CIVIL JUSTICE & NATIONAL ADVOCACY

**Center for Justice & Democracy's**
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# MEMORANDUM SUPPORTING THE "ENDING FORCED ARBITRATION OF SEXUAL HARASSMENT ACT OF 2017" (S. 2203, H.R. 4734) AND THE RIGHTS OF ALL WORKERS TO FILE CLASS ACTIONS

*An upcoming U.S. Supreme Court decision may do even more damage to the legal rights of sexual harassment victims in the workplace, requiring Congress to act*

## Introduction and Summary

In December 2017, a bi-partisan group of Senators and House members held a joint news conference announcing the introduction of a vital new piece of legislation, the "Ending Forced Arbitration of Sexual Harassment Act of 2017" (S. 2203, H.R. 4734).[1] This legislation addresses an important subset of cases that have been pushed out of court due to recent highly-controversial U.S. Supreme Court decisions interpreting the 1924 Federal Arbitration Act[2] – rulings that Congress has the power to correct, but so far has not.[3]

Forced arbitration clauses keep disputes in secretive, rigged proceedings that the company controls, and keeps information hidden from the public.[4] These clauses usually prevent class actions as well, allowing systemic discrimination to continue. We join many others, including former Fox News anchor Gretchen Carlson, leaders in the #MeToo movement and every state attorney general in the nation in applauding this new bi-partisan effort and encourage Congress to pass this legislation as soon as possible.

Yet a new Supreme Court decision is expected any day that could do even more damage to the legal rights of employees suffering any kind of discrimination or harassment, making it even more

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[1] *See* https://www.gillibrand.senate.gov/news/press/release/standing-with-gretchen-carlson-senators-gillibrand-and-graham-and-representative-bustos-announce-bipartisan-legislation-to-help-prevent-sexual-harassment-in-the-workplace-void-forced-arbitration-agreements-that-prevent-sexual-harassment-survivors-from-getting-the-justice-they-deserve; http://thehill.com/blogs/congress-blog/civil-rights/375639-speaker-ryan-you-have-the-power-to-help-end-sexual

[2] *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011).

[3] *See*, *e.g.*, the Arbitration Fairness Act of 2018 (S. 2591, H.R. 1374).

[4] For more information, *see* https://centerjd.org/content/faq-vanishing-rights-and-remedies-under-forced-arbitration

imperative that Congress act.[5] This case will decide whether or not class actions fall within the definition of "concerted activity" that is protected by the National Labor Relations Act (NLRA) and whether or not the NLRA supersedes the 1924 Federal Arbitration Act.[6] If the Court interprets the NLRA against the interests of employees (as some reports say is likely[7]), the case could have a severe impact on the rights of discrimination and harassment victims. Thus, congressional action may be urgent.

**The Problem of Forced Arbitration and Class Action Waivers in the Workplace**

Forced arbitration clauses – hidden in the fine print of contracts and written in legalese that is incomprehensible to most – prohibit harmed individuals from suing law-breaking companies in court. Instead, employees must resolve their disputes in secretive, corporate-controlled, rigged, private systems. These clauses also typically prevent workers from joining together with others in class action lawsuits, which is the subject of the new Supreme Court case. These clauses are considered "forced" because employees are required to sign them, perhaps even unknowingly, in order to get the job. There is no voluntary, post-dispute agreement between parties.

In recent years, these clauses have become considerably more common in employment contracts. The numbers are astonishing: 56.2 percent of private-sector nonunion employees are subject to mandatory employment arbitration procedures.[8] Essentially, 60.1 million American workers have lost the ability to protect their legal employment rights through the court system.[9] Moreover, 80 percent of the country's 100 biggest companies use these clauses.[10] "Of employees subject to mandatory arbitration, 41.1 percent have also waived their right to be part of class action claims. Overall, this means that 23.1 percent of private-sector nonunion employees, or 24.7 million American workers, no longer have the right to bring a class action claim if their employment rights have been violated."[11]

Without the class action tool, workplace harassment and discrimination can be impossible to prove. As the NAACP Legal Defense Fund wrote, class action waivers "effectively foreclose the use of two crucial methods for proving employment discrimination: disparate impact and pattern-or-practice theories," which require employees to present evidence as a group.[12] Indeed, in the 1970s, "proposals to abolish class actions or to restrict their scope in Title VII [employment discrimination] cases were rejected." As a Senate Report stated at the time, "Title VII actions are by

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[5] There are actually three consolidated cases, presented in the first oral argument of the new term: *Epic Systems Corp. v. Lewis*, *Ernst & Young LLP v. Morris* and *National Labor Relations Board v. Murphy Oil USA*. *See*, *e.g.*, http://www.scotusblog.com/2017/10/argument-analysis-epic-day-employers-arbitration-case/

[6] 9 U.S.C. Ch. 1.

