, Microsoft became the first Fortune 100 company to publicly endorse the proposed legislation.[152] All this to say, in addition to the political support previously discussed, current social movements provide LGBTQ employees with an array of allies who can help push for a narrow amendment exempting sex discrimination claims from the FAA. By capitalizing on this unique political and social climate, LGBTQ employees are ensured that *Bostock* Title VII sex discrimination protections are not thwarted by MAAs.

147. *See* Alix Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements and How They're Alike,* TIME (Mar. 22, 2018, 5:21 PM), http://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements/ [https://perma.cc/YF49-XYHN].

148. *See supra* Part II; Gretchen Carlson, *Gretchen Carlson: The Supreme Court Tried to End #MeToo. Here's How We're Fighting Back.,* FORTUNE (May 31, 2018, 11:06 AM), http://fortune.com/2018/05/31/gretchen-carlson-supreme-court-ruling-arbitration-metoo/ [https://perma.cc/5WXE-R4FT] ("Forced arbitration is a sexual harasser's best friend: It keeps proceedings secret, findings sealed, and victims silent.").

149. *See* McCullough, *supra* note 29, at 2683–85.

150. *Id*. at 2683–84 (most of these corporate measures were introduced in 2018, after the EFASHA was unsuccessful in 2017).

151. *Id*.

152. *Id*. at 2683; Brad Smith, *Microsoft Endorses Senate Bill to Address Sexual Harassment,* MICROSOFT: ON THE ISSUES (Dec. 19, 2017), https://blogs.microsoft.com/on-the-issues/2017/12/19/microsoft-endorses-senate-bill-address-sexual-harassment/ [https://perma.cc/ND4X-NZV4].

## CONCLUSION

On June 15, 2020, *Bostock* provided hope to many LGBTQ employees across America because the law would protect them from discrimination in the workplace.[153] But the FAA diminishes these protections for LGBTQ employees by allowing the employer, through MAAs, to determine the ultimate recourse, if any, the employee will receive as a result of alleged employer sex discrimination. LGBTQ employees face socioeconomic disadvantages that leave them with little bargaining power and government agencies struggle to have the capacity and resources to assist discriminated against employees from navigating MAAs. Additionally, MAAs do not achieve the remedial or preventative goals of anti-discrimination legislation because MAAs favor the employer and provide the employee with no way to access justice through the public process of litigation. While ideally all Title VII claims would be exempt from arbitration, LGBTQ employees have a unique opportunity to seize on current political support and the efforts of social movements to push for a narrow amendment to the seemingly all-powerful FAA that would exempt sex discrimination claims from mandatory arbitration. This amendment is a necessary step to provide LGBTQ employees the ability to litigate their discrimination claims and enforce their hard-fought rights under *Bostock* to the full extent.

153. *See* Jamieson & Reinstein, *supra* note 3.