[7] https://www.theatlantic.com/politics/archive/2018/02/how-the-supreme-court-could-reshape-employment-law/554009/

[8] https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/

[9] Ibid.

[10] http://time.com/money/4958168/big-companies-mandatory-arbitration-cant-sue/

[11] https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/

[12] Brief Of *Amici Curiae* NAACP Legal Defense & Educational Fund, Inc. (August 16, 2017). http://www.scotusblog.com/wp-content/uploads/2017/08/16-285-16-300-bsac-16-307-tsac-NAACP-Legal-Defense-Education-Fund-Inc..pdf

their very nature are class complaints, and that any restriction on such actions would greatly undermine the effectiveness of Title VII."[13]

**The Use of Forced Arbitration to Suppress Cases and Silence Sexual Harassment Victims**

More and more Americans who suffer sexual harassment are bound by forced arbitration clauses, which not only prevents them from filing claims but also keeps them silent about their abuse. The *Wall Street Journal* reported recently, for example, that "[m]ore companies are adopting the mandatory-arbitration clauses, and many employees are walking away from harassment, wrongful-termination and discrimination claims rather than taking them to a privately run tribunal, according to experts and new research."[14] Also, "In many cases, workers drop the claims because they can't get lawyers to take their cases."[15]

For those who sexually harass, silence is a clear motivator to bind victims to arbitration. For example, President Trump and his attorney Michael Cohen have tried to silence two current accusers, Stormy Daniels and Karen McDougal, after forcing them to agree to nondisclosure agreements, which require all disputes to be resolved in secret arbitration.[16]

Gretchen Carlson, who was sexually harassed by Roger Ailes and Steve Doocy while at Fox News,[17] had to sue Ailes directly because of the forced arbitration agreement she was required to sign with the network.[18] Standing with bi-partisan members of Congress when they introduced the Ending Forced Arbitration of Sexual Harassment Act of 2017, Carlson said, "Forced arbitration is a harasser's best friend … It keeps harassment complaints and settlements secret. It allows harassers to stay in their jobs, even as victims are pushed out or fired. It silences other victims who may have stepped forward if they'd known. It's time we as a nation – together – in bipartisan fashion give a voice back to victims."[19]

And in an unprecedented letter to congressional leaders urging bill passage and signed by all 50 state Attorneys General (plus those from D.C. and the U.S. territories), the AGs wrote, "Ending

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[13] Brief Of *Amici Curiae* NAACP Legal Defense & Educational Fund, Inc. (August 16, 2017), http://www.scotusblog.com/wp-content/uploads/2017/08/16-285-16-300-bsac-16-307-tsac-NAACP-Legal-Defense-Education-Fund-Inc..pdf; S. Rep. No. 92-415, at 27 (1971), *reprinted in* Subcomm. on Labor of the S. Comm. on Labor and Pub. Welfare, *Legislative History of the Equal Opportunity Act of 1972*, at 436 (1972).

[14] https://www.wsj.com/articles/as-more-employees-sign-arbitration-agreements-sexual-harassment-claims-fizzle-1516876201

[15] Ibid.

[16] https://www.washingtonpost.com/news/the-fix/wp/2018/03/08/whats-the-deal-with-this-arbitration-thing-between-trump-and-stormy-daniels/?utm_term=.4f68045e0c05; https://www.nytimes.com/2018/03/20/us/ex-playboy-model-sues-to-break-silence-on-trump.html

[17] http://fortune.com/2016/09/06/fox-gretchen-carlson-settlement-apology/

[18] https://www.usatoday.com/story/money/2017/12/06/bipartisan-bill-would-eliminate-forced-arbitration-break-silence-sexual-harassment-cases/925226001/

[19] https://www.gillibrand.senate.gov/news/press/release/standing-with-gretchen-carlson-senators-gillibrand-and-graham-and-representative-bustos-announce-bipartisan-legislation-to-help-prevent-sexual-harassment-in-the-workplace-void-forced-arbitration-agreements-that-prevent-sexual-harassment-survivors-from-getting-the-justice-they-deserve

mandatory arbitration of sexual harassment claims would help to put a stop to the culture of silence that protects perpetrators at the cost of their victims."[20]

**An Upcoming Supreme Court Case May Make Congressional Action More Urgent**

When Congress enacted the National Labor Relations Act in the 1930s, it became illegal for employers to interfere in any way with employees' rights to engage in "concerted activities" for their "mutual aid or protection."[21] In the consolidated cases *Epic Systems Corp. v. Lewis*, *Ernst & Young LLP v. Morris* and *National Labor Relations Board v. Murphy Oil USA,* the U.S. Supreme Court is poised to decide if employment contracts with class action waivers, which prevent concerted *legal* activity, violate this section of the NLRA and are therefore illegal.[22] The outcome of the case will impact some 25 million employment contracts.[23] Incredibly, Trump's Solicitor General switched sides in the case, filing a new brief arguing that such clauses should be legal even though the Obama Administration had sided with workers in the same case.[24]

According to *SCOTUSblog*, Justices Roberts, Kennedy and Alito already seem to be siding with employers and Trump, while "Thomas has voted in favor of a broader reading of the [Federal Arbitration Act] in earlier cases." And in the past, "Gorsuch generally interpreted arbitration clauses 'in light of the overriding presumption in favor of arbitration.'"[25] In other words, the outcome does not look good for employees in this case.

**What Congress Should Do if the Supreme Court Rules Against Workers**

Should the Supreme Court rule against employees, Congress will have to act. Legislation will depend on the scope of the ruling itself, but generally:

1. The Ending Forced Arbitration of Sexual Harassment Act of 2017 (S. 2203, H.R. 4734) may have to be amended to expressly ban class actions waivers;
2. The Arbitration Fairness Act of 2018 (S. 2591, H.R. 1374) may have to be amended to expressly ban class actions waivers; and
3. The National Labor Relations Act may have to be amended to expressly define "concerted activity" to include class litigation and should not be superseded by the Federal Arbitration Act.

For more information, please contact students Gianne Falvo (S. 2203, H.R. 4734), Daniel Lerman (Supreme Court case), or Adjunct Professor and Executive Director of the Center for Justice & Democracy at New York Law School, joanned@centerjd.org.

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[20] http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/%24file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf
[21] 29 U.S.C. § 158. *See*, *e.g.*, *NLRB v. Washington Aluminum Co*., 370 U.S. 9, 14 (1962).
[22] http://www.scotusblog.com/2017/10/argument-analysis-epic-day-employers-arbitration-case/
[23] https://www.nytimes.com/2017/10/02/us/politics/supreme-court-workplace-arbitration.html
[24] *See* http://www.scotusblog.com/2017/06/murphy-oils-law-solicitor-generals-office-reverses-course-arbitration-cases-supports-employers/; https://www.law360.com/articles/935889/doj-reverses-obama-era-stance-in-class-waiver-suit; https://www.justice.gov/sites/default/files/briefs/2017/06/20/revised_16-285_16-300_16-307_tsac_bsac_unitedstates.pdf
[25] http://www.scotusblog.com/2017/10/argument-analysis-epic-day-employers-arbitration-case/

## ADDENDUM 1

Congressional action to restore employee rights will have the support of major constituencies.

### States

Not only do all 50 states support the Ending Forced Arbitration of Sexual Harassment Act of 2017 (S. 2203, H.R. 4734),[26] but also, many states weighed-in on the side of workers before the U.S. Supreme Court in *Epic Systems Corp. v. Lewis*, *Ernst & Young LLP v. Morris* and *National Labor Relations Board v. Murphy Oil USA*. These states include: California, Connecticut, Delaware, Illinois, Iowa, Maryland, Massachusetts, Minnesota, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia and Washington plus the District of Columbia.[27]

### Unions

In *Epic Systems Corp. v. Lewis*, *Ernst & Young LLP v. Morris* and *National Labor Relations Board v. Murphy Oil USA*, an important brief was filed on behalf of a number of "international labor unions with a combined membership of approximately 13.5 million working men and women throughout the United States and Canada," including: the American Federation of Teachers; American Federation of State, County and Municipal Employees; Communications Workers of America; International Association of Machinists; International Brotherhood of Teamsters; International Union, United Automobile, Aerospace and Agricultural Implement Workers of America; National Education Association; Service Employees International Union; United Food and Commercial Workers International Union; and United Steelworkers International Union.[28]

### Civil Rights, Public Interest and Business Groups

In addition to the NAACP Legal Defense Fund and the Impact Fund – which filed a critical civil rights brief before the U.S. Supreme Court in *Epic Systems Corp. v. Lewis*, *Ernst & Young LLP v. Morris* and *National Labor Relations Board v. Murphy Oil USA*[29] – other likely allies will be the Main Street Alliance, the American Sustainable Business Council and consumer groups like Public Citizen, which also filed briefs supporting workers.[30] In fact, there is a large coalition of public interest groups that opposes forced arbitration clauses.[31] In addition, Microsoft announced support of S. 2203, H.R. 4734 and has committed to not compel arbitration in cases where sexual harassment or discrimination is alleged by any of its 125,000 employees.[32]

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[26] http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/%24file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf
[27] http://www.scotusblog.com/wp-content/uploads/2017/08/16-285-16-300-bsac-16-307-tsac-Maryland.pdf
[28] http://www.scotusblog.com/wp-content/uploads/2017/08/16-285-16-300-bsac-16-307-tsac-ten-national-labor-unions.pdf
[29] http://www.scotusblog.com/wp-content/uploads/2017/08/16-285-16-300-bsac-16-307-tsac-NAACP-Legal-Defense-Education-Fund-Inc..pdf
[30] http://www.scotusblog.com/case-files/cases/epic-systems-corp-v-lewis/
[31] https://www.fairarbitrationnow.org/
[32] http://thehill.com/blogs/congress-blog/civil-rights/375639-speaker-ryan-you-have-the-power-to-help-end-sexual

## ADDENDUM 2

Recent class action settlements that have benefitted sexual harassment victims:

**Brown v. Medicis Pharmaceutical Corporation, (2016), Case No. 1:13-cv-01345 (D.D.C.)** Valeant settled[33] with a class of 225 female sales representatives for condoning and perpetuating a "systemic sexually hostile and demeaning work environment," where women were subjected to "unwelcome sexually-charged 'jokes' and commentary, name-calling, and offensive stereotypical comments about women, pregnancy, and caregiving," expected to drink alcohol, socialize with and tolerate sexual advances from co-workers, denied promotions and paid less than their male counterparts.[34] Under the settlement, Medicis agreed to pay class members $4.4 million and institute extensive new company training and protocols as well as fairer compensation and promotion processes.

**Aviles v. BAE Systems Norfolk Ship Repair Inc., (2016), Case No. 2:13-cv-00418 (E.D. Va.)** BAE Systems settled[35] with a class of 166 female shipyard workers for discriminatory practices like "assigning newly hired female employees to lower-level job classifications and ranks than equally or less qualified male employees," denying promotions and "creating and perpetuating a sexually discriminatory and hostile work environment," where "[m]anagers and supervisors frequently share and/or display sexual photographs at work, and make sexual comments to class members," "workers frequently and regularly use the words 'bitch' and 'whore' to refer to women, and discuss what they did sexually with women, including graphic descriptions of sex acts" and victims who speak out against sex discrimination face retaliation, including denial of promotions, sexual harassment, discipline and termination.[36] Under the settlement, BAE agreed to $3 million in class relief, with individual payouts ranging between $5,000 and $33,000. In addition, the company agreed to "changes in workplace policies and procedures, including the implementation of relief addressing BAE's hiring, promotion, training, and complaint investigation process."[37]

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[33] Final Approval of Class Settlement, *Brown v. Medicis Pharmaceutical Corporation*, Case No. 1:13-cv-01345 (July 11, 2016), http://medicisgendersettlement.com/blog/wp-content/uploads/2016/07/52-Order-Granting-Final-Approval-of-the-Class-Settlement.pdf; Modified Settlement Agreement, *Brown v. Medicis Pharmaceutical Corporation*, Case No. 1:13-cv-01345 (January 14, 2015), http://medicisgendersettlement.com/blog/wp-content/uploads/2016/07/Fully-Executed-Modified-Settlement-Agreement-1-14-15-FINAL.pdf

[34] Class Action Complaint, *Brown v. Medicis Pharmaceutical Corporation*, Case No. 1:13-cv-01345 (September 5, 2013), http://medicisgendersettlement.com/blog/wp-content/uploads/2016/07/1-Complaint.pdf

[35] Final Approval of Class Action Settlement, *Aviles v. BAE Systems Norfolk Ship Repair Inc.,* Case No. 2:13-cv-00418 (February 10, 2016). *See also*, Matthew Bultman, "BAE Systems To Pay $4.6M In Gender Discrimination Row," February 10, 2016, http://www.law360.com/articles/757931/bae-systems-to-pay-4-6m-in-gender-discrimination-row; "$4.59 Million Class Action Settlement Resolves Virginia Federal Gender Discrimination And Retaliation Action Brought By Female Workers At Shipyard," 2015 Jury Verdicts LEXIS 12084.

[36] First Amended Complaint, *Aviles v. BAE Systems Norfolk Ship Repair Inc.,* Case No. 2:13-cv-00418 (December 17, 2013), https://www.plainsite.org/dockets/download.html?id=132198485&z=3c405635

[37] "$4.59 Million Class Action Settlement Resolves Virginia Federal Gender Discrimination And Retaliation Action Brought By Female Workers At Shipyard," 2015 Jury Verdicts LEXIS 12084. *See also*, Matthew Bultman, "BAE Systems To Pay $4.6M In Gender Discrimination Row," February 10, 2016, http://www.law360.com/articles/757931/bae-systems-to-pay-4-6m-in-gender-discrimination-